Disaster in the Amazon: Dodging "Boomerang Suits" in Transnational Human Rights Litigation

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INTRODUCTION

On May 30, 2001, after nearly a decade of litigation, Judge Jed Rakoff of the Southern District of New York dismissed *Aguinda v. Texaco*.[1] The landmark lawsuit sought to hold the petroleum giant accountable for the worst oil-related disaster in recorded history.[2] Suing on behalf of over twenty-five thousand affected individuals, the plaintiffs contended that during the course of Texaco's operation in the *Oriente*—a region of the Ecuadorian Amazon approximately the size of Rhode Island—the company intentionally released more than eighteen billion gallons of toxic waste into rainforest waterways, wetlands, and subsoil.[3] Texaco filed for summary judgment on the grounds of *forum non conveniens* (FNC),[4] a common law doctrine permitting dismissal

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

2. William Langewiesche, *Jungle Law*, VANITY FAIR, May 2007, at 228; Scott Wilson, *Rare Class-Action Pits Indians Against U.S. Oil Company*, WASH. POST., Oct. 13, 2003, at A18 (calling the case the "trial of the century"); LAGO AGRIO LEGAL TEAM, AMAZON DEF. COAL., RAINFOREST CATASTROPHE: CHEVRON'S FRAUD AND DECEIT IN ECUADOR 4 (2006), *available at* http://www.texacotoxico.org/docs/PDF%20Files/rainforest_catastrophe.pdf.

3. Complaint, at 3-5, 20, 70, Aguinda v. Texaco, Inc., 850 F. Supp. 282 (S.D.N.Y. 1994); LAGO AGRIO LEGAL TEAM, *supra* note 2. Raw petroleum comprised only a small fraction of these eighteen billion gallons. Most waste took the form of "produced" or "production" water. *See infra* note 48.

4. Literally, "an unsuitable court." BLACK'S LAW DICTIONARY 680 (8th ed. 2004).

even when jurisdiction and venue are proper if, "in the interest of justice and for the convenience of the parties," the matter would better be adjudicated elsewhere.[5] The plaintiffs responded that the case should proceed in the United States because high-ranking Texaco officials in New York and Florida had supervised decisions made by the company's foreign subsidiary, TexPet, and because the Ecuadorian legal system was unequipped to handle a matter of this complexity.[6] Judge Rakoff disagreed. Stating that the case had "everything to do with Ecuador and nothing to do with the United States," he sustained the defendant's motion after Texaco agreed in writing "to submit to the jurisdiction of the Ecuadorian courts for the purposes of [the instant] action."[7]

Unlike many litigants facing the prospect of pursuing human rights claims in comparatively undeveloped or unsympathetic foreign judicial systems,[8] or petitioners lacking the resources or economic incentives to continue,[9] the

5. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 100 (2d Cir. 2000). FNC can be used to transfer cases domestically (from a state or federal forum to its counterpart in another jurisdiction). However, for international human rights cases dismissal is generally to the nation or nations where the alleged violations occurred.

6. Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss Based upon Forum Non Conveniens at 3-8, 8 n.8, Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996) (No. 93 Civ. 7527 (JSR)), *vacated sub nom.*, Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998) (alleging, in addition, that "[i]n matters involving the petroleum industry, the Ecuadoran judiciary lacks sufficient independence" because "[t]he Ecuadoran military is still funded exclusively from oil revenues, and those in Ecuador who protest the oil industry's substandard practices face serious reprisals from the military" and that "many of the significant documents are in Texaco's possession in the United States").

7. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 537-38 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

8. *See* Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 689 (Tex. 1990) (Doggett, J., concurring) ("At present, the tort laws of many third world countries are not yet developed. Industrialization is 'occurring faster than the development of domestic infrastructures necessary to deal with the problems associated with industry.'") (citations omitted), *superseded by statute*, Act of Feb. 23, 1993, ch. 4, 1993 Tex. Sess. Law Serv. 10-12 (Hein) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b) (Vernon 2005)), *as recognized in* '21' Int'l Holdings, Inc. v. Westinghouse Elec. Corp., 856 S.W.2d 479, 484 (Tex. App.-San Antonio 1993); JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY? (Mark Gibney & Stanislaw Frankowski, eds., 1999) (collecting essays on foreign judicial systems' mixed human rights track records); *cf.* Julius Jurianto, Forum Non Conveniens: *Another Look at Conditional Dismissals*, 83 U. DET. MERCY L. REV. 369, 406 (2006) (discussing how civil law jurisdictions are often prohibited by the doctrine *actor sequitur forum rei* from hearing suits against nondomiciliaries, including multinational corporations, absent consent); M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient is Forum Non Conveniens In Transnational Litigation?*, 4 B.Y.U. INT'L L. & MGMT. REV. 21, 22 (2007) (addressing jurisdictional "blocking statutes" enacted by several Latin American countries that prevent cases dismissed on an FNC basis from being heard abroad); Rejeev Muttreja, Note, *How to Fix the Inconsistent Application of Forum Non Conveniens to Latin American Jurisdiction—And Why Consistency May Not Be Enough*, 83 N.Y.U. L. REV. 1607, 1619-21 (2008) (same).

9. *See, e.g.*, David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction"*, 103 L.Q. REV. 398, 418-20 (1987) (conducting a postal survey of plaintiffs' lawyers whose cases had been dismissed on an FNC basis and demonstrating that the majority decided not to file suit abroad or settled for less than 10% of the claims' estimated

Aguinda plaintiffs persevered. Aided by American consultants and backed by a Philadelphia firm specializing in class-action securities litigation, leaders of affected communities (*los afectados*) assembled in Lago Agrio, Ecuador and filed suit in May 2003.[10] Their case soon encountered obstacles. In May 1995, Texaco had negotiated a remediation contract, or "release" agreement, with oil-friendly agencies in the Ecuadorian government that absolved the company of potential liability in exchange for a partial cleanup of contaminated sites.[11] When *los afectados* filed suit in 2003, Texaco—now ChevronTexaco—invoked this agreement and began proceedings before the American Arbitration Association (AAA).[12] In its AAA petition, the petroleum giant alleged the remediation contract obligated the Republic of Ecuador to indemnify ChevronTexaco for the costs of any cleanup ordered by the Lago Agrio court, even though the agreement did not explicitly release the company from liability to third parties.[13]

The Republic responded by moving for a stay of arbitration in New York state court, an attempt to secure jurisdiction over both ChevronTexaco and the AAA itself.[14] After the proceedings were removed to federal court at ChevronTexaco's request, counsel for the Republic inadvertently waived sovereign immunity, allowing the oil company to counterclaim.[15] The

value); Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 335 (1994) (noting Robertson's results showed "higher costs and lower returns abroad"); *Dow Chem. Co.*, 786 S.W.2d at 683 n.6 (plaintiffs "earn approximately one dollar per hour . . . [and] clearly cannot compete financially with [corporate defendants] in carrying on the litigation.").

10. Langewiesche, *supra* note 2, at 228; Plaintiffs' Complaint Addressed to the President of Superior Court of Justice of Nueva Loja (Lago Agrio) [hereinafter Lago Agrio Complaint], Maria Aguinda Salazar v. ChevronTexaco Corp. (filed May 7, 2003) (on file with author).

11. MINISTRY OF ENERGY & MINES, REPUBLIC OF ECUADOR, CONTRACT FOR IMPLEMENTING OF ENVIRONMENTAL REMEDIAL WORK AND RELEASE FORM [SIC] OBLIGATIONS, LIABILITY AND CLAIMS 2 (1995), *available at* http://www.texaco.com/sitelets/ecuador/docs/contract.pdf (signed by Dr. Galo Abril Ojeda, Minister of Energy and Mines; Dr. Federico Vintimilla Ojeda, Executive President of Petroecuador; Dr. Rodrigo Perez Pallares, Legal Representative of Texaco Petroleum; and Mr. Ricardo Reis Veiga, Vice President of Texaco Petroleum); Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador's Amazon Oil Fields*, 2 SW. J.L. & TRADE AM. 293, 322-33 (1995) [hereinafter Kimerling, *Rights, Responsibilities*] (providing narrative account of negotiations). The Texaco officials responsible for negotiating this contract have been indicted for their role in the process. *See* discussion *infra* note 69.

12. *See* Republic of Ecuador v. ChevronTexaco Corp. (*ROE I*), 376 F. Supp. 2d 334, 342 (S.D.N.Y. 2005) (reciting case history).

13. *See id.*; Republic of Ecuador v. ChevronTexaco Corp. (*ROE III*), 499 F. Supp. 2d 452, 457 (S.D.N.Y. 2007) (No. 04 Civ. 8378 (LBS)), *aff'd*, No. 07-2868-cv, 296 F. App'x 124 (2d Cir. Oct. 7, 2008), *petition for cert. filed*, 77 U.S.L.W. 3531 (U.S. Mar. 09, 2009) (No. 08-1123).

14. Email from Steven Donziger, Consultant, Amazon Def. Coal., to author (Jan. 4, 2009) (on file with author). Judge Sand dismissed the AAA from the proceedings as neither a necessary nor proper party under the "well-established legal principle of arbitral immunity." *ROE I*, 376 F. Supp. 2d. at 343.

15. After removal, the Republic filed an amended complaint that alleged several other

counterclaims overlapped with several issues being pursued in Ecuador, including whether the release agreement or a 1999 environmental statute foreclosed the Lago Agrio plaintiffs' standing to seek a complete remediation.[16]

Judge Leonard Sand denied preliminary motions from both sides and brought *Republic of Ecuador v. ChevronTexaco* (*ROE*) to trial in May 2007.[17] Although he ultimately granted a permanent stay of arbitration,[18] the fact that hearings took place at all is problematic. First, they replicated much of the Lago Agrio litigation, raising specters of delay and inconsistent results. Second, and more importantly, the oil giant's counterclaims continue to pose significant risks to the Lago Agrio plaintiffs who have no voice in the proceedings.[19] Their pendency provides ChevronTexaco the opportunity to circumvent the consequences of the FNC dismissal it so assiduously sought from Judge Rakoff, and echoes the history of Texaco's systematic and highly corrupting influence on the Ecuadorian political process.[20] Ironically, this threat stems

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bases for relief. Counsel represented that these were contingent upon the failure of the stay petition; however, because the amended filing did not state so on its face, Judge Sand found it waived sovereign immunity. *ROE I*, 376 F. Supp. 2d. at 344, 372-75 ("To the extent that Plaintiffs have freely chosen to avail themselves of this Court's jurisdiction with regard to matters other than the (possibly meritless) petition for arbitration, and have thereby created jurisdiction over counterclaims, they have only themselves to blame."). *But see* Plaintiffs' Supplemental Memorandum of Law in Support of Their Motion (1) to Dismiss Defendants' Counterclaims or, Alternatively, (2) to Renew Their Outstanding Motion for Summary Judgment Dismissing Defendants' Counterclaims at 1 [hereinafter Plaintiffs' *ROE III* Brief], *ROE III*, 499 F. Supp. 2d 452 (No. 04 Civ. 8378 (LBS)) (arguing the claims that waived sovereign immunity were "conditional" and could be "self-extinguished by their own terms").

It remains to be seen whether these procedural mishaps diminish the probability similar boomerang suits will arise. Likely, they do not. Because contracts between governmental entities and foreign corporations commonly include waivers of sovereign immunity and forum selection clauses mandating dispute resolution in the United States (or the country where the multinational business in question is headquartered), there is a significant risk that U.S. corporations can game the system, a risk amplified under conditions of unequal bargaining power. *Cf.* Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 518-20, 527-38 (2008) (discussing contract formation between foreign sovereigns and multinational corporations and advocating corporations use their power to induce governmental compliance with human rights regimes). Further, because foreigners often lack familiarity with the U.S. court system, there is a significant home-team advantage, given the myriad technical, and highly idiosyncratic, filing rules for different districts. *See* Casey & Ristroph, *supra* note 8, at 37 (discussing an example where a court in the Northern District of California refused to enforce a Nicaraguan judgment because the "plaintiffs' counsel failed to identify and properly serve the particular Dole corporate entity involved"). Finally, the drastic consequences of boomerang litigation merit, at the very least, prophylactic measures to diminish their likelihood of occurrence.

16. See *infra* Parts II, III and accompanying notes for further discussion.

17. *ROE III*, 499 F. Supp. 2d at 452, 454.

18. *Id.*

19. *But see infra* Part II (regarding whether the Republic and the Lago Agrio plaintiffs were "in privity").

20. Judith Kimerling, *Transnational Operations, Bi-national Injustice: ChevronTexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 447-48 (2007) [hereinafter Kimerling, *Transnational Operations*] ("Texaco's discovery of

from a court a continent away—a court in the same district that previously refused to hear the *Aguinda* claims because they had "nothing to do with the United States."[21]

This Comment takes as its centerpiece the *Aguinda* and *ROE* stories because they portend an ominous trend for corporate accountability and international civil procedure.[22] Over the past three decades, the number of human rights lawsuits filed in the United States against multinational corporate entities has skyrocketed.[23] At the same time, U.S. courts have displayed a

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commercially valuable oil sparked an oil rush, and petroleum quickly came to dominate Ecuador's economy. . . . Although relations between Ecuador and Texaco and other oil companies have not been static, at the core of those relationships lies an enduring political reality. Since the oil boom began, successive governments have linked national development plans and economic policy almost exclusively with petroleum policy, and the health of the industry has become a central concern for the State. . . . As a result, it is vulnerable to international pressures, including demands of foreign companies."). Ironically, Texaco, now ChevronTexaco, claims to be the victim of Ecuador's process defects, accusing President Rafael Correa's administration of exerting undue influence in favor of the plaintiffs in the Lago Agrio trial. *See* Memorandum of Law in Support of Motion of Chevron Corp. & Texaco Petroleum Co. to Supplement the Record at 5, *ROE III*, 499 F. Supp. 2d 452 (No. 04 Civ. 8373 (LBS)) (attacking the President for arguing Texaco's actions constituted "crimes against humanity" executed by "corrupt people and traitors" who were "capable of selling their souls"); *see also infra* Parts II, IV.

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

22. Much has been written on the former, including a veritable cottage industry of academic commentary devoted to examining the ramifications of the Ecuadorian oil industry on international environmental law. *See, e.g.*, Kimerling, *Rights, Responsibilities*, *supra* note 11; Judith Kimerling, *International Standards in Ecuador's Amazon Oil Fields: The Privatization of Environmental Law*, 26 COLUM. J. ENVTL. L. 289 (2001); Maxi Lyons, *A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress*, 32 DENV. J. INT'L L. & POL'Y 701 (2004). However, academics have paid scant attention to the latter. Indeed, as of this writing, *ROE* had been cited by only four law review articles, once in a footnote. *See* Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and* Aguinda v. Texaco, 38 N.Y.U. J. INT'L L. & POL. 413, 627 n.571 (2006) [hereinafter Kimerling, *Indigenous Peoples*]; Kimerling, *Transnational Operations*, *supra* note 20, at 494 (tracking the related issue of a motion to intervene in *ROE* by "118 representatives [other than the *Aguinda* plaintiffs] from twenty-eight Huaorani and Lower Napo Kichwa communities" affected by the dispute over the remediation agreement); Casey & Ristroph, *supra* note 8, at 40-45 (critiquing the phenomenon of boomerang litigation, and proposing a collateral estoppels as a solution); Alford, *supra* note 15, at 525-26 (arguing *ROE* "illustrates the direct connection between domestic litigation against corporations alleging international law violations and arbitration proceedings between the corporation and the sovereign over the responsibility to pay for any adverse judgment").

23. *See* Luis Enrique Cuervo, *The Alien Tort Statute, Corporate Accountability, and the New* Lex Petrolea, 19 TUL. ENVTL L.J. 151, 163 n.44 (2006) (chronicling increase in Alien Tort Claims Act suits brought against corporations); Jeffrey E. Baldwin, Note, *International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 CORNELL INT'L L.J. 749, 750 n.1 (2007) (enumerating advantages for human rights litigants in U.S. courts, including "(1) the wide availability of public interest litigators, (2) contingency fees, (3) punitive damages, (4) the availability of default judgments, (5) liberal pretrial discovery, and (6) the fact that the American legal system does not require the losing party to pay the winner's legal fees"); Alford, *supra* note 15, at 509, 511, 516 (noting that "while the percentage of successful claims is quite small, the

marked reluctance to hear such cases, in part due to the heavy administrative burden they impose—for example, resulting from the challenges of managing foreign plaintiffs and witnesses, translation requirements, and extensive documentation—and in part due to the complex and unfamiliar questions of transnational and international law they raise.[24] Although courts have many "arrow[s] in their dismissal quivers,"[25] FNC is the dart of choice for human rights suits because it is substantively malleable and procedurally mandates a high degree of deference to district court judges.[26] Further, FNC rulings do not

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opportunity [alone] . . . has led to a cottage industry . . . in the United States" and that "[a]s human rights claims against sovereigns generally have proved unavailing, the issue of corporate liability under international law has become increasingly important . . . over [75%] of the claims filed under the ATS and/or Torture Victim Protection Act (TVPA) involve corporate defendants . . . [including] household names, such as Coca-Cola, Nestle, Pfizer, Daimler-Chrysler, Del Monte, Dow, Levi Strauss, Target, and Mitsubishi").

24. *See* Baldwin, *supra* note 23, at 757-66; Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 71-72 (1998); *see also* Proyectos Orchimex de Costa Rica, S.A. v. E.I. DuPont de Nemours & Co., 896 F. Supp. 1197, 1201 (M.D. Fla. 1995) (protesting that human rights cases "are complex and highly contested . . . often featuring lengthy trials. . . . The burden, delays and inconvenience to the other civil and criminal litigants . . . would be enormous. This court's docket would be thrown into chaos.").

25. *See* Emily J. Derr, *Striking a Better Public-Private Balance in Forum Non Conveniens*, 93 CORNELL L. REV. 819, 820 (2008) (quoting Malay. Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349, 364 (3d Cir. 2006), *rev'd*, 549 U.S. 422 (2007)). For human rights suits, federal courts have a variety of other means of disposal. First, courts can refuse to hold corporations accountable for Alien Tort Statute claims, an avenue left open by the Supreme Court's ruling in *Sosa v. Alvarez-Machain* that has produced inconsistencies in lower courts, but finds support in the D.C. and Ninth Circuits. 542 U.S. 692 (2004); Alford, *supra* note 15, at 514-18, 515 n.44 (collecting cases). Second, courts can dismiss suits on grounds of comity, as Judge Rakoff originally attempted to do. *See* Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated sub nom.*, Jota v. Texaco, Inc., 157 F. 3d 153 (2d Cir. 1998); *see also* Sequihua v. Texaco, Inc., 847 F. Supp. 61, 63 (S.D. Tex. 1994). Third, courts can use foreign subsidiaries to insulate principles from liability (a strategy that effectively renders suits meaningless, since subsidiaries usually have insufficient assets to satisfy judgments rendered in human rights and environmental cases, even if they can be joined as parties to the litigation). *See* Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CALIF. L. REV. 195, 195-99 (2009); Jurianto, *supra* note 8, at 405; *cf.* Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 496-501, 527-28 (2002) (discussing how joinder of foreign subsidiaries may result in loss of subject matter jurisdiction). Finally, courts can use conflict of law principles to determine that foreign law governs, a determination that can void subject matter jurisdiction, not to mention the underlying cause of action. *See, e.g.*, Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495, 502-03 (S.D.N.Y. 2005) (holding that because Nigerian law applied, claims arising under Connecticut statutes were invalid), *rev'd sub nom.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).

26. Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 609 & n.2, 619 nn.60–63 (2008) (observing, as an empirical matter, that FNC motions are not only filed, but also granted, in nearly every case against foreign plaintiffs in U.S. courts); Baldwin, *supra* note 23, at 757; Derr, *supra* note 25, at 820; *see also Boyd*, *supra* note 24, at 46-48 (noting strong incentives for corporate defendants to

necessarily deny process, but, as in *Aguinda*, can help promote it through the use of collateral stipulations. Such stipulations may force defendants to submit to jurisdiction in the nation or nations where the alleged violations occurred, waive statutes of limitation and other defenses, and even undergo U.S.-style discovery alien to foreign jurisdictions and especially civil law systems.[27]

Defendants routinely agree to these conditions, often with the well-founded expectation that plaintiffs will not pursue their claims abroad.[28] Yet the *Aguinda* and *ROE* story illustrates an emergent phenomenon that threatens to frustrate the purpose of these stipulations and of FNC as a doctrine: "boomerang litigation."[29] As FNC dismissals occur more frequently, progressive nations in the Global South, including Ecuador, have passed sweeping procedural and substantive reforms that enable their judiciaries to entertain complex human rights suits and to hold corporate defendants

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pursue FNC dismissals and acknowledging the room that deference affords U.S. courts to avoid "politically-charged international issues").

Crucially, this degree of deference means appellate courts review under a "clear abuse of discretion" standard, and reversals are rarely granted, in contrast to some of the tools enumerated in *supra* note 25. *See* Jurianto, *supra* note 8, at 401; Scottish Air Int'l, Inc. v. British Caledonian Group, PLC, 81 F.3d 1224, 1232 (2d Cir. 1996). For a critique of the wide berth of discretion this doctrine accords district court judges see David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353, 360 (1994).

27. *See* Tim A. Thomas, *Validity and Propriety of Conditions Imposed upon Proceeding in Foreign Forum by Federal Court in Dismissing Action Under Forum Non Conveniens*, 89 A.L.R. FED. 238, § 4[a]-[e] (2009) (collecting cases); Jurianto, *supra* note 8, at 399-401 n.301 (same); Heiser, *supra* note 26, at 614-15 nn.37-38.

28. *See supra* notes 8, 9 and accompanying text.

29. *See* Casey & Ristroph, *supra* note 8, at 22 n.3, 38-40 (coining the term "boomerang litigation" to refer to "case[s] that return[] to a forum from which [they were] previously dismissed" and placing *ROE* in this category despite differences in the parties and the addition and subtraction of issues from the original dispute). I explicitly bracket the question of "blocking statutes" designed to return suits dismissed on an FNC basis to the United States. I deal only with the question of end-runs around the judicial forum corporate defendants once designated as more convenient. For other articles detailing the ramifications of "retaliatory" or "blocking" statutes and FNC, see Heiser, *supra* note 26; Muttreja, *supra* note 8.

While few examples of boomerang suits exist outside the blocking context, scholars and practitioners of international civil procedure agree that they are highly likely to materialize in the near-to-medium future. *See* Alford, *supra* note 15, at 526 (*ROE* epitomizes a wave of coming "who pays" arbitration); Heiser, *supra* note 26, at 633-34 (boomerang suits likely because corporate assets are located in the United States); Casey & Ristroph, *supra* note 8, at 43 (boomerang suits likely given procedural and substantive legal reforms abroad). The primary reason this litigation has not yet presented is that the aforementioned reforms are relatively recent. Because human rights litigation can take years if not decades to conclude, plaintiffs seeking relief have not yet had the opportunity to enforce judgments handed down abroad. These judgments are likely to be challenged by defendants on public policy or due process grounds under the Uniform Foreign Money-Judgment Recognition Act (UFMJRA) or equivalent state statute. *See* Heiser, *supra* note 26, at 635-57 (discussing grounds for nonenforcement of judgments post-judicial reforms in Costa Rica and the Commonwealth of Dominica). For further discussion of due process issues see *infra* Part IV.

accountable.[30] Seeking to evade the prospect of massive foreign judgments, corporate defendants subvert the very proceedings they originally sought via FNC by attempting to return cases to the forum that granted dismissal.

Without taking a position on either the theoretical desirability of FNC[31] or whether Judge Rakoff effectively applied it in *Aguinda*,[32] this Comment proposes a simple two-step solution to the problem of "boomerang suits." First, if a suit returns to the United States after having been dismissed on an FNC basis, judges should apply FNC sua sponte to determine whether it is proper to retain control over the proceedings.[33] In so doing, courts should presume that

30. *See infra* Part IV for a detailed treatment of these reforms. *See also* Dearborn, *supra* note 25, at 227-29 (tracing the story of the Bhopal litigation and the subsequent reaction of the Indian Supreme Court); Casey & Ristroph, *supra* note 8, at 21, 29, 35-36 (analyzing, inter alia, Nicaragua's *Ley 364*, which requires foreign defendants "to post a $100,000 bond to pay for court costs and to guarantee the payment of a final judgment" at the initiation of a suit and within ninety days of service to "deposit an additional $20 million"); Heiser, *supra* note 26, at 610-11 (discussing tort liability and damage reforms that effectively allow foreign judiciaries to apply U.S. law to cases dismissed on the basis of FNC).

31. FNC poses obvious problems for plaintiffs seeking to hold U.S.-based corporations accountable for human rights abuses committed abroad. As one commentator scathingly put it, the doctrine creates incentives for companies to operate in foreign countries "specifically selected because of lower wages, lower standards of care, and potential plaintiffs' limited access to courts, the political process, and little hope of any realistic and meaningful relief." Paul Santoyo, *Bananas of Wrath: How Nicaragua May Have Dealt Forum Non Conveniens a Fatal Blow Removing the Doctrine as an Obstacle to Achieving Corporate Accountability*, 27 HOUS. J. INT'L L. 703, 705 (2005). Further, it runs directly counter to the concept of cosmopolitanism, which posits that problems affecting one nation affect the global community at large. *See, e.g.*, Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 689 (Tex. 1990) (Doggett, J., concurring) (arguing "[t]he parochial perspective embodied in the doctrine of forum non conveniens enables corporations to evade legal control merely because they are transnational. This perspective ignores the reality that actions of our corporations affecting those abroad will also affect Texans."), *superseded by statute*, Act of Feb. 23, 1993, ch. 4, 1993 Tex. Sess. Law Serv. 10-12 (Hein) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b) (Vernon 2005)), *as recognized in* '21' Int'l Holdings, Inc. v. Westinghouse Elec. Corp., 856 S.W.2d 479, 484 (Tex. App.-San Antonio 1993).

Nevertheless, deeming foreign judiciaries "inadequate," as many proponents of human rights have suggested, can prove unsustainable and counterproductive. For example, courts have refused to deem Sierra Leone—a country long plagued by civil war—incapable of entertaining cases. When viewed in the context of capacity-building measures undertaken by the U.N.'s hybrid war crimes tribunal, such rulings support the Westphalian aspiration of equality for all sovereigns. For excellent treatment of these difficult and complex questions see Boyd, *supra* note 24; Hilmy Ismail, *Forum Non Conveniens, United States Multinational Corporations, and Personal Injuries in the Third World: Your Place or Mine?*, 11 B.C. THIRD WORLD L.J. 249 (1991); Ugo Mattei & Jeffrey Lena, *U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications*, 24 HASTINGS INT'L & COMP. L. REV. 381, 381-82 (2001).

32. *See* Kimerling, *Indigenous Peoples*, *supra* note 22, at 416-17 (claiming the application of FNC to the *Aguinda* proceedings was "colored by a series of detailed but questionable factual assumptions, including erroneous and unsupported findings about the history of litigation in Ecuador's courts" and failed to take into "account a number of factors that favored the plaintiffs' choice of a U.S. forum").

33. *See* Derr, *supra* note 25, at 837 ("Anyone with only a basic understanding of forum non conveniens would likely be surprised to learn that, despite complying with all venue and jurisdictional requirements, and in the absence of any motion by, or inconvenience to, a defendant

the foreign forum is adequate, and that public and private factors favor adjudication abroad. Only evidence of a substantial change in circumstances that renders the foreign forum unable to meet minimum standards of due process—defined in reference to the Uniform Foreign Money-Judgments Recognition Act or its local equivalent—should be enough to rebut such a presumption.[34]

Second, as a prophylactic matter, judges should use their discretion to require defendants filing an FNC motion to consent to aggressive dismissal conditions. For example, defendants might be compelled to satisfy judgments rendered by foreign courts[35] and to waive the right to litigate any issues pending in the foreign forum (or arising from the same "case or controversy") in any jurisdiction other than the one designated by the court's dismissal order or the defendant's FNC motion.[36] Such criteria would prevent suits from bouncing back to U.S. courts, to private arbiters such as the AAA or the International Center for Settlement of Investment Disputes (ICSID), or to the tribunals of a third country.[37]

This two-part solution presents several advantages over others proposed by scholars and practitioners of international civil procedure, though it is by no means incompatible with them.[38] First, and perhaps most importantly, it is easy

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party, a court may dismiss a plaintiff's case on [this] basis . . ."). This principle will be discussed in greater detail *infra* Parts III, IV.

34. 13 U.L.A. 43 (2002). The UFMJRA provides a mechanism for enforcing judgments rendered abroad. Generally, judgments are enforced unless they violate public policy or do not comply with minimum standards of due process (such as notice and a hearing). For a detailed discussion of the UFMJRA, see Heiser, *supra* note 26, at 635-57.

35. Such clauses are common. *See* Thomas, *supra* note 27, at § 4[d] (collecting cases). Defendants, of course, should be permitted to exhaust the appeals process in the designated jurisdiction. Similarly, they need not be required to abide by judgments that do not comply with minimum standards of due process. *See* Banco De Seguros Del Estado v. J.P. Morgan Chase & Co., 500 F. Supp. 2d 251, 264 (S.D.N.Y. 2007) ("Any denial by [foreign] courts of due process can be raised . . . as a defense to a plaintiffs' later attempt to enforce a resulting judgment against [a] [defendant] in [the United States]. . . . [S]peculation about another country's due process requirements is not a proper consideration for a district court.") (quoting *In re* Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 205 (2d Cir. 1984)). *See infra* Part IV (discussing problems posed by drafting dismissal orders).

36. Many, if not most, human rights fact patterns implicate multiple plaintiffs. The importance of protecting third-party plaintiffs will be discussed *infra* Parts II, IV.

37. Another negative consequence of boomerang suits is the incentive to enforce decisions in a third country. Knowing that their ability to take a decision back to the United States has been undercut, plaintiffs may very well try their luck elsewhere. From the perspective of judicial economy, this makes little sense. Additionally, it may diminish the credibility of the U.S. legal system on an international scale. Future scholars may wish to consider broader solutions such as setting up international treaties modeled on the Brussels Convention to standardize the enforcement of foreign judgments, or creating an international civil court. *See* Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 48 (2004) (describing the Brussels Convention's "first in time" approach to parallel proceedings).

38. *See generally* Casey & Ristroph, *supra* note 8 (proposing the application of collateral

to implement because it does not require changing existing doctrine, but aggressively applies the law as it is. District courts need not wait with bated breath for circuit review, and appellate courts need not hold off for a Supreme Court pronouncement.[39]

Second, and relatedly, this solution accords with the principles underlying FNC: judicial efficiency and respect for the sovereignty of sister judiciaries. Given the undeniable increase in FNC dismissals, solutions seeking to counteract this trend (and in particular ones that advocate recalibrating the weight afforded plaintiffs' forum preferences or abolishing the doctrine altogether) are unlikely to hold sway with judges disinclined to clog their dockets with complex suits involving foreign law in which they lack expertise.[40] Instead, judges can ensure that if suits *are* dismissed to foreign jurisdictions, U.S. courts fundamentally respect the proceedings of these increasingly autonomous, technically competent, and sometimes far more substantively protective legal systems.

Third, unlike fickle and highly malleable equity principles such as estoppel or issue preclusion,[41] stipulations have a hard-and-fast quality that

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estoppel to boomerang cases challenging the enforceability of foreign rulings); Heiser, *supra* note 26, at 661 (same); *see also* E.E. Daschbach, *Where There's a Will, There's a Way: The Cause for a Cure and Remedial Prescriptions for Forum Non Conveniens as Applied in Latin American Plaintiffs' Actions Against U.S. Multinationals*, 13 LAW & BUS. REV. AM. 11 (2007) (advocating increased deference to plaintiffs' choice of forum or elimination of the FNC doctrine entirely); Derr, *supra* note 25, at 826 (advocating discretionary consideration of "problematic public interest factors"); *cf.* Note, *Cross-Jurisdictional Forum Non Conveniens Preclusion*, 121 HARV. L. REV. 2178, 2178 (2008) (addressing the analogous problem of "a plaintiff whose suit has been dismissed on *forum non conveniens* grounds in one U.S. jurisdiction fil[ing] suit in another U.S. jurisdiction in the hope of obtaining a different result" and arguing that principles of finality and repose suggest the second court "allow those legal and factual differences to counteract preclusion only to the extent that new legal arguments or new evidence would justify relitigation of the issue in the jurisdiction where it was originally decided").

39. *Cf.* Casey & Ristroph, *supra* note 8, at 30 (discussing the related problem of blocking statutes yet to receive Supreme Court attention).

40. *But see* Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 679, 688 n.11 (Tex. 1990) (Doggett, J., concurring) (arguing predictions of "dire consequences . . . [in a world] without forum non conveniens . . . [cannot] be supported. The doctrine has been developing for over [one hundred] years, yet [it] . . . 'was at best incipient among the states' until 1947 . . . [and] ten states in the United States have not adopted forum non conveniens"), *superseded by statute*, Act of Feb. 23, 1993, ch. 4, 1993 Tex. Sess. Law Serv. 10-12 (Hein) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b) (Vernon 2005)), *as recognized in* '21' Int'l Holdings, Inc. v. Westinghouse Elec. Corp., 856 S.W.2d 479, 484 (Tex. App.-San Antonio 1993). However, the reaction to *Dow*—which abolished FNC in Texas over the vigorous dissent of four justices—was swift. The state legislature codified, and embellished, the typical common law test.

41. Some courts have ruled a party seeking FNC dismissal cannot subsequently assert the desired forum is inadequate. *See* PLM Int'l., Inc. v. Nath, No. C 98-01912 SC, 1998 WL 514045 (N.D. Cal. Aug. 17, 1998); Weisel Partners LLC v. BNP Paribas, No. C 07-6198 MHP, 2008 WL 3977887 (N.D. Cal. Aug. 26, 2008). Others cases, however, suggest a substantial degree of wiggle room for defendants. *See* Flores v. S. Peru Copper Corp., No. 00 CIV. 9812(CSH), 2001 WL 1658213, at *1 (S.D.N.Y. Dec. 27, 2001) (FNC dismissal must be based on "the world as it then

provides predictability to all parties, actual or potential, to the litigation. This predictability also stems from stipulations' ex ante, as opposed to ex post, approach. Knowing there is no possibility, however remote, of returning to the United States after opting to take their chances abroad, corporate defendants may be reluctant to file FNC motions in the first place, especially in light of judicial reforms sweeping the Global South.[42] Similarly, if dismissal requests are used against them, corporations may be less inclined to fight a lawsuit "to the death" through contradictory arguments or litigation strategies. The prospect of heightened liability may induce settlement[43] and prompt corporations to become better global citizens. Fear of being held jointly and severally liable under state-corporate contractual partnerships, such as petroleum concessions, might also encourage business entities to aid foreign governments in bettering sovereign human rights records.[44]

Finally, unlike other solutions that address boomerang suits after a judgment has been rendered,[45] this framework solves the puzzle of pendent litigation. This Comment will show that Judge Sand had ample room, doctrinally speaking, to dismiss *ROE* without a motion by either party. He still has the power to apply FNC to ChevronTexaco's counterclaims, promoting

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exists, not as it may have existed months earlier").

42. *Cf.* Heiser, *supra* note 26, at 660, 661 n.279 (discussing diminished incentives to file an FNC motion for cases involving the Dominican Republic after the passage of the Transnational Act, and citing a California state court matter where, because of this legislation, defendants opted not to move for dismissal).

Of course, defendants might appeal such court-imposed stipulations. A clever litigator seeking to avoid a judgment against her client could wait until after litigation began in the foreign forum, gauging her chances there before determining whether to challenge the stipulations. Such behavior may cross the line from zealous advocacy to unethical, and legally actionable, representation. Further, the success rate on appeal is quite low; hence, it may be more economically efficient for the corporation to comply and play the role of the responsible global citizen rather than engage in demonstrably futile machinations. Similarly, a corporation might contest what "issues" are before a foreign court. However, assuming dismissal orders encompass counterclaims, crossclaims, and issues arising from the same "case and controversy" as the underlying dispute, there should be ample buffer room to discourage illegal behavior and to adequately protect victims of human rights abuses. *See infra* Part IV (unpacking drafting and enforcement of FNC stipulations).

43. Heiser, *supra* note 26, at 662 (discussing enhanced settlement value for claims dismissed to countries that have undergone judicial reforms).

44. *Cf.* Alford, *supra* note 15, at 527-29 (discussing corporations as least cost avoiders in situations of joint liability). The economic benefits associated with ex ante FNC stipulations may, of course, accrue through other means, including some of the alternatives discussed *supra* note 38. Nevertheless, because of ambiguity problems, they are less likely to function effectively; that is to say, if corporations reasonably believe they will not be held accountable for their behavior, there is little incentive, short of public relations, to compel them to compensate those whom their policies adversely affect.

45. *Cf.* Casey & Ristroph, *supra* note 8 (advocating application of collateral estoppel once judgments have been rendered abroad). It is theoretically possible to apply estoppel proper (that is, minus the collateral aspect) to pendent cases, such as *ROE*. This option was strongly advocated by the Republic after Judge Sand granted the stay of arbitration.

corporate accountability for human rights violations and signaling respect for the Ecuadorian legal process.

This Comment is divided into four Parts. In Part I, I provide an overview of *Aguinda* and *ROE* to illustrate the procedural mechanics of boomerang litigation. In Part II, I explore policy reasons for curtailing such suits, focusing on delay, inconsistent results, and harm to third parties excluded from the litigation. In Part III, I demonstrate how a court can swiftly and fairly handle a boomerang suit through sua sponte application of FNC. Finally, in Part IV, I explain how using stipulations can help stop boomerang suits before they start and illustrate how, as a practical matter, courts can draft such stipulations to avoid prejudice to corporate defendants and other potential plaintiffs. I conclude by drawing lessons for the future from the story of *Aguinda* and *ROE*, focusing on the incentive structure the FNC doctrine, as currently applied, creates for endless litigation.

I
"THE TRIAL OF THE CENTURY": A CASE HISTORY OF *AGUINDA V. TEXACO* AND ITS OFFSPRING, *REPUBLIC OF ECUADOR V. CHEVRONTEXACO*

Texaco operated in the Ecuadorian Amazon for nearly thirty years, from 1964 to 1992.[46] During this time, it promised to "employ modern and efficient machinery" and to "avoid contamination of waters, airs, and lands."[47] Nevertheless, Texaco deliberately dumped over eighteen billion gallons of crude oil and toxic "produced water" into unlined pits known, and often purposefully designed, to drain into surrounding streams and rivers used for bathing, cooking, and drinking.[48] Altogether, Texaco released the "equivalent of 332 million gallons" of crude into the Ecuadorian Amazon, more than thirty

46. Texaco's operations formed part of a consortium of oil companies that lasted until 1992. Aguinda v. Texaco, Inc., 303 F.3d 470, 473 (2d Cir. 2002). From 1964 to 1974, TexPet, a subsidiary of Texaco, shared a 50% interest with Gulf Oil Company. *Id.* In 1974, PetroEcuador, Ecuador's state-owned oil company, joined the group with a quarter interest, with the remaining shares split between Gulf and TexPet. *Id.* In 1977, PetroEcuador bought out Gulf and assumed a 62.5% stake in the venture, with the remaining 37.5% remaining in the hands of TexPet. Kimerling, *Indigenous Peoples*, *supra* note 22, at 420. At all times during this interval, TexPet served as the Consortium's Operator. *Id.* In 1992, a subsidiary of PetroEcuador assumed this role. *Aguinda*, 303 F.3d at 473.

47. AMAZON DEF. COAL., CHEVRON'S DIRTY BUSINESS IN ECUADOR: 13 EXAMPLES THAT EXPOSE A CORPORATE COVER-UP 2 (2006), http://www.texacotoxico.org/docs/PDF%20Files/Myths%20QA%2020SEP06.pdf.

48. LAGO AGRIO LEGAL TEAM, *supra* note 2, at 4 n.8 ("Chevron had admitted to discharging roughly [eighteen and a half] billion gallons of toxic 'water of formation' in Ecuador. Approximately 2% of water of formation is pure crude"); *see also* Kimerling, *Indigenous Peoples*, *supra* note 22, at 452 ("Produced water is a noxious brew of crude oil, formation water, and chemicals that have been injected down a well or used in the separation process. . . . Because of this, most produced water in U.S. oil fields is re-injected underground.") (footnotes omitted).

times the amount spilled by the Exxon Valdez tanker.[49] In addition, pipeline ruptures discharged millions of gallons of petroleum into the rainforest, and horizontal flares released tons of hydrocarbons into the atmosphere.[50] An environmental and human health catastrophe resulted. Residents suffered from a dramatic increase in cancer rates, genetic defects, and spontaneous abortions.[51] The contamination was so dire that one indigenous community, the Tetetes, disappeared entirely and others, such as the Cofanes, were pushed to the brink of annihilation.[52] Some studies estimate that over 83% of the remaining rainforest inhabitants suffer from illnesses related to the contamination.[53]

Texaco profited richly from these activities. While the company's practices allegedly violated Ecuadorian and international laws,[54] and deviated from the methods patented by the oil company for safe use in the United States,[55] they saved the North American business one to three dollars per barrel, enabling it to post over $30 billion in profits during this period.[56] In comparison, the cost of a complete remediation is estimated to be between $6 and $27 billion, and will take decades to complete.[57]

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49. LAGO AGRIO LEGAL TEAM, *supra* note 2, at 4, 16 nn.8-11.

50. *Id.* at 4 n.11.

51. *Id.* at 4 nn.13-15 (collecting numerous epidemiological studies); *see also* AMAZON DEF. COAL., *supra* note 47; AMAZON WATCH, CHEVRON'S "RAINFOREST CHERNOBYL" IN ECUADOR (2005), http://www.adventureecology.com/ecuador/chevron.pdf.

52. AARON PAGE, AMAZON DEFENSE COALITION, GENOCIDE IN THE RAINFOREST: LEGAL ANALYSIS: THE ENVIRONMENTAL AND CULTURAL DESTRUCTION OF CHEVRON IN ECUADOR AS ACTS OF GENOCIDE AND CRIMES AGAINST HUMANITY PROHIBITED UNDER INTERNATIONAL CRIMINAL LAW (2006), http://www.texacotoxico.org/eng/node/58.

53. Lago Agrio Complaint, *supra* note 10, at 13.

54. *See* LAGO AGRIO LEGAL TEAM, *supra* note 2, at 4 n.16 (explaining that Texaco's drilling techniques were outlawed in the oil-friendly state of Texas as early as 1939 and that they violated Ecuador's Constitution, the *Ley de Gestión Ambiental*, the *Ley de Hidrocarburos*, and the *Código de Salud*); Kimerling, *Indigenous Peoples*, *supra* note 22, at 433-37 ("Texaco did not instruct its Ecuadorian personnel about environmental precautions or monitoring, and oil field workers—who had been trained by Texaco—were so unaware of the hazards of crude oil during the 1970s and 1980s that they applied it to their heads to prevent balding. They sat in the sun, or covered their hair with plastic caps overnight. To remove the crude, they washed their hair (and hands) with diesel. Similarly, many workers took jars of crude to parents suffering from arthritis.").

55. Eyal Press, *Texaco on Trial*, NATION, May 13, 1999, http://www.thenation.com/doc/19990531/press.

56. LAGO AGRIO LEGAL TEAM, *supra* note 2, at 4.

57. *Id.* at 3-4; RICHARD STALIN CABRERA VEGA, TECHNICAL SUMMARY REPORT 6 (2008), *available at* http://www.texacotoxico.org/docs/Cabrera%20Summary%20Report%20English%20final[1].pdf; *Chevron $27 Billion Liability in Ecuador's Amazon Confirmed by Team of Independent Scientists* AMAZON DEF. COAL., Dec. 1, 2008, http://www.texacotoxico.org/eng/node/185. If the plaintiffs are victorious, this would be the largest reported judgment in the history of environmental litigation in the United States. *Cf.* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (reducing punitive, damages to victims of Exxon Valdez spill from $2.5 billion to $500 million); William H. Rodgers et al., *The Exxon Valdez Reopener: Natural Resources*

In 1993, seventy-six individuals, primarily Kichwa Indians, filed a complaint against Texaco in the Southern District of New York on behalf of the approximately twenty-five thousand rainforest dwellers affected by the contamination.[58] The suit alleged the relevant environmental decisions were made in the United States by high-ranking Texaco executives and sought a comprehensive cleanup.[59] Texaco filed for summary judgment on several grounds, including FNC. Judge Broderick, to whom the case was originally assigned, stayed the motion pending a preliminary period of discovery.[60] He noted that most factors in an FNC analysis, which requires accounting for the adequacy of the alternative forum and weighing public versus private interests in favor of adjudication in the disputed location, supported the defendants.[61] Nevertheless, a final determination required complete information regarding the nexus between events in the United States and in Ecuador.[62]

Over the next several years, the case underwent a period of substantial discovery. The plaintiffs obtained responses to "no fewer than [eighty-one] document requests and 143 interrogatories" and conducted numerous depositions.[63] Then, in March 1995, Judge Broderick died. Judge Rakoff assumed jurisdiction over the matter and took a much harsher stance toward the plaintiffs' claims. He sustained the defendant's renewed motion to dismiss on the grounds of FNC, international comity, and failure to join indispensible parties (PetroEcuador and the Republic of Ecuador)[64] in a brief opinion closely

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Damage Settlements and Roads Not Taken, 22 ALASKA L. REV. 135, 136 (2005).

58. *See* Complaint, Aguinda v. Texaco, Inc., 850 F. Supp. 282 (S.D.N.Y. 1994).

59. *Id*. at 3-4 (alleging "[a] substantial part of the tortious acts and omissions giving rise to this Complaint took place in this judicial district. The policies, procedures and decisions relating to oil exploration and drilling in Ecuador were set and made in New York.").

60. Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (VLB), 1994 WL 142006, at *1 (S.D.N.Y. Apr. 11, 1994).

61. *Id.* (limiting discovery to "(a) events relating to the harm alleged by plaintiffs occurring in the United States . . . and (b) events occurring outside the United States to the extent the information can be furnished or secured voluntarily or through directives to parties in the United States to secure the information").

62. *Id.* at *2 ("Disputes over class membership, determination of individualized or common damages, and the need for large amounts of testimony with interpreters, perhaps often in local dialects, would make effective adjudication in New York problematic at best"); *see also* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-57 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

63. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 538 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

64. At the time, neither PetroEcuador nor the Republic of Ecuador had waived sovereign immunity (though the Republic would later file a petition to intervene on behalf of *Aguinda* plaintiffs). *See* Jota v. Texaco, 157 F. 3d 153, 157-58 (1998). Judge Rakoff argued that, as a result, the Foreign Sovereign Immunities Act (FSIA) voided his jurisdiction over both parties. Aguinda v. Texaco, Inc., 945 F. Supp. 625, 628 (S.D.N.Y. 1996), *vacated sub nom.*, Jota v. Texaco, Inc., 157 F. 3d 153 (2d Cir. 1998); *see also* Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified in scattered sections of 28 U.S.C.). This conclusion is suspect. *Jota* points out that the plaintiffs' claims for equitable relief would still have furnished a basis for jurisdiction. 157 F. 3d at 161-62.

tracking *Sequihua v. Texaco*, a parallel action brought in Texas.[65]

The Second Circuit reversed and remanded on the grounds that Judge Rakoff did not consider the unique issues raised by *Aguinda* and that he had not obtained Texaco's commitment to submit to Ecuadorian jurisdiction.[66] Before the case was heard on remand, Texaco agreed to this stipulation. Upon reconsideration, Judge Rakoff once again dismissed the case, stating that it had "everything to do with Ecuador and nothing to do with the United States."[67] This time, the Second Circuit affirmed his order, but gave the plaintiffs extra time to collect signatures of affected Amazon residents because, in contrast to the United States, no "opt-out" mechanism existed in Ecuador for class action lawsuits.[68]

While the *Aguinda* case was pending in New York, Texaco entered into negotiations with the government of Ecuador to form an agreement that would release it from liability. Ricardo Reis Veiga, General Counsel to Texaco (and future lead attorney for the defendants in Lago Agrio) headed the talks.[69] The final accord obligated Texaco to partially remediate polluted areas. The price tag was forty million dollars—less than 1% of the lowest damage estimate by independent sources.[70] Though the company agreed to sponsor a series of public works in selected communities, no monies were set aside for medical monitoring, public health, personal injuries, or harm to properties owned by

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Even were that not true, the plaintiffs also could have sued PetroEcuador and the Republic for monetary damages in their commercial, rather than governmental, capacities since the petroleum concession was originally a joint venture with the private sector and was operated for profit, analogous to a state-run casino or lottery. Under FSIA, the commercial activity in question must also have a "direct effect" on the United States. But, such a standard is fairly lax. *See* Republic of Argentina v. Weltover, 504 U.S. 607 (1992). The doctrine of sovereign immunity can be considered the flip side of *parens patriae*, discussed *infra* Parts II, III.

65. Aguinda v. Texaco, Inc., 945 F. Supp. 625, 628 (S.D.N.Y. 1996), *vacated sub nom.*, Jota v. Texaco, Inc., 157 F. 3d 153 (2d Cir. 1998); *see also* Sequihua v. Texaco, Inc., 847 F. Supp. 61, 63 (S.D. Tex. 1994).

66. *Jota*, 157 F. 3d at 159.

67. *Aguinda*, 142 F. Supp. 2d at 537, 550 (slamming the plaintiffs for coming up "bone dry" after having "deposed numerous Texaco witnesses and reviewed tens of thousands of Texaco documents in an effort to establish a meaningful nexus between the United States and the decisions and practices here complained of"). The veracity of this claim has been hotly disputed. *See, e.g.*, Kimerling, *Indigenous Peoples*, *supra* note 22, at 605 ("[T]here is no question that many evidentiary roads lead to activities in Coral Gables, Houston, and New York.").

68. Aguinda v. Texaco, Inc., 303 F.3d 470, 478-79 (2d Cir. 2002).

69. Reis Veiga's position has been criticized as a conflict of interest that violates American Bar Association rules and he has been criminally indicted for conspiracy to falsify results of Texaco's remediation. *Amazon Defense Coalition: Criminal Indictment of Chevron Lawyer's in Ecuador Based on Wide Body of Scientific Evidence*, ENERGY BUS. J., Oct. 3, 2008, at 22 [hereinafter *Amazon Defense Coalition*].

70. LAGO AGRIO LEGAL TEAM, *supra* note 2, at 6. No party ever officially disclosed a cleanup price, but the oil company estimates it spent approximately this sum of money. Kimerling, *Indigenous Peoples*, *supra* note 22, at 494.

Amazon dwellers.[71] The petroleum giant would later claim this accord absolved it of all responsibility for the environmental and human health emergency, even though it was silent on the issue of liability toward private citizens and only expressly released the company as to PetroEcuador, the state-owned oil company and member of Texaco's operating consortium, and as to the Republic.[72]

Meanwhile, the *Aguinda* class—now the Lago Agrio plaintiffs—collected the requisite signatures and filed a complaint in May 2003 in the Superior Court of Justice in Nueva Loja (Lago Agrio) located in the *Oriente*.[73] Less than one year later, Texaco, which merged with Chevron in 2001,[74] sought relief in front of the AAA, claiming the remediation agreement indemnified it against any judgment reached by the Lago Agrio court, and that the Republic was separately obligated to resolve any disputes over the meaning of this agreement through arbitration by an earlier contract—the 1965 Napo Joint Operating Agreement (Napo JOA).[75] The remediation accord also required the Republic of Ecuador and PetroEcuador to inspect the cleanup work and inform the oil company of any "significant deviations" from the scope of the initial agreement—otherwise the work was deemed accepted.[76]

The Republic sought a stay, which Judge Sand of the Southern District of New York temporarily granted. In so doing, the Republic unintentionally waived sovereign immunity.[77] ChevronTexaco counterclaimed. It asked the court to dismiss the underlying action, asserting that the "environmental remediation claims in the Lago Agrio lawsuit [were] barred by releases granted to ChevronTexaco by Ecuador pursuant to the 1995 Remediation Contract . . . and a subsequent agreement, the 1998 'Final Act,' which certified that Texaco Petroleum had performed its obligations under the Remediation Contract."[78]

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71. *See* Kimerling, *Indigenous Peoples*, *supra* note 22, at 508-13, 493-94.

72. *Id.* at 496 (noting the lack of "mechanism[s] for independent oversight of remedial activities, long term monitoring, public comment, or transparency in the approval process").

73. Lago Agrio Complaint, *supra* note 10. *But see* Kimerling, *Transnational Operations*, *supra* note 20, at 488 (arguing NGOs managing litigation and North American plaintiffs' lawyers unjustly excluded certain groups—especially the Kichwa and Huaorani communities of Makarik Nihua—from the proceedings and tracking the development of a parallel case filed in a different region of Ecuador).

74. George Raine, *The Chevron-Texaco Merger: An Oil Giant Emergers*, S.F. CHRON., Oct. 10, 2001, at D1.

75. *ROE III*, 499 F. Supp. 2d 452, 457 (S.D.N.Y. 2007) (No. 04 Civ. 8378 (LBS)), *aff'd*, No. 07-2868-cv, 2008 WL 4507422 (2d Cir. Oct. 7, 2008).

76. Kimerling, *Indigenous Peoples*, *supra* note 22, at 496.

77. *See supra* note 15.

78. Kimerling, *Transnational Operations*, *supra* note 20, at 494; *see also* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment and Plaintiffs' Stay of Arbitration Proceedings at 63-66; Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment On Their Counterclaims at 15-16, *ROE III*, 499 F. Supp. 2d 452 (No. 04 Civ. 8373 (LBS)).

Further, the company argued that, in seeking to enforce a 1999 pollution control statute not yet conceived of at the time *Aguinda* was filed, the Lago Agrio plaintiffs were acting as pseudo-attorneys general and usurping the role of the state in environmental policy.[79] Thus, they were not entitled to bring any action against ChevronTexaco because the government of Ecuador had already signed away their rights.[80]

After a substantial discovery period that involved the review of over two hundred thousand pages of documentation and extensive briefing and expert testimony on Ecuadorian law, Judge Sand denied the Republic's motion to dismiss the counterclaims and ruled that New York law would control the validity of the contested contracts.[81] In May 2007, he brought the entire case to trial, and in July 2007, he issued a permanent stay of arbitration, holding that the 1965 Napo JOA was not binding.[82] In October 2008, the Second Circuit summarily affirmed; and in December 2008, it rejected ChevronTexaco's petition for rehearing.[83] ChevronTexaco sought certiorari in March 2009. The company's counterclaims remain pendent.

II
THE HUMAN COST OF BOOMERANG LITIGATION: *AGUINDA* AND *REPUBLIC OF ECUADOR* AS CASE STUDIES IN DELAY, INCONSISTENT RESULTS, AND PREJUDICE TO THIRD PARTIES

Aguinda and *ROE* exemplify the dangers of boomerang litigation and the risk that corporate defendants will use procedural loopholes as an end run around the judicial process, avoiding massive judgments for human rights abuses committed abroad. This Part is divided into three subsections and discusses the policy reasons that favor a more aggressive and consistent application of FNC.

79. *See* Memorandum of Law in Support of Motion of Chevron Corp. & Texaco Petroleum Co. for Summary Judgment upon Their Counterclaims at 3, *ROE III*, 499 F. Supp. 2d 452 (No. 04 Civ. 8373 (LBS)).

80. *Id.*

81. *ROE II*, 426 F. Supp. 2d 159, 162 (S.D.N.Y. 2006); *ROE I*, 376 F. Supp. 2d 334 (S.D.N.Y. 2005); *see also* Plaintiffs' *ROE III* Brief at 9 n.7, *supra* note 15.

82. *ROE III*, 499 F. Supp. 2d at 460-69. The portion of Judge Sand's ruling dealing with this agreement is beyond the scope of this Comment, as it was never at issue in the initial *Aguinda* proceedings, nor disputed in Lago Agrio. Briefly, Judge Sand found that Chevron and its subsidiaries never had a reasonable basis for believing a contract existed with PetroEcuador, Ecuador's state oil company and a member of the consortium run by Texaco; this was proven by multiple internal communications of company executives and the absence of formalities that must be completed for an agreement to be valid under Ecuadorian contract law.

83. Republic of Ecuador v. ChevronTexaco Corp., No. 07-2868-cv, 2008 WL 4507422 (2d Cir. Oct. 7, 2008).

A. The "Cold Logic" of Delay

The Lago Agrio trial has slowly but surely progressed since its inception in May 2003. Over the years, the parties marshaled substantial documentation chronicling environmental and health effects in the region, leading Judge Germán Yánez Ruiz, an early Ecuadorian trial judge in charge of the proceedings, to joke that he would "have to isolate himself in a Tibetan monastery . . . just to get the reading done."[84] ChevronTexaco "insists that delay is not its object,"[85] and, indeed, the plaintiffs are responsible for an extended phase of discovery requiring the collection of soil and water samples from hundreds of sites throughout Ecuador.[86]

But the numbers tell a different story. Assume, for example, the Ecuadorian court renders a judgment of $6 billion—a conservative estimate given a judicially-appointed expert's recent conclusion that Texaco "left large amounts of contamination behind" and that "total losses" approximate $8 billion, excluding any damages for "unjust enrichment."[87] Were the petroleum giant to deposit this money in a savings account, its profit from the interest would substantially offset the litigation expenses incurred.[88] Further, the longer ChevronTexaco delays the case, the greater the chance it will win by attrition or diminish the settlement value of the case as the plaintiffs' resources and patience wear thin.[89] This, of course, is to say nothing about the financial

84. Langewiesche, *supra* note 2, at 229, 232 (quoting Judge Yánez Ruiz). In Lago Agrio, trial judges preside over a given matter for a maximum of two years. Judge Juan Nuñez recently replaced Judge Yánez Ruiz.

85. *Id.* at 232 (referring to financial incentives as the "cold logic" of delay). *But see infra* note 97.

86. Interview with Steven Donziger, Consultant, Amazon Def. Coal., in Quito, Ecuador (Jul. 26, 2007); Langewiesche, *supra* note 2, at 232 (noting that the plaintiffs' originally requested 122 sites, a number that was later reduced to fifty-eight).

87. CABRERA, *supra* note 57, at 4, 6 (reporting toxin levels "above background levels, above environmental standards, and even above standards in the remediation contract"); *see also* Michael Isikoff, *A $16 Billion Problem: Chevron Hires Lobbyists to Squeeze Ecuador in Toxic-Dumping Case. What an Obama Win Could Mean*, NEWSWEEK, Jul. 26, 2008, http://www.newsweek.com/id/149090.

88. *See* Langewiesche, *supra* note 2, at 232.

89. The settlement value of most cases diminishes over time. This premise might not hold true for many large-scale human rights lawsuits, however, which tend to attract media attention and inflame public outrage the longer they last. The Lago Agrio proceedings are illustrative of this point. Celebrities such as Daryl Hannah have visited the site, staging photo-ops that dominated the international news cycle, several documentaries have been made about the case, and the Lago Agrio plaintiffs' representative recently won the Goldman Environmental Award, the environmental equivalent of a Nobel Prize. *See* Dolores Ochoa, *Hannah Visits Polluted Site in Ecuador*, WASH. POST, June 5, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/05/AR2007060500665 .html; Reyhan Harmanci, *'Justicia Now!': Ecuadorans Sue Chevron*, S.F. CHRON., Apr. 17, 2008, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/04/17/NSH8103GO4.DTL&type=movies; *Amazon Defense Coalition: Amazon Watch: Chevron's Amazon Disaster Lands at Sundance*, ENERGY & ECOLOGY, Jan. 30, 2009, at 87.

effects a final judgment would have on ChevronTexaco share prices[90] or on its image as an environmental leader—both results the company hopes to avoid.[91]

Delay has another side effect. The environmental costs of oil contamination are exponential; the longer toxins remain in soil and water, the farther they spread, and the more harm they pose to human health and rainforest ecology.[92] Other human rights cases follow similar fact patterns. The Bhopal disaster, for instance, exposed over five hundred thousand Indian residents to toxic methyl isocyanate gas from a Union Carbide pesticide plant. Thousands died in the weeks following the incident, but tens of thousands more continue to suffer health effects twenty years later.[93] Unfortunately, enhanced damages cannot adequately recompense these harms because money cannot bring back the lives that have been lost. This is particularly true for indigenous communities already on the brink of annihilation, where every individual

90. Some NGOs, such as Amazon Watch, have petitioned the SEC to conduct an investigation into Chevron for failure to disclose the lawsuit to its shareholders. *See* AMAZON WATCH, SUMMARY AND ANALYSIS OF CHEVRON'S UNDISCLOSED ECUADOR LIABILITIES, http://www.amazonwatch.org/amazon/EC/toxico/downloads/analysis_cvx_undisclosed_liabilities.pdf (last visited Jan. 24, 2009). Chevron protests that it has previously "referenced the suit in proxy statements." Clarification, NEWSWEEK, Aug. 7, 2008, http://www.newsweek.com/id/149090 (correcting imprecise language in Isikoff's July 26, 2008 story *A $16 Billion Problem*, *supra* note 87). In addition, on May 4, 2009, New York attorney general Andrew Cuomo sent a letter to Chevron requesting information on the lawsuit, as the state's pension funds have over $1 billion invested in Chevron. *Justice or Extortion?*, ECONOMIST, May 23, 2009, at 42.

91. Chevron trades on its image as a socially responsible corporation, as is evident from its "global issues" environment webpage. *See* Chevron, Environment, http://www.chevron.com/globalissues/environment/ (last visited Jan. 24, 2009) ("We're committed to helping meet the world's demand for energy while taking steps to protect the environment. We believe that it's the right thing to do and that it's critical to our success in a world in which energy sources should be developed in an environment that's clean, safe and healthy.").

92. These effects are known as "biomagnification" or "bioamplification" and occur as a result of slow toxin degradation and reuptake by animals in the environment. *See* CABRERA, *supra* note 57, at 10; Jae-Young Ko & John W. Day, *A Review of Ecological Impacts of Oil and Gas Development on Coastal Ecosystems in the Mississippi Delta*, 47 OCEAN & COASTAL MGMT. 597 (2004).

93. *Bhopal: Could it happen again?*, BBC NEWS, Nov. 25, 2004, http://news.bbc.co.uk/2/hi/programmes/bhopal/4034829.stm; *see also* Dearborn, *supra* note 25 at 227. The Bhopal case is illustrative for two reasons. First, it demonstrates the human costs of delay—had the company acted earlier, it might have prevented the accident altogether, or minimized loss of life through early settlement (enabling victims to afford expensive medical treatments). Second, it shows the power of aggressive dismissal stipulations to facilitate process and settlement abroad. While arguably FNC dismissal was inappropriate given India's assertion, made in *paren patriae* capacity, that its own judicial system could not handle the case, Judge Keenan's requirement that Union Carbide submit to U.S.-style discovery is undoubtedly a "but for" cause of the company's eventual $470 million settlement. *See* Upendra Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law*, 276 REC. DES COURS 297, 354-63 (1999). *But see* Jurianto, *supra* note 8, at 329 n.213 (arguing "$470 million was staggering lower" than the public expected, which is why "the stock price of . . . []Union Carbide[] jumped up by $2 on the day the settlement was announced"). *See also infra* Part IV (discussing the *Carbide* case).

constitutes a fragile tie to an ancestral past.[94] In light of the incentives for and harm caused by corporate intransigence in human right suits, the additional obstacles boomerang suits create for plaintiffs at the judgment-enforcement stage demand scrutiny.

While human rights cases are unavoidably slow and arduous, boomerang suits complicate judgment enforcement in at least three discrete ways—each reflective of the inherent difficulties posed by simultaneously litigating the same set of issues in different countries. First, if two sovereign courts reach disparate conclusions, a process of sorting out which one got it right ensues. Another court, potentially in a third country, must reconcile the trial records, a process that could conceivably lead the litigants back to square one in terms of the legal and factual questions at issue. The judges' reasoning will need to be compared and contrasted, again possibly under the microscope of an entirely different system likely to have its own view of the matter.[95]

Second, even if the domestic and foreign courts concur, unless the two orders are perfectly harmonious, boomerang defendants can emphasize discrepancies in judicial reasoning to justify avoiding payment. For example, if Judge Nuñez, the most current Ecuadorian judge presiding over the Lago Agrio matter, and Judge Sand use different interpretive methodologies to approach the remediation contract in question, then the petroleum giant may point to tensions as evidence it has been deprived of due process. Because the two judges are considering different bodies of evidence in different places at different times in different languages, legal systems, and cultures, the probability of this outcome is quite high. And while such a legal strategy may be doomed given the low bar set for procedurally adequate foreign proceedings, it will likely require additional discovery, briefing, and court hearings that further delay relief.

Third, even if the two courts arrive at identical conclusions at the same time, two separate appeals processes loom. *ROE* has already been on Judge Sand's docket for five years; after summarily losing the arbitration question on appeal, ChevronTexaco went so far as to request a rehearing en banc and certiorari.[96] There is little doubt the company would take issue with an adverse ruling on its counterclaims. Similarly, it has promised to take the Lago Agrio case to the Ecuadorian Supreme Court, a process projected to take several

94. *See* Dara O'Rourke & Sarah Connolly, *Just Oil? The Distribution of Environmental and Social Impacts of Oil Production and Consumption*, 28 ANN. REV. ENV'T RESOUR. 587, 596 (2003).

95. *Cf.* Teitz, *supra* note 37, at 32-35 (discussing confusion resulting from parallel cyber-squatting actions).

96. *See* Republic of Ecuador v. ChevronTexaco Corp., No. 07-2868-cv, 296 F. App'x 124 (2d Cir. Oct. 7, 2008), *petition for cert. filed*, 77 U.S.L.W. 3531 (U.S. Mar. 9, 2009) (No. 08-1123).

additional years.[97] Reconciling not only the rulings of two different trial courts, but of two different judicial systems with long paper trails is likely to be a task that no judge envies and a process that is inherently weighted towards the corporate defendants. As the complexity of issues increases, so does the possibility of tactical error by the plaintiffs who are outmatched in almost every sense of the word. Similarly, the longer the oil company or other boomerang defendants delay, the more probable governments in politically progressive nations will change their tune for fear of deterring foreign investment in light of the financial crisis pounding the Global South.[98] Thus, unless they are barred from so doing, boomerang defendants will likely follow the oil company's path, exacerbating the harms of corporate malfeasance.

B. The Risk of Inconsistent Results

Inconsistent results engendered by boomerang suits pose an even greater threat to human rights. If, for example, the Ecuadorian tribunal and the New York court reach identical conclusions—that the remediation contract did not release the oil company from the Lago Agrio claims *or* that it did release the oil company—no conflict arises.

However, Judge Nuñez might hold the remediation release fraudulent and find the oil company liable to third parties; concurrently, Judge Sand might deem the release agreement valid and hold it covers third parties. In this example, the Republic of Ecuador would face an order in one nation requiring it to pay a multibillion-dollar judgment, and another in a different nation absolving it from financial responsibility. Which ruling prevails would, of course, be subject to further litigation, as discussed in the preceding subsection.

Alternatively, and perhaps more damagingly, the first court to reach a judgment might foreclose the results of the second, as will be explained in the next subsection. If Judge Sand ruled on the release issue before Judge Nuñez did, this could render obsolete years of litigation in Lago Agrio: a court already deemed more appropriate and which has considered additional, complex issues that could not be brought in New York.[99]

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97. *See* Plaintiffs Memorandum of Law in Opposition to Defendants' Motion to Supplement the Record, at 3 n.1, *ROE III*, 499 F. Supp. 2d 452 (No. 04 Civ. 8378 (LBS)) (collecting statements by ChevronTexaco); *see also Amazon Defense Coalition: Chevron Lawyers Explode In Anger After More Oil Found at "Remediated" Sites In Ecuador Trial*, EARTH TIMES, Mar. 15, 2009, *available at* http://www.earthtimes.org/articles/show/amazon-defense-coalitionnbspchevron-lawyers-explode,749573.shtml (quoting oil company statements "telling Ecuador's indigenous leaders to expect a 'lifetime of litigation' if they persist in pressing their claims").

98. *See* Alexei Barrionuevo, *Emerging Markets Find They Aren't Insulated From the Tumult*, N.Y. TIMES, Oct. 7, 2008, at B1; Peter S. Goodman, *A Rising Dollar Lifts U.S. But Adds to Crisis Abroad*, N.Y. TIMES, Mar. 9, 2009, at A1 (noting Ecuador is on the "list of potential danger zones").

99. The opposite scenario, where Judge Nuñez rules first, would not be as harmful. The

While it is hard to state definitively the impact of inconsistent judgments in this or future boomerang suits, a significant risk exists that massive corporate malfeasance will go unremedied. If Judge Sand holds that the remediation contract indemnifies ChevronTexaco with regard to third-party claims while Judge Nuñez finds to the contrary, the government of Ecuador has every incentive for intransigence. President Rafael Correa is sympathetic to the plight of the Lago Agrio plaintiffs.[100] But given the country's dire financial situation, his administration is likely to blame the "imperialistic" U.S. judiciary and refuse to pay on the grounds that ChevronTexaco is morally responsible.[101] The Republic's financial situation is, of course, legally irrelevant, and in and of itself might not be sufficient to support Correa's moral argument. Yet from both an economic and a distributional justice perspective, damages should accrue to the least cost avoider. Undoubtedly, the oil company meets this description given its ability to have prevented the contamination, its profit derived from lax environmental practices, and its comparative strength relative to the Ecuadorian government.[102]

Finally, if the Republic were to pay, it might drive the country to bankruptcy. This outcome seems intuitively unjust given Texaco's admittedly substandard, and possibly deceptive, behavior. According to many reports, the South American government believed that Texaco was using the same technology it employed in the United States for the majority of the time the company operated in the *Oriente*.[103] Furthermore, an Ecuadorian prosecutor recently indicted high-ranking ChevronTexaco officials for fraudulently

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main issue in Lago Agrio is not the *Republic's* liability to Chevron so much as the Lago Agrio plaintiffs' standing to bring suit. Thus, the *ROE* trial bears far more directly on the Lago Agrio proceedings than the reverse.

100. *See* discussion *supra* note 20.

101. The government has already refused to honor the countries' foreign debt obligations on similar grounds. *See* Jeanneth Valdivieso, *Ecuador Minister: Debt Renegotiation Imminent*, FORBES.COM, Jan. 9, 2009, http://www.forbes.com/feeds/ap/ 2009/01/09/ap5903339.html. Of course, the Correa administration may refuse to pay even if Judge Nuñez and Judge Sand both find the remediation agreement indemnifies the oil company as to third-party claims. However, in that scenario President Correa would lack a credible basis for his argument, risking injury to the country's standing in the environmental and human rights communities—standing President Correa cannot afford to lose given the international support required for his conversion of the Yasuní National Reserve. *See* Kintto Lucas, *Ecuador: Support Grows for Letting Sleeping Amazon Oil Lie*, INTER PRESS SERVICE, Aug. 23, 2007, http://www.ipsnews.net/news.asp?idnews=39002. In any event, such an outcome is unlikely given the judicial and constitutional reforms that have transformed Ecuador into a far more plaintiff-friendly location, much to ChevronTexaco's consternation, and the damning Cabrera report, *supra* note 57.

102. *But see* Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. LEGAL STUD. 339, 372 (2008) (arguing that holding corporations liable may result in loss of foreign direct investment (FDI), diminishing overall societal welfare, and having "little effect on the level of objectionable behavior").

103. Kimerling, *Transnational Operations*, *supra* note 20, at 451-55.

certifying the remediation conducted in the Amazon.[104] Thus, inconsistent results would inevitably hurt *either* the government of Ecuador *or* the Lago Agrio plaintiffs, in both cases making it more difficult to hold corporate defendants accountable in the long run, and in both cases preserving incentives for misbehavior by multinational business entities in the Global South.

The increasing proliferation of parallel international proceedings,[105] combined with the high stakes of human rights cases, suggests that courts should regulate the risk of inconsistent judgments far more systematically. While a related doctrine—*lis alibi pendens*—takes into account the effect of overlapping foreign litigation, nearly one hundred years after its inception this area remains very much in gestation. The Supreme Court has never spoken on the issue, and courts of appeal are in disarray.[106] Even lower courts that conduct an FNC-type analysis, taking into account the adequacy of the foreign proceedings, neglect the obvious concerns of contradictory judgments.[107] Thus, even it its strongest incarnation, *lis alibi pendens* may only prevent run-ins between multiple courts by happenstance, not by design, and most certainly cannot be relied upon with any degree of certainty as a doctrinal device to stop

104. *Amazon Defense Coalition*, *supra* note 69.

105. As a general matter, the subject of parallel international proceedings, dubbed *lis alibi pendens*, or international abstention, is beyond the scope of this Comment. I focus only on the specific problem of boomerang suits in which a U.S. court has already made a determination that a foreign forum is better suited for resolving the issue or issues in question. For excellent general treatments of the broader topic see N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601 (2006); Steven R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions*, 30 GEO. WASH. J. INT'L L. & ECON. 1 (1996); Teitz, *supra* note 37.

106. *See* Calamita, *supra* note 105, at 655-72. Among circuits supporting deference to foreign proceedings—since others mandate exercising parallel jurisdiction until a decision is reached—there are three different schools of thought. The first, labeled "abstentionism," is modeled on the Supreme Court's decision *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), regarding deference to state courts. Calamita, *supra* note 105, at 657. The second group of courts follows the Supreme Court's decision *Landis v. North American Co.*, 299 U.S. 248 (1936), and bases its capitulation to other tribunals on factors such as the "promotion of judicial efficiency, the adequacy of relief available in the alternative forum, considerations of fairness to the parties and possible prejudice, and the temporal sequence of the filing of each action." Calamita, *supra* note 105, at 666. The third group "exercises jurisdictional discretion under principles of adjudicatory comity, [and] 'invok[es] a doctrine akin to forum non conveniens.'" *See id.* at 669 (quoting Diorinou v. Mezitis, 237 F.3d 133, 139 (2d Cir. 2001)).

107. *See id.* at 671 n.221, 672-73 n.222-24 (collecting cases) (noting an "early application of [FNC], often cited by the Supreme Court . . . was itself a case involving a *lis alibi pendens* in the Admiralty Court of Canada . . . [in which] a substantial consideration . . . was the existence of the parallel Canadian action and the concern that if the two actions were allowed to proceed 'the Canadian Court of Admiralty [might] determine liability one way, and this court another way'") (citations omitted); *see also* Royal & Sun Alliance Ins. Co. v. Century Int'l Arms, Inc., 466 F.3d 88 (2d. Cir. 2006) (holding that international abstention requires a finding of "exceptional circumstances," taking account the totality of the circumstances, including similarity of parties, similarity of issues, order of actions filed, adequacy of the foreign forum, prejudice and convenience to either party, and connection to the United States).

boomerang suits.

C. Prejudice to Absent Third Parties

ROE also illustrates the risk of boomerang litigation to absent third parties. Under basic principles of civil procedure, individuals, classes, and entities are not bound by the outcomes of suits in which they were not litigants.[108] If Judge Sand ruled that the remediation agreement released ChevronTexaco as to third parties, his mandate would not bind Judge Nuñez, nor prevent the Lago Agrio plaintiffs from enforcing a judgment in the United States.[109]

Nevertheless, ChevronTexaco may be able to argue that there is a substantial identity of interest between the Republic of Ecuador and the Lago Agrio plaintiffs such that they are "in privity" with one another.[110] Indeed, there are already hints of such a strategy. In its recent briefs, the oil company has accused the two of "collusion" for exchanging electronic communications, formerly sharing counsel,[111] and "coincidentally" releasing information to the press on the days ChevronTexaco executives were scheduled for deposition in the Lago Agrio trial.[112] Alternatively, ChevronTexaco may argue that the Lago Agrio plaintiffs are bound by the results of the *ROE* proceedings because *parens patriae* prevents third parties from litigating claims previously asserted by their government, which is presumed to have adequately represented their interests.[113]

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108. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (holding that issue preclusion can be applied by nonparties to earlier litigation but not against a person or entity who was "not a party or a privy" in the initial action); *see also* Richards v. Jefferson County, 517 U.S. 793 (1996) ("[A] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.") (quoting Martin v. Wilks, 490 U.S. 755, 761-62 (1989)).

109. Of course, Judge Sand's ruling may serve as persuasive authority, though it is unlikely that Judge Nuñez would deem a foreign court's interpretation of Ecuadorian law particularly compelling. *See infra* Part III (for a brief discussion of choice of law issues).

110. Privity "is a legal conclusion 'designating a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved.'" United States v. Schimmels, 127 F.3d 875, 881 (9th Cir. 1997) (quoting Sw. Airlines Co. v. Texas Int'l Airlines, Inc. 546 F.2d 84, 94 (5th Cir. 1977)); *see also* James R. Pielemeier, *Due Process Limitations of the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U. L. REV. 383, 386-89 (1983) (outlining the many categories of legal relationships under the rubric of privity).

111. Cristóbal Bonifaz was the lead attorney for the *Aguinda* plaintiffs as well as the Republic of Ecuador in *ROE* but was terminated by both. His legal team has also been sanctioned for proceedings in the Northern District of California, where they presented falsified testimony from other individuals not part of the Lago Agrio class seeking personal injury damages for the health effects of Texaco's pollution in the *Oriente*. *See* Doe v. Texaco, Inc., No. C 06-02820 WHA, 2006 WL 2917581 (N.D. Cal. Oct. 11, 2006).

112. Memorandum of Law in Support of Motion of Chevron Corp. & Texaco Petroleum Co. for Summary Judgment upon Their Counterclaims, *supra* note 79, at 3-4, 13.

113. *Parens patriae* is defined as "[a] doctrine by which a government has standing to

Even though both strategies have substantial weaknesses, such as conflicts of interest between the Ecuadorian government and its citizens,[114] they have enough legitimacy to create problems in enforcing a judgment. For example, if the Republic of Ecuador is deemed in *ROE* to have acted in *parens patriae* capacity, this might implicate the legal standing of the Lago Agrio plaintiffs to bring the Lago Agrio case under a 1999 Ecuadorian statute that also relies on *parens patriae*.[115] If the Lago Agrio court does not give effect to this argument and allows the plaintiffs to proceed, ChevronTexaco could raise the issue at the judgment enforcement stage, claiming that it implicates questions of due process or that a U.S. judgment on the issue deserves a greater degree of deference than a foreign judgment.[116] While hypothetical, the preclusion concern was substantial enough to motivate another group of plaintiffs, suing ChevronTexaco in a separate region of Ecuador on the same underlying facts, to petition to intervene in *ROE*.[117] This suggests that preclusion is a live issue

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prosecute a lawsuit on behalf of a citizen, esp[ecially] on behalf of someone who is under a legal disability to prosecute the suit." BLACK'S LAW DICTIONARY 1144 (8th ed. 2004). *See, e.g.*, City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958); Alaska Sport Fishing Ass'n v. Exxon Corp., 34 F.3d 769, 774 (9th Cir. 1994); Badgley v. City of New York, 606 F.2d 358, 364 (2d Cir. 1979); City of New York v. Beretta U.S.A. Corp., 315 F. Supp. 2d 256, 256-66 (E.D.N.Y. 2004); United States v. Olin Corp., 606 F. Supp. 1301, 1308 (N.D. Ala. 1985). This doctrine commonly arises in the environmental law context. However, it usually applies where the government seeks to enforce environmental statutes (for example, CERLA) rather than as a defense to a private actor's claims. *See, e.g.*, Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592, 602 (1982).

114. As the Republic makes plain, it is not taking sides. Rather, it stands caught in the middle "between two warring protagonists who have been in litigation for fifteen years." Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment on Their Counterclaims, *supra* note 78, at 4. The Republic has an interest in maintaining an "independent judiciary" and remaining at arms length from the Lago Agrio plaintiffs to preserve this appearance. *See id.* at 8. Furthermore, it would not be in the Lago Agrio plaintiffs' best interest to collaborate fully with the Republic, especially since there may be future lawsuits over PetroEcuador's involvement in the Consortium or the Republic's failure to adequately protect the rights of indigenous groups.

115. *See* Memorandum of Law in Support of Motion of Chevron Corp. & Texaco Petroleum Co. for Summary Judgment upon Their Counterclaims, *supra* note 79, at 3. Of course, the argument that the Republic implicitly or accidentally acted in *parens patriae* capacity in *ROE* might face an uphill battle given *Carbide*, where the government of India explicitly took this stance on behalf of its citizens. *See* Baxi, *supra* note 93.

116. Arguably, the Ecuadorian and U.S. versions of *parens patriae* differ. *See* Foreign Law Declaration of Genaro Eguiguren and Ernesto Alban at 29-30, Republic of Ecuador v. ChevronTexaco Corp. (*ROE II*), 426 F. Supp. 2d 159 (S.D.N.Y. 2006). The significance of this difference at the judgment enforcement stage is hard to predict.

117. Memorandum of Law of Proposed Intervening Plaintiffs Kemperi Baihua, et al., in Support of the Motion of Kemperi Baihua, et al., to Intervene as Plaintiffs Pursuant to Fed. R. Civ. P. 24, at 6, *ROE III*, 499 F. Supp. 2d 452 (No. 04-CV-8378 (LBS)) ("(1) to protect their rights, claims and interests, and vigorously dispute the defendants' allegation that they lacked the right to sue Texaco for remediation and restoration prior to the enactment of Ecuador's 1999 Law of Environmental Management (*Ley de Gesti[ó]n Ambiental*), and the corollary implication that absent that legislation, they would have no rights or claims for remediation or restoration against Texaco or any other oil company that has damaged, destroyed, degraded and/or contaminated their

and that this boomerang suit implicates the rights of third parties beyond the Lago Agrio plaintiffs.

While the *ROE* fact pattern highlights the specific risk to third parties in Ecuador, there is every reason to believe that similar prejudice problems will occur in the future. First, most events giving rise to human rights and environmental claims involve multiple victims. In their article chronicling boomerang litigation in Latin America, M. Ryan Casey and Barrett Ristroph discuss the "Banana Cases"—a body of over six thousand separate suits stemming from Dole's conduct in the Global South.[118] Similarly, in the Bhopal example previously discussed, over 148 complaints were filed.[119] Even the *Aguinda* case had spinoffs in other U.S. jurisdictions, some of which were dismissed on the grounds of FNC.[120]

Second, scholars project that as suits against multinational corporations for human rights abuses become more common, these entities will, in turn, force host countries to sign release agreements similar to the remediation contract at issue in *ROE*.[121] While some resource-rich countries, such as Venezuela, may be able to resist, in the long run sovereigns may have little choice in these matters given the power of foreign direct investment.[122] Furthermore, corporate bargaining power is enhanced in the context of these joint ventures with foreign governments, around which the majority of corporate malfeasance suit are centered.[123] While it is possible that these "who

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environment and natural resources; and (2) to assert claims against the defendants that are not currently being litigated either in this Court or in the Lago Agrio action."). The question of intervention will be discussed in greater depth *infra* Part IV.

118. *See* Ristroph & Casey, *supra* note 8, at 33.

119. Dearborn, *supra* note 25, at 148.

120. *See* Sequihua v. Texaco, Inc., 847 F. Supp. 61, 63 (S.D. Tex. 1994); Doe v. Texaco, Inc., No. C 06-02820 WHA, 2006 WL 2917581 (N.D. Cal. Oc. 11, 2006).

121. *See* Alford, *supra* note 15, at 518, 526 (noting that human rights claims against corporations "almost always are premised on some contractual agreement between the corporation and the sovereign" and predicting that "[t]o the extent that corporations are increasingly subject to third-party claims for human rights violations arising out of or related to a contract with a sovereign . . . corporations will seek to shield themselves from this third-party risk by invoking the arbitration clause in the contract against the sovereign. In short, human rights litigation will lead to 'who pays' arbitration.").

122. *See* Zachary Elkins, Andrew T. Guzman & Beth Simons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-90*, Latin Am. & Caribbean L. & Econ. Ass'n (ALACDE) Annual Papers, 26-27 (2006), http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1028&context=bple; *see also* LUKE ERIC PETERSON & KEVIN R. GRAY, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND IN INVESTMENT TREATY ARBITRATION 16 (2003), *available at* http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf, ("[A]s all nations - but developing countries in particular - increasingly compete for scarce foreign direct investment, it is sometimes the case that host states will ignore their international human rights obligations . . . foreign direct investment by multinational corporations has exacerbated or contributed to conflict, having inimical effects upon human rights and human security in the host state.").

123. *See* Alford, *supra* note 15, at 518 (documenting, inter alia, cases involving Pfizer's

pays" contracts—typically requiring arbitration in investor-friendly fora like ICSID and the AAA—may be drafted to include protections for third parties,[124] ultimately these venues offer inferior procedural, and sometimes substantive, rights.[125] Thus, human rights suits will likely continue to proliferate against corporations, U.S. courts will continue to dismiss these suits to foreign fora, corporations will continue to invoke agreements with sovereigns, and third parties will be left out of the intermediate phase, complicating their ability to collect judgments.

III
AVOIDING BOOMERANG LITIGATION: WHY *AGUINDA* AND *REPUBLIC OF ECUADOR* SUPPORT SUA SPONTE CONSIDERATION OF *FORUM NON CONVENIENS*

When *ROE* was initiated in New York, one question on the minds of many—or at least the Lago Agrio plaintiffs[126]—was whether Judge Sand should be hearing the case in the first place.[127] In light of Judge Rakoff's ruling in *Aguinda* and the trial proceeding in Lago Agrio, the Republic expressed considerable consternation and confusion that the counterclaims were being heard:

> Plaintiffs surely appreciate that agreements negotiated in Ecuador resolving claims of harm to the Ecuadorian environment . . . should be adjudicated by Ecuadorian courts—for many of the same reasons on which Texaco relied when it urged this Court to dismiss the *Aguinda* action in favor of an Ecuadorian forum. Plaintiffs further find it reasonable that claims and assertions raised by Texaco in Ecuador—after it had persuaded this Court to dismiss *Aguinda*—should be decided first by the Ecuadorian court rather than to allow Texaco to

contracts with Nigeria for experimental drug testing, Unocal's joint venture with Burma for an oil pipeline, Titan's agreement with the United States to detain and interrogate detainees at the Abu Ghraib, and ExxonMobil's liability for abuses committed by the Indonesian military contingent charged with guarding gas production facilities in Sumatra). *See also* discussion *supra* note 15.

124. Alford, *supra* note 15, at 528-48.

125. PETERSON & GRAY, *supra* note 122, at 18; *cf.* LUKE ERIC PETERSON, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, BILATERAL INVESTMENT TREATIES AND DEVELOPMENT POLICY-MAKING 24-26 (2004) (noting lack of transparency and massive costs of hiring arbiters give corporations a leg up in disputes).

126. Interview with Steven Donziger, *supra* note 86.

127. I will focus exclusively on ChevronTexaco's counterclaims because they directly overlap with matters under adjudication in Ecuador (that is, the release agreement and the 1999 environmental statute). Nevertheless, it is possible to argue, consistent with the thesis of this Comment, that the arbitration issue should also have been dismissed on FNC grounds if the two issues stem from the "same case and controversy." The reasons supporting a dismissal of the Republic's request for a stay are primarily those discussed in this Part: the original justifications proffered by Judge Rakoff. The dangers of delay, inconsistent results, and prejudice to third parties, however, are less pressing given that the 1965 Napo JOA has no relationship to the facts underlying *Aguinda*.

> bypass the Ecuadorian forum. This would include, for example, Texaco's defense that the *Lago Agrio* plaintiffs are barred by the release contained in the 1995 Settlement. But the reality is that Texaco has bypassed the very Ecuadorian forum it told this Court in *Aguinda* was more than "adequate" to resolve the issue in favor of a forum in the United States. Texaco has asked this court to decide the very issue that it earlier submitted to the Lago Agrio court.[128]

Nevertheless, the Republic neglected to make a formal motion on FNC grounds in the early stages of the proceedings.

It was not until July 2007—after Judge Sand ruled in Ecuador's favor on the arbitration issue and nearly three years since the New York Supreme Court transferred the case—that the Republic filed a full-fledged petition urging dismissal based on FNC.[129] Similarly, in his early rulings, Judge Sand failed to consider whether New York was an appropriate forum for ChevronTexaco's counterclaims given the pendent Lago Agrio trial. Instead, he plunged into a lengthy period of discovery and instructed both parties to brief him on difficult choice of law issues at least some of which would have been rendered moot by an FNC ruling.

This Part argues that Judge Sand had ample room—doctrinally speaking—to consider the issue sua sponte. Further, Texaco's motions and Judge Rakoff's opinion in *Aguinda* counseled heavily in favor of dismissal, as did the need to harmonize precedents within the Southern District of New York.

A. Beyond the ABCs of the FNC Doctrine

Normally, FNC is raised by one of the parties to the litigation (most commonly the defendant). Nevertheless, trial judges may consider the issue of their own accord.[130] Sua sponte dismissals are upheld so long as judges are not

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128. Republic of Ecuador's and PetroEcuador's Memorandum Opposition Motion to Intervene [hereinafter Ecuador Opposition] at 11, *ROE III*, 499 F. Supp. 2d 452 (S.D.N.Y. 2007) (No. 04 Civ. 8373 (LBS)).

129. Plaintiffs' *ROE III* Brief, *supra* note 15, at 13-14 ("There can be no doubt that at this juncture Ecuador is the far more appropriate forum in which to litigate Defendants' counterclaims—all of which center on the construction of 'release' language in two Spanish language contracts entered into in Ecuador in 1995 and 1998 by Plaintiffs and Defendants, the former allegedly (but contestedly) acting in a *parens patriae* capacity under Ecuadorian public law in signing the release (a contract relating to obligations by Texaco to be performed in Ecuador, pertaining to the health and safety of the environment in Ecuador and to its citizens, and pursuant to which Ecuadorian law will be paramount)—all this against the backdrop of the 1999 Ecuadorian environmental legislation, Chevron's ten-year campaign to move the *Aguinda* litigation to Ecuador for *forum non conveniens* reasons, and the alleged 'collusion' within Ecuador between Ecuadorian government officials and the *Aguinda* plaintiffs.").

130. *See, e.g.*, Seagal v. Vorderwuhlbecke, 162 F. App'x 746, 748 (9th Cir. 2006) (upholding broad sua sponte dismissal powers and according deference to district court's legal and factual determinations, even when the trial judge did not explicitly discuss some of the FNC

motivated *solely* by the desire to decongest their dockets and instead reserve this course of action for "exceptional circumstances."[131] *ROE* clearly meets even this stringent test, as will many, if not most, boomerang suits given the policy considerations outlined in Part II, and, in particular, prejudice to third parties who cannot petition themselves. Further, FNC dismissals without a motion by either party are consistent with the principle of judicial economy that animates the doctrine and counsels against "burdensome shifts" of venue after the litigants have invested time and energy litigating issues in another forum.[132]

B. Ecuador as a Presumptively Adequate Forum

The first, and most obvious, "exceptional circumstance" favoring sua sponte application of FNC in *ROE* and other boomerang cases is the existence of arguments advanced by corporate entities like Texaco in prior proceedings on the same set of underlying facts (and in which they prevailed) lauding the adequacy of the designated forum.

To grant an FNC motion, the district court must conclude that an adequate alternative forum exists.[133] The requirement is "ordinarily . . . satisfied when

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factors); Corporacion Mexicana de Servicios Maritimos v. M/T Respect, 89 F.3d 650, 656 n.1 (9th Cir. 1996) ("Although Pemex-Refining waived the doctrine of forum non conveniens when it intervened in this action, the district court could still raise the issue *sua sponte*."); Plum Tree, Inc. v. Stockment, 488 F.2d 754, 757 (3d Cir. 1973); Vogt-Nem, Inc. v. M/V Tramper, 263 F. Supp. 2d 1226, 1233-34 (N.D. Cal. 2002).

131. *See* Kelly v. Kelly, 911 F. Supp. 70, 71 n.3 (N.D.N.Y. 1996). *But see* Oil Basins Ltd. v. Broken Hill Proprietary Co., 613 F. Supp. 483, 486, 488-89 (S.D.N.Y. 1985) (declining to "order such a drastic remedy *sua sponte*, particularly in light of the ongoing dispute concerning the Australian court's jurisdiction over plaintiff").

"Exceptional circumstances" is the same standard employed for international abstention; thus, a court may prefer to stay proceedings until a foreign court reaches a judgment. Nevertheless, as explained in, *supra* note 107, the abstention doctrine is in disarray.

Some commentators also question whether sua sponte FNC dismissals are appropriate if neither party objects to the location. *See* Derr, *supra* note 25, at 838 (arguing "[f]ederal judges have good, but possibly erroneous, historical and doctrinal reasons to presume (and exercise) their power to dismiss sua sponte for forum non conveniens. . . . Court-access doctrines, designed to ensure a sufficient connection between the dispute and the forum, are duplicated in purpose and effect by the forum non conveniens analysis. Hence, the mandatory presence of jurisdiction and venue requirements undercuts any argument that the need for control over administrative matters requires that judges have the power to raise forum non conveniens sua sponte.") (footnotes omitted).

132. The oil company's own briefs also suggest that Judge Sand should be wary of taking any action that undermines litigation predating the *ROE* proceedings and support the proposition that the Judge could have considered FNC from the outset. *See* Memorandum of Chevron Corp. & Texaco Petroleum Co. in Opposition to Plaintiffs' Motion to Dismiss Defendants' Counterclaims at 9, *ROE III*, 499 F. Supp. 2d 452 (S.D.N.Y. 2007) (No. 04 Civ. 8378 (LBS)) (citing Alnwick v. European Micro Holdings, Inc., 29 F. App'x 781, 783 (2d Cir. 2002); Bank of Crete v. Koskotas, No. 88 Civ. 8412 (KMW), 1991 WL 280714, at *5 (S.D.N.Y. Dec. 20, 1991)).

133. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 100-02 (2d Cir. 2000). When FNC is decided by motion, the burden falls on the moving party, normally the defendant, to defeat her opponent's forum choice. *Id.* (noting the deference accorded the plaintiffs' forum choice increases

the defendant is 'amenable to process' in the other jurisdiction"[134] or when the defendant consents to jurisdiction.[135] In *Aguinda*, Texaco "unambiguously agreed in writing to being sued . . . in Ecuador, to accept service of process . . . and to waive for [sixty] days after the date of [the] dismissal any statute of limitations-based defenses" that might have matured since the complaint had been filed.[136] In *ROE*, it is clear from the Republic's briefs that the Ecuadorian government would have assented to similar, if not more stringent, stipulations.[137] Further, according to Texaco's evidence in *Aguinda* it would be possible under existing joinder mechanisms to attach the company's counterclaims against the Ecuadorian government to the Lago Agrio proceedings.[138] While these stipulations do not necessarily suggest that ChevronTexaco would consent to Ecuadorian adjudication of an entirely separate matter, such as the validity of the 1965 Napo JOA, they do strongly imply consent to jurisdiction over the same underlying set of facts, including the release agreement negotiated while *Aguinda* was pending. As such, Judge Sand would have been well within his discretion to assume consent to Ecuadorian jurisdiction over portions of the counterclaims that overlapped with

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along a sliding scale with the strength of her ties to the United States). When a boomerang suit is decided sua sponte, the question of deference to the plaintiff's forum preference might be informed by the *Wiwa* sliding scale, *supra*, and by the interests of absent third parties, discussed *supra* Part II and *infra* Part IV. No recorded federal case appears to deal with the question of FNC motions made by a plaintiff. This fact likely explains the Republic's reluctance to make a formal motion on these grounds earlier in the proceedings.

134. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981) (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947)); *see also* Blanco v. Banco Industrial de Venezuela, S.A., 997 F.2d 974, 981 (2d Cir. 1993).

135. *DiRienzo*, 232 F.3d at 57; *see also* Jota v. Texaco, Inc., 157 F. 3d 153, 159 (2d Cir. 1998).

136. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 539 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

137. *See* Ecuador Opposition, *supra* note 128. Perhaps more relevant than service of process is whether the Republic would be vulnerable to suit in its own courts. As in the United States, the government is protected by sovereign immunity. However, this privilege can be waived, and often only extends to certain types of judicial proceedings. The Republic of Ecuador routinely consents to suits over everyday matters, such as contracts, in special tribunals, known as District Courts of Administrative Proceedings.

See Ernesto Velázquez Baquerizo, *La Justicia Administrativa en la Reforma Constitucional*, REVISTA JURÍDICA, Sept. 28, 1993, at 173-74, *available at* http://www.revistajuridicaonline.com/images/stories/revistas/1993/08/08_La_Justicia_Administrativa_En_Reforma_Const.pdf. If ChevronTexaco wanted to dispute the validity of the release agreement, it could file in these venues, or, if the Government was deemed to act in its protectorate capacity under the judicial doctrine of *parens patriae*, it could be sued in other civil courts. *But see supra* note 64.

138. *See Aguinda*, 142 F. Supp. 2d at 551 (noting that, according to Texaco's affidavits, the government of Ecuador and PetroEcuador "could be joined in any similar suit brought in Ecuador" and that "Petro[E]cuador was in fact so impleaded in one of the similar suits brought against TexPet in Ecuador").

issues in front of the Lago Agrio court.[139] To protect against unforeseen procedural impediments, Judge Sand could qualify his dismissal with the assurance that should the Ecuadorian tribunal deem itself incompetent to hear the counterclaims (or portions thereof), he would resume jurisdiction over them.[140]

A second inquiry regarding the adequacy of an alternative forum is whether it will be able to administer justice impartially and without being subject to undue or corrupt influences.[141] Judge Rakoff entertained the possibility, sua sponte, that Ecuador would not be able to fairly adjudicate the continuation of *Aguinda* when a coup attempt occurred in January 2000.[142] After extensive briefing from both parties, searching for other cases labeling the nation's judiciary procedurally or substantively defective in light of the recent events,[143] and conducting an independent examination of the country's human rights record,[144] he concluded that Ecuador was still an adequate alternative forum. "The courts of the United States are properly reluctant to assume that the courts of a sister democracy are unable to dispense justice," he wrote, and "something more than bald assertion is required to overcome this presumption."[145]

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139. While such stipulations might give a district court the ability to infer consent, they do not compel a judge reach such a conclusion. The desirability of more aggressive pre-dismissal waivers is developed *infra*.

140. *See Aguinda*, 142 F. Supp. 2d at 547. *But see Aguinda*, 303 F.3d at 477 (quoting Bank of Credit & Commerce Int'l v. State Bank of Pak., 273 F.3d 241, 248 (2d Cir. 2001) to "suggest[] that the degree of protection that must be afforded by a conditional dismissal on *forum non conveniens* grounds will vary depending on how certain the court is that, under unsettled foreign law, the foreign forum will be available").

141. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.22 (1981) (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947)) (noting there are "rare circumstances" under which "the remedy offered by the other forum is clearly unsatisfactory" that warrant denial of an FNC motion).

142. *Aguinda*, 142 F. Supp. 2d at 544 (noting the court considered, sua sponte, "submissions . . . not only from the parties but also from the U.S. Department of State and the Government of Ecuador").

143. *See, e.g.*, Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1359-60 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000).

144. *Aguinda*, 142 F. Supp. 2d at 545 (noting human rights violation "largely involve[d] confrontations between the police and political protestors" and thus were irrelevant to the question of whether the plaintiffs' claims could fairly be tried abroad).

145. *Id.* at 544; *see also* El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 678 (D.C. Cir. 1996). Scholars have subsequently questioned much of Judge Rakoff's reasoning. Professor Judith Kimerling, who works with several indigenous communities affected by the contamination, wrote a seminal article taking the judge to task for relying entirely on Texaco affidavits to establish the absence of corruption in the Ecuadorian judiciary while ignoring more credible documents to the contrary from the State Department, the United Nations, the Inter American Court, and Americas Watch. Kimerling, *Indigenous Peoples*, *supra* note 22, at 546-50, 548 n.372 (collecting sources detailing corruption). Responsible factors for corruption include "poor salaries, low prestige, and the growing politicization of the courts." Kimerling, *Rights, Responsibilities*, *supra* note 11, at 304.

While a district court is required to determine a forum's adequacy "at the moment of deciding [an FNC] motion,"[146] a prior ruling on the issue—such as Judge Rakoff's in *Aguinda*—should be given a great deal of weight, especially when the dismissal is originally sought by a party now claiming the forum's inadequacy. Absent a serious change of circumstances, allowing ChevronTexaco or other boomerang defendants to advance contradictory claims undermines the integrity of the judicial process, which seeks to produce coherent and consistent results. Courts routinely reject similar strategies in other contexts. Estoppel, for example, is an equitable doctrine intended to prevent litigants from playing "fast and loose" and "gaining unfair advantage[s] through the deliberate adoption of inconsistent positions in successive suits."[147]

Contradictory arguments by boomerang defendants are particularly objectionable when the corporate entities in question have repeatedly taken the same position across a wide spectrum of cases. ChevronTexaco, for instance, advocated removal on an FNC basis in cases involving its extraction rights in Ecuador, even when the country was under the power of a military dictatorship that "retained the right to veto or intervene in any judicial matter . . . of national concern."[148] To put it bluntly, Texaco was aware of the advantages of litigating in a country in which the oil industry was widely perceived as a boon to the economy, had significant political support from elites, and was responsible for a great deal of fiscal policy as well as national development plans, including contracts related to petroleum concessions.[149]

Judge Sand and other district courts ought not reward corporate gambles that failed to reap the expected benefits. If the Lago Agrio court were corrupt, it would likely favor the defendants, not the plaintiffs.[150] While political winds may have shifted with the election of President Correa in November 2006,[151]

146. I.T. Consultants, Inc. v. The Islamic Rep. of Pakistan, No. 01-0241, 2003 U.S. Dist. LEXIS 23500, at *25-26 (D.D.C. Feb. 12, 2003).

147. Wight v. BankAmerica Corp., 219 F.3d 79, 89 (2d Cir. 2000) (citation omitted).

148. Plaintiff's *ROE III* Brief, *supra* note 15, at 16 n.14 (quoting Phoenix Canada Oil Co. v. Texaco, Inc., 78 F.R.D. 445, 455 (D. Del. 1978)).

149. *See* Kimerling, *Indigenous Peoples*, *supra* note 22, at 415-16, 422, 425.

150. *See id.* at 559-60 (providing chilling examples of environmental activists who were intimidated and subsequently killed to debunk Judge Rakoff's conclusion that no evidence of any impropriety on behalf of the petroleum company existed in any judicial proceeding in Ecuador). *Cf.* AMAZON DEFENSE COALITION, CHRONOLOGY OF INTIMIDATION AGAINST COALITION LEGAL TEAM (2006), *available at* http://www.texacotoxico.org/eng/node/81 (detailing kidnapping attempts, burglaries, and harassment of the Lago Agrio plaintiffs' attorneys); AMNESTY INTERNATIONAL, ECUADOR: FURTHER INFORMATION ON FEAR FOR SAFETY (2006), *available at* http://www.amnesty.org/en/library/asset/AMR28/009/2006/en/dom-AMR280092006en.pdf (same).

151. ChevronTexaco has made much of President Correa's bias in favor of the Lago Agrio plaintiffs and the sweeping judicial and constitutional reforms the president has implemented. *See* discussion *supra* note 20. For the purposes of this Comment, I assume that if the bias is as severe as ChevronTexaco alleges, it can raise this point at the judgment enforcement stage.

his assumption of power seems unlikely to render Ecuador an inadequate alternative forum, especially given that U.S. courts have universally deemed it satisfactory since the country became a democracy in 1979.[152]

Finally, there is good reason to believe that an Ecuadorian forum and other fora to which U.S. courts have dismissed suits based on FNC would not only be adequate, but better suited to resolving related matters. One of Judge Rakoff's principal reasons for dismissing the original *Aguinda* proceedings was that relevant parties—specifically the Republic of Ecuador and PetroEcuador—could not be joined as co-defendants.[153] According to Judge Rakoff, it would have been difficult, if not impossible, to craft an equitable remedy to the contamination without the involvement of the Republic of Ecuador and PetroEcuador, which own and control the areas left behind by Texaco.[154] In *ROE*, there is no need for injunctive relief given that the counterclaims concern only interpretation of the government's release accords. Nevertheless, there are substantial advantages to joining other parties such as the Lago Agrio plaintiffs. For example, other parties could provide evidence that Texaco fraudulently negotiated the remediation contract by hiding over two hundred toxic waste pits, an argument the Republic was not able to pursue given *ROE*'s tight discovery schedule, but that has been well-developed in front of Judge Nuñez.[155] If true, this argument would invalidate the entire remediation contract, freeing the Republic from the indemnification sought by ChevronTexaco and allowing the oil company to be held responsible for full extent of pollution caused by its operations in the *Oriente*.

Furthermore, even overlooking the release agreement negotiations, the bulk of the evidence a court would need to assess the contract's execution is also there. One of the Lago Agrio plaintiffs' main arguments—also adopted by the Republic in *ROE*, though abandoned for lack of time—is that the oil company did not adhere to the environmental cleanup standards listed in the remediation contract, an argument that would similarly void the agreement.[156]

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152. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 545 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002); Blumberg, *supra* note 25, at 507-08 ("Even in the cases involving international human rights where the deficiencies are particularly harmful, no court has concluded that they have deprived plaintiff of an adequate alternative forum or resulted in a denial of justice."); *see also* Banco Latino v. Gomez Lopez, 17 F. Supp. 2d 1327, 1332 (S.D. Fla. 1998) (parallel proceeding in Venezuela "lends further support to the adequacy of the Venezuelan forum").

153. *Aguinda*, 142 F. Supp. 2d. at 551 (noting that "neither the Government of Ecuador nor PetroEcuador, the state-run oil company that owns the Consortium and had primary control of it through much of the relevant time period, are parties to the instant suits, whereas they could be joined in any similar suit brought in Ecuador"). *But see* discussion *supra* note 64 (questioning the conclusion that the Republic of Ecuador and PetroEcuador could not be joined).

154. *Id.* at 542.

155. *See* Plaintiffs' *ROE III* Brief, *supra* note 15, at 10 n.8; LAGO AGRIO LEGAL TEAM, *supra* note 2, at 7.

156. Lago Agrio Legal Team, *supra* note 2, at 7-10.

According to the Lago Agrio plaintiffs, the Ecuadorian subcontractors responsible for executing the remediation agreement failed miserably; instead of lowering radioactivity and total petroleum hydrocarbons (TPHs) to safe levels, the companies neglected to treat at least ninety-two specified sites and presented false lab results of toxin levels in the remainder.[157] To investigate this allegation, a judicially-appointed expert in Lago Agrio conducted a battery of on-site soil and water samples.[158] Such tests simply could not be performed from the United States. It would also be difficult and extremely expensive to investigate allegations of TexPet bribes to Ecuadorian officials to "certify" the contract was adequately performed since the payments allegedly occurred in Quito and Amazonian municipalities. Joining the Lago Agrio plaintiffs in *ROE* would allow the contract to be appraised in context, leading to a more accurate assessment of its validity and of ChevronTexaco's concomitant liability. Unfortunately, joinder would be a logistically difficult feat given the size of the class, language barriers, and the sheer volume of information it would add to the proceedings.[159] From a practical standpoint, it makes far more sense for the Lago Agrio court to handle the matter, as will be discussed more fully in the next subsection.

Similar joinder scenarios are likely to exist in other boomerang suits, given the substantive scope of most human rights cases and the geographically broad effect of corporate malfeasance in the Global South. The triangular nature of most disputes—corporate defendants, foreign sovereigns, and affected private citizens—will, as discussed in Part II, likely spur rounds of "who pays" litigation. Assuming contracts are negotiated and performed in similarly suspicious manners, the importance of including third parties with access to this information and a stake in the outcome as a means for assessing forum adequacy cannot be overstated.

C. Prior Interest Balancing as Presumptively Correct

Assuming the alternative forum is deemed adequate, the next step in an FNC analysis requires gauging the balance of private and public interests in favor of the original forum choice.[160] Normally the plaintiff's—but in this case

157. *Id.* at 10-13.

158. *See* CABRERA, *supra* note 57, at 7-27.

159. In fact, Judge Sand rejected a motion to intervene on behalf of the Huaorani and Kichwa, two of the indigenous groups living in contaminated areas, possibly on the grounds that such an intervention would be untenable for logistical reasons. No ruling detailing the judge's reasoning on this issue is publically available; Judge Sand denied the would-be intervenors' motion on November 13, 2006 after oral arguments. *Cf. supra* note 62 (discussing logistical difficulties in *Aguinda*).

160. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-57 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-10 (1947); DiRienzo v. Philip Servs. Corp., 232 F.3d 49, 56 (2d Cir. 2000), *vacated*, 294 F.3d 21, 56-57 (2d Cir. 2002).

the defendant's—preference is accorded a significant degree of deference. For the motion to be granted, the balance of factors must weigh strongly against the "chosen forum" such that "trial [there] would establish . . . oppressiveness and vexation to a [movant] . . . out of proportion to [a non-movant's] convenience."[161] In striking this balance, courts examine considerations laid out in the Supreme Court's canonical decision *Gulf Oil Corp. v. Gilbert*, "as well as other relevant factors special to the case."[162] Points relating to private interests include "the relative ease of access to sources of proof, the cost of obtaining the attendance of willing witnesses, the availability of compulsory process for obtaining attendance of unwilling witnesses, the possibility of viewing the relevant premises, and other such practical concerns."[163]

Judge Rakoff's determination that these factors weighed heavily in favor of the defendants also should have been accorded deference and prompted Judge Sand to consider FNC at the outset without a request by either party.[164] Judge Rakoff concluded that the lack of evidence linking Texaco executives in the United States to decisions relating to contamination in Ecuador weighed in favor of dismissal.[165] Furthermore, an Ecuadorian judge would be able to view toxic waste sites and assess the damages there "in ways no New York jury could hope to approximate."[166] Finally, the populations affected by the pollution reside in the Amazon, and it would be difficult, if not impossible, to transport many of these witnesses or records of their personal injuries and property to the United States.[167]

Just as in *Aguinda*, the majority of evidence in *ROE* resides in Latin

161. Kimerling, *Indigenous Peoples*, *supra* note 22, at 528 (quoting *Piper Aircraft*, 454 U.S. at 241) (punctuation omitted). *But see* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 100-02 (2d Cir. 2000) (foreign plaintiffs have diminished interest in a U.S. hearing). Foreign plaintiffs in boomerang suits may have little interest in remaining in the United States, as evidenced by the Republic of Ecuador's initial protestations. Thus, in many instances, the *Wiwa* scale actually tilts toward dismissal. For cases where the foreign plaintiffs wish to remain in the United States, but doing so would pose a risk to third parties pursuing law suits abroad, an FNC analysis becomes more complicated. *See infra* Part IV.

162. *See Aguinda*, 142 F. Supp. 2d at 547 (citing *Gilbert*, 330 U.S. at 508-09).

163. *Id.* at 548.

164. *Id.*

165. *Id.* ("The record . . . clearly establishes that all of the Consortium's key activities, including the decisions and practices here at issue, were managed, directed, and conducted by Consortium employees in Ecuador . . . By contrast, no one from Texaco or, indeed, anyone else operating in the United States, made any material decisions as to the Consortium's activities and practices that are at issue here."). *But see* Kimerling, *Indigenous Peoples*, *supra* note 22, at 577-78 ("The litigation record developed by the plaintiffs is lean but not empty. It shows considerable attention by Texaco to financial details, including clear procedures requiring multiple approvals in the United States for Texaco Petroleum's annual budget, off-budget expenditures and contracts with subcontractors, and use of expatriate personnel—U.S. nationals—in Texaco Petroleum's Ecuador office to supervise accounting.") (footnotes omitted).

166. *Aguinda*, 142 F. Supp. 2d at 548.

167. *See id.*

America. Most of the fact witnesses and legal experts who testified as to the validity of the 1965 Napo JOA came from Ecuador or other South American countries, and it stands to reason that even more foreign witnesses would have to testify regarding the release agreement. The negotiations over Texaco's exit strategy, while masterminded by the company's California-based General Counsel Reis Veiga, principally involved the Republic, PetroEcuador, and the Ecuadorian Ministry of Energy and Mines.[168] Key players also included Dr. Rodrigo Pérez, Texaco's legal agent in Quito;[169] Giovanni Rosania, Ecuador's Deputy Secretary for the Environment and a former employee of the Texaco-PetroEcuador consortium; and Patricio Maldonado, a member of PetroEcuador's environmental division and a former worker for TexPet.[170] Other participants included political officials of several affected municipalities, including Lago Agrio, Shushufindi, Joya de los Sachas, Francisco de Orellana, and Sucumbios, as well as two Kichwa federations.[171] Furthermore, while Woodward Clyde International and Smith Environmental Technologies, the companies responsible for drafting the cleanup plan, were North American, the work on the ground was conducted by Ecuadorian subcontractors based out of Coca, a town near Lago Agrio.[172]

Finally, certain decisions were made in the United States regarding the particular sites designated for cleanup and related engineering and design work. This suggests that, as in the original *Aguinda* proceedings, Judge Sand should at the very least grant a period of limited discovery to extract relevant information from involved parties. If the documents and witness testimony uncovered establish a link to the United States, the judge could then issue an order requiring the parties make stipulations as to the admissibility of such evidence in Ecuadorian court.[173]

After debating private interest factors for and against the original forum choice, courts weigh the public interest in adjudicating the dispute there. Relevant considerations include "local interest in the controversy, [docket] congestion, avoidance of unnecessary problems in application of foreign law, and avoidance of imposing jury duty on residents of a jurisdiction having little relationship to the controversy."[174] In suits involving related proceedings in

168. *See* Kimerling, *Indigenous Peoples*, *supra* note 22, at 493.

169. LAGO AGRIO LEGAL TEAM, *supra* note 2, at 4 n.6.

170. Kimerling, *Indigenous Peoples*, *supra* note 22, at 497-98, 528.

171. *See id.* at 508-13 (discussing the controversy regarding the involvement of both groups and the disappearance of monies supposedly earmarked for community projects aimed at improving education, public works, and environmental remediation).

172. *Id.* at 498 (discussing the company Corposega S.A. in relation to irregularities and misuses of funds intended for the remediation).

173. Ecuador, unlike the United States, does not have well-developed standards for screening evidence for accuracy and relevance. E-mail from Steven R. Donziger, Consultant, Amazon Def. Coal., to author (May 24, 2009) (on file with the author).

174. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 551 (S.D.N.Y. 2001), *aff'd*, 303 F.3d

other countries, courts can consider the costs of to uprooting or interfering with other litigation.[175]

In *Aguinda*, Judge Rakoff concluded that each of these factors favored dismissal. First, he concluded that the United States' interest in the matter was minimal because Ecuador had made a conscious, cost-benefit decision to extract oil during the boom of the 1970s.[176] Second, because the South American nation was substantially "less litigious" than New York, the suit there would undoubtedly proceed more rapidly.[177] Third, and perhaps most importantly, choice of law considerations favored an Ecuadorian forum since the country's interest in the case supported the application of its statutes and Constitution, and its tribunals possessed greater familiarity with these authorities than U.S. courts.[178]

Although each of these points can be contested,[179] taking Judge Rakoff's reasoning at face value suggests that it applies equally to *ROE*. First, the United States undoubtedly has an interest in preventing corporate misbehavior abroad generally[180] and in ensuring compliance with the terms of foreign contracts, more specifically. However, for the United States to hear a case involving a debate over the meaning of *parens patriae* in Ecuador when the Republic itself is a party might be seen as meddlesome and even imperialistic. Additionally, Ecuador's stake in holding the oil giant to its environmental commitments and conducting a fraud investigation is undoubtedly stronger than any U.S. interest.

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470 (2d Cir. 2002) (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947)).

175. *See* M & I Eastpoint Tech., Inc. v. Mid-Med Bank, No. Civ.99-411-JD, 2000 WL 1466150, at *10 (D.N.H. Jan. 28, 2000) ("[D]ismissal of this case in favor of the case pending in Malta, where [the plaintiff] is already a party and could bring its claims as counterclaims, would not add to the docket in Malta. In contrast, if Eastpoint's suit is maintained here, both this court and the Malta court will hear and decide essentially the same case based on the same evidence and the same witnesses, although the Malta court may have better access to both evidence and witnesses. Duplicate parallel litigation would mean a duplication of effort by the courts and the related additional burdens and costs incurred by the parties and their counsel. Interests of both the parties' convenience and judicial economy favor dismissing the suit in this court in favor of the proceeding in Malta.").

176. *See Aguinda*, 142 F. Supp. 2d at 551.

177. *Id.* at 552.

178. *Id.*

179. *See* Kimerling, *Indigenous Peoples*, *supra* note 22, at 606-13 (arguing that none of the factors was fully considered by the court).

180. *Id.* at 608 (listing two reasons given by Judge Broderick in favor of U.S. intervention: "relieving developing nations like Ecuador 'of the need to offend [foreign] investors by imposing . . . controls which, however desirable, might be resisted by the investors;' and deterring harmful pollution and conduct by investors that violates applicable legal norms") (footnotes omitted); *see also* Memorandum of Chevron Corp. & Texaco Petroleum Co. in Opposition to Plaintiffs' Motion to Dismiss Defendants' Counterclaims, *supra* note 132, at 12 (arguing there is a U.S. "interest in deciding the counterclaims . . . [because] Chevron and TexPet are United States corporations" and because the remediation contract has "important implications for the ability of United States corporations to do business abroad and to discharge their responsibilities when their operations in a foreign nation come to a close.").

Indeed, the oil company's operations directly affected large segments of the Amazonian populace, whereas at most they have an indirect impact on North Americans. Finally, because Lago Agrio trial is already underway, U.S. interests must also be balanced with principles of comity.

Second, while Judge Rakoff's reasoning in *Aguinda* regarding the speediness of the litigation was questionable, most notably because it failed to consider the impact of restarting a decade's worth of work,[181] it applies soundly to *ROE*. Although the case in Ecuador has been in process for over six years, the primary cause of its slow advancement has been the plaintiff's own request to conduct a battery of scientific tests to prove the remediation inadequate.[182] These tests, which recently culminated in the *Peritaje Global*, or Global Damage Assessment,[183] have spawned an entire industry around the case, which has brought toxicologists, engineers, and other technicians to the area.[184] As a result, the court has developed an intimate familiarity with each of the affected communities, as well as the legal arguments and science at issue. This expertise would be difficult to replicate within a reasonable amount of time in the proceedings before Judge Sand, as illustrated by the lead Lago Agrio attorney's decision to pursue an advanced degree in environmental law to understand the technical aspects of the case.[185] Of course, Judge Sand might find the majority of the Lago Agrio plaintiffs' evidence irrelevant to the question of contract interpretation. Given the fraud argument explained in the preceding subsection, however, it suggests the most capable court of interpreting the contract is one located near the events in question.

Finally, and perhaps most crucially, choice of law considerations mentioned by Judge Rakoff apply to *ROE*.[186] In *ROE* the governing laws are those of contract formation. Judge Sand originally ruled that New York law

181. Kimerling, *Indigenous Peoples*, *supra* note 22, at 603-13.

182. The Lago Agrio trial has probably amassed more scientific data than any environmental case to date, and possibly more than any previous proceeding in the world. Over eighty thousand tests have been conducted. Interview with Steven Donziger, *supra* note 86.

183. In Ecuador, trials are not broken up into separate liability and damages phases. The Peritaje Global—assessing whether or not the remediated areas are free from environmental toxins—occurs at the end, but does not preclude a court from ruling that the Lago Agrio plaintiffs' legal standing was foreclosed by the remediation contract, or that ChevronTexaco was not liable for the actions of its Ecuadorian subsidiary, TexPet, or that the Republic of Ecuador and PetroEcuador were jointly and severally liable. This might strike U.S. practitioners as remarkably inefficient given that thousands of scientific tests and over two hundred thousand pages of documentation chronicling the health and environmental effects ultimately may have no legal relevance.

184. *See id.*

185. E-mail from Steven R. Donziger, Consultant, Amazon Def. Coal., to author (May 24, 2009) (on file with author).

186. *But see* Kimerling, *Indigenous Peoples*, *supra* note 22, at 609-10 (arguing Judge Rakoff did not sufficiently consider the extent complicated U.S. environmental laws would need to be applied by the Lago Agrio court to evaluate Texaco's arguments).

applied and obviously intended to circumvent an extended inquiry into Ecuadorian contract law.[187] Yet, after concluding that where U.S. law was unclear or unsettled, Ecuadorian codes would fill in the gaps, he was obligated to make a substantial investigation into foreign governing paradigms, at least for the 1965 Napo JOA.[188] In the end, the court heard a parade of expert witnesses testify over a four-day period about various details of Ecuadorian law.[189]

There is every indication that the same analysis applies to the remediation agreement at issue in Texaco's counterclaims. First, as the court has already found, and as the defendants have conceded,[190] general principles of Ecuadorian jurisprudence shaped "the background against which [any] contractual intent [would have been] formed."[191] Second, since the remediation contract was putatively negotiated in the government's sovereign capacity, it is also likely to be governed by the doctrine of *parens patriae*, which according to the Republic's experts differs from its North American counterpart.[192] Finally, the counterclaims draw on both the Ecuadorian Constitution as well as the country's 1999 Law of Environmental Management.[193] Thus, Ecuadorian law would likely take center stage, and it would make the most sense for a tribunal with experience applying its own laws to do so to an already-familiar fact pattern.

Undoubtedly, similar evidentiary and choice of law questions will arise in other boomerang suits involving human rights abuses perpetrated, if not orchestrated, abroad. Aside from reasons of docket congestion, these are

187. *ROE II*, 426 F. Supp. 2d 159, 159 (S.D.N.Y. 2006).

188. *See ROE III*, 499 F. Supp. 2d at 460-68 (exploring whether Ecuador's laws encompass the estoppel concept for PetroEcuador).

189. *Id.* (concluding that failure to follow government contract formalities particular to Ecuador, such as obtaining a report from the Armed Forces and the President's signature, rendered the agreement void and that the *actos propios* doctrine—the Ecuadorian equivalent of estoppel—was inapposite, having come into being twenty years after the JOA).

190. Chevron Corp.'s & Texaco Petroleum Co.'s Supplemental Reply Brief on Ecuador Law and Choice of Law at 2, *ROE III*, 499 F. Supp. 2d 452 (No. 04 Civ. 8378 (LBS)) (arguing that the South American nation's law is important as "background fact or 'datum'"); Supplemental Summary Judgment Memorandum of Chevron Corp. & Texaco Petroleum Co. at 20 n.10, *ROE III*, 499 F. Supp. 2d 452 (No. 04 Civ. 8378 (LBS)) (stating that New York's relevant choice of law proviso concerning questions outside of the agreement and the relationship of the parties explicitly calls for the use of Ecuadorian law as a gap filler).

191. *ROE II*, 426 F. Supp. 2d at 163.

192. *See* Foreign Law Declaration of Genaro Eguiguren and Ernesto Alban at 29-30, Republic of Ecuador v. ChevronTexaco Corp. (*ROE II*), 426 F. Supp. 2d 159 (S.D.N.Y. 2006).

193. Kimerling, *Transnational Operations*, *supra* note 20, at 494; *see also* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment and Plaintiffs' Stay of Arbitration Proceedings at 63-66, *ROE III*, 499 F. Supp. 2d 452 (No. 04 Civ. 8378 (LBS)); Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment On Their Counterclaims at 15-16, *supra* note 78; Memorandum of Law in Support of Motion of Chevron Corp. & Texaco Petroleum Co. for Summary Judgment upon Their Counterclaims, *supra* note 79, at 23, 29-33.

precisely the type of arguments likely to convince district courts to dismiss matters on an FNC basis in the first place. While "who pays" disputes complicate the picture by revolving around questions of contract interpretation, to the extent they involve issues of contract negotiation, execution, or performance, prior FNC dismissals ought to be honored.

IV
THE POTENTIAL OF *FORUM NON CONVENIENS* STIPULATIONS: STOPPING BOOMERANG LITIGATION BEFORE IT STARTS

From an examination of both classic FNC factors and the policy justifications in Part II, it is clear that Judge Sand had the theoretical basis and the doctrinal ability to dismiss *ROE* on his own initiative. His failure to do so represents years of additional litigation, millions of dollars, and possible contradictory judgments. More importantly, the pollution at issue constitutes a grave health risk to the Lago Agrio plaintiffs—absent third parties who could not file an FNC motion on their own behalf. As such, *ROE* and comparable boomerang suits easily meet the exceptional circumstances threshold, a conclusion that finds support in the underdeveloped doctrine of *lis alibi pendens* as well as principles of comity.[194]

Further, a prior determination on the same underlying set of facts that another forum is adequate and that public and private interest factors weigh in favor of dismissal merits substantial deference. Indeed, precedent is tantamount to a presumption in favor of dismissal, unless the boomerang defendant can prove a substantial change in circumstances or illustrate why the matter sought to be adjudicated in the United States could not be dealt with abroad (for example, due to lack of joinder mechanisms). In most human rights suits, any equitable solution crafted by a foreign court will necessarily involve complicated logistics that become blurred with the intervention of a U.S. judge. Thus, when confronted with boomerang litigation, district courts should not hesitate to reach for the FNC arrow in their dismissal quivers.

Nevertheless, sua sponte application of FNC is a decidedly second-best remedy. First, it is discretionary rather than compulsory, and therefore accords room to refrain from raising the argument or to conclude no harm has been wrought. This problem is compounded because sua sponte motions are perceived as drastic and unusual, a consideration likely to give any district court pause. Second, because such applications rely on underlying principles of estoppel, defendants have great leeway that sophisticated corporate counsel can expand given FNC's malleable nature. Finally, because it is ex post, sua sponte

194. In fact, Canada and England both employ FNC to "determine where a case should best be heard where parallel actions are pending in different countries." Calamita, *supra* note 105, at 670.

application of FNC is unlikely to substantially alter incentives for good corporate behavior.

This Part suggests a manner of dealing with the problem before it arises: the aggressive use of dismissal stipulations. In many circuits, stipulations are boilerplate; while occasionally tailored to the specific needs of the litigants, most require (at minimum) submitting to jurisdiction of a foreign country and waiving statute of limitations and other defenses. And because FNC has statutory roots in some states,[195] ideally legislatures could codify the proposed stipulations as a precondition for dismissal. In the following subsections I unpack the basics of crafting stipulations to encompass boomerang claims, addressing concerns of due process and the rights of other plaintiffs along the way.

A. Drafting Dismissal Stipulations: Basic Rules for the Road

Drafting dismissal stipulations is relatively straightforward, particularly because appeals courts rarely find them improper.[196] Overturned limitations generally treat the parties disparately—for example mandating that a defendant submit to U.S.-style discovery abroad while allowing the plaintiffs to abide by the host forum's rules—or trammel another state's sovereignty or judicial process.[197] Yet *Carbide*, the path-making Second Circuit case restricting FNC stipulations, also sparked progressive judicial reforms in India and prompted a settlement for victims of the Bhopal disaster.[198] *Carbide*'s legacy suggests that in order to promote corporate accountability and empower foreign judiciaries, district courts should err on the side of aggressive requirements, even if some are ultimately overturned on appeal.

Furthermore, the touchstone of *Carbide* was that U.S. courts could impose conditions *precedent* on defendants, so long as they did not impose conditions *subsequent* on an overseas forum. Indeed, the opinion brutally mocked the defendant corporation's pleas for protection against the audacious foreign judiciary that might dare to hold it accountable.[199] The *Carbide* court's concern

195. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b) (Vernon 2005).

196. *See* Thomas, *supra* note 27, § 4[a]-[h]. *But see id.* at § 5.

197. *Id.*; *In re* Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195 (2d. Cir. 1987), *cert. denied sub nom.*, Executive Comm. Members v. Union of India, 484 U.S. 871 (1987).

198. *See* Dearborn, *supra* note 25, at 227. *But see* Jurianto, *supra* note 8, at 329 n.213.

199. *See* 809 F.2d at 204-05 (The defendant "argues that we should protect it against such denial of due process by authorizing Judge Keenan to retain the authority . . . to monitor the Indian court proceedings and be available on call to rectify in some undefined way any abuses of UCC's right to due process as they might occur in India. UCC's proposed remedy is not only impractical but evidences an abysmal ignorance of basic jurisdictional principles, so much so that it borders on the frivolous. The district court's jurisdiction is limited to proceedings before it in this country. . . . Nor could we, even if we attempted to retain some sort of supervisory jurisdiction, impose our due process requirements upon Indian courts, which are governed by their laws, not ours. . . . Any denial by the Indian courts of due process can be raised by UCC as a defense to the plaintiffs' later

arose over the enforcement clause of the trial judge's order, which required the Indian judgment "comport with the minimal requirements of due process" (left undefined).[200] Presumably, had the district court clarified its reference to the New York Foreign Country Money Judgments Law, rather than leave room for a lesser standard of justice, its order would have been upheld.[201] Thus, as long as stipulations do not force the defendant to abide by an inferior set of rules, or paternalistically monitor the proceedings of the foreign forum, they will generally be permitted.

Given ample maneuvering room to impose aggressive stipulations on defendants petitioning for FNC dismissal, how might district courts frame orders at a mechanical level to prevent boomerang suits? In *ROE*, the problematic issues were actually counterclaims raised against a nonparty to the original action that were being heard simultaneously in Ecuador.[202] Specifically, ChevronTexaco argued that both a 1999 environmental statute and the remediation contract, ostensibly negotiated by the Republic of Ecuador in *parens patriae* capacity, foreclosed the standing of private litigants—the Lago Agrio plaintiffs—to sue for monetary and injunctive relief. Notably, ChevronTexaco did not advance these arguments in the original *Aguinda* proceedings because neither the remediation contract nor the legislation at issue existed at that time. Furthermore, *Aguinda* never reached the merits in the United States. Thus, stipulations that merely required corporations to waive the right to contest elements of the original complaint or that prohibited defendants from counterclaiming against the initial plaintiffs in any forum other than the one designated by the FNC dismissal would have been inadequate to prevent this boomerang suit from occurring.

Similarly, one might anticipate other boomerang defendants raising issues not pending in a foreign court but that, if decided in their favor, could effectively undercut the plaintiffs' case there. Suppose, for example, that Judge Nuñez were not presented with either argument above, perhaps because the defendants simply did not raise them, or, perhaps more diabolically, because defendants anticipated raising them in the United States or in front of a private international arbitration body pursuant to a contract or bilateral investment treaty requiring the foreign government to indemnify multinational businesses from third-party suits, arbitrate any government claims, and waive sovereign immunity. Such scenarios are not implausible. Indeed, given empirical data collected on joint ventures, contracts along these lines may be the rule rather

attempt to enforce a resulting judgment against UCC in this country.").

200. *Id.* at 198.

201. *See id.* at 205.

202. If the Republic and PetroEcuador had been joined as codefendants in *Aguinda*, the arguments would have been crossclaims.

than the exception.[203] Accordingly, stipulations that only bar defendants from raising issues pending in another forum might not prevent boomerang suits.

What standard, then, might govern both actual and potential issues relevant to the litigation but not unduly prejudice corporations (in turn discouraging foreign direct investment) or other potential plaintiffs? In answering this question, courts should consider turning to the touchstones of FNC doctrine and federal joinder rules. Here, Judge Rakoff's opinion proves elucidative: when witnesses, material evidence, and applicable law are found in the same foreign jurisdiction, it makes sense for courts with expertise and access to be calling the shots. And, as a logical outgrowth, courts with accumulated knowledge of the law and facts at issue can most efficiently handle any claims, counterclaims, or crossclaims stemming from the "same case or controversy" by bringing relevant parties and issues into the fold.

Using this "same case or controversy" standard as a condition precedent to FNC dismissal has several advantages. First, courts have a well-developed body of jurisprudence to apply it. Second, the standard encourages entertaining the "broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[204] Indeed, it encompasses both compulsory and permissive counterclaims and crossclaims and puts defendants on notice that FNC is not a forum-shopping exercise. Third, and finally, the standard provides for uniformity of results, comparable to U.S. venue statutes that deal with adjudication of mass torts, such as airplane crashes, linking together as many claims as possible.

Such a standard clearly would allow FNC dismissal of the counterclaims at issue in *ROE*, which bore directly on the Lago Agrio plaintiffs' ability to receive an effective remedy. The counterclaims would likely also pass the more stringent "same nucleus of operative fact" test given ChevronTexaco's lengthy relationship with the government of Ecuador, from directing and operating the petroleum concession, to training PetroEcuador in extraction and reinjection techniques, to overseeing the "cleanup" performed by Ecuadorian subcontractors. Similarly, the "same case or controversy" test would likely encompass the vast majority of other boomerang cases, as a result of the broad net it casts. Indeed, the primary concern is that the standard may sweep up more than it should, depriving defendants of due process and hurting the rights of bystander victims. The following subsections address these concerns.

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203. *See* Alford, *supra* note 15, at 518, 526.

204. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966) (providing this narrower standard for compulsory joinder). Joinder under Article III's "case and controversy" requirement allows joinder of any claims that the current rules permit. *See* William A. Fletcher, *"Common Nucleus of Operative Fact" and Defensive Set-Off: Beyond the* Gibbs *Test*, 74 INDIANA L.J. 171, 176-79 (1998).

B. Due Process or Process Due?

In crafting stipulations designed to prevent situations like *ROE* and other boomerang suits from arising, courts (or legislatures amending existing FNC statutes) ought to focus on the volitional nature of the FNC motion. The plaintiff's forum choice is, at least ostensibly, accorded deference. To win an FNC dismissal, a defendant must show it is disadvantaged by the original location. It is an open secret, however, that defendants often petition for FNC to prevent human rights suits from progressing to the merits. As one commentator put it:

> Defendants are quite aware that a dismissal often effectively ends the litigation . . . sav[ing] a corporation billions of dollars in liability otherwise owed to foreign plaintiffs who are victims of blatant wrongdoing. . . . Any deterrent effect that legal penalties may have had has turned into a corporate incentive to seek out alternative forums in the absence of such consequences.[205]

Given the marked benefits defendants derive from dismissal it is surely not onerous or unreasonable to ask them to face the consequences of their requests. In recent years, these consequences have mounted, as countries like Ecuador, enraged by the systemic harms inflicted upon their territory and populations, have passed sweeping constitutional and environmental law reforms. Instead of defunct claims, defendants now face the prospect of judgments far larger than those to which they might be subject in the United States.[206] In addition, these judgments have no chance of being reduced upon recognition,[207] unlike domestic awards whittled down by the business-friendly U.S. Supreme Court.[208] As a result, Chevron and its cohorts are crying foul, mounting large-scale efforts to question the attitude of the Lago Agrio court, the impartiality of the independent expert, and the sympathies of the Correa administration in the hopes of undermining the proceedings, a strategy that is taking center stage in the most recent batch of *ROE* briefs.[209] This attitude will

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205. Santoyo, *supra* note 31, at 712-13.

206. *See* Casey & Ristroph, *supra* note 8, at 35 (discussing $489 million judgment against Dole, Shell, and Standard Fruit Corporation on behalf of 583 injured workers); *see also* discussion *supra* note 57.

207. *See* ROBERT E. LUTZ, A LAWYER'S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD 19 (2007) (enumerating six grounds for non-enforcement of foreign judgments: "[1] insufficient notice to the defendant; [2] obtaining a judgment by fraud; [3] a judgment repugnant to public policy in domestic state; [4] a judgment that conflicts with another final and conclusive judgment; [5] a foreign court proceeding contrary to the parties' agreement in question in another forum; or [6] a seriously inconvenient forum for the trial of action"); Heiser, *supra* note 26, at 635.

208. *See* Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38; *cf. supra* note 57 (citing landmark punitive damages reduction case).

209. *See supra* note 20. Unfortunately, as ChevronTexaco's attitude evinces, corporations are often able and willing to fight to the death to avoid liability (in ChevronTexaco's case even

undoubtedly prompt objections to more stringent dismissal stipulations; after all, what if there is a process breakdown in Lago Agrio? What if a war erupts between Ecuador and Columbia, and insurgents destroy the border town courthouse? What if Revolutionary Armed Forces of Columbia (FARC) drug traffickers or militant indigenous groups kidnap wealthy defense attorneys (who insisted on wearing camouflage to the site inspections during the *Peritaje Global*)? What if, as a result of the sweeping "case and controversy" standard, defendants lose the right to make various substantive legal arguments not provided for by the law of the foreign forum?

Yet, as even conservative jurists like Judge Posner admit, a judgment of a foreign court need not comport with American standards of due process (typically thought of in constitutional terms) to be enforceable.[210] Rather, it need only meet basic standards of fairness elaborated in the representative recognition statute.[211] In some cases, the enforcement statute in question requires only a *system* of fair tribunals, not that the particular court in question meet specified standards of due process.[212]

Since defendants are capable of anticipating the costs and benefits of foreign litigation, and defendants routinely must waive rights when litigating abroad (whether explicitly or implicitly), it can hardly be argued that compelling them to pursue claims related to the underlying dispute in these fora creates unpredictability. Defendants, to reiterate, also have the option to decline the stipulations and rescind their FNC motions if they are concerned about due process. Given increasing globalization—and the spread of electronic correspondence, facsimile, and teleconferencing—the burdens imposed on private entities defending in the United States are actually far smaller than at the time the Supreme Court decided *Gilbert*.[213] The relative ease of U.S.

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going so far as to lobby the U.S. trade representative to withdraw from the U.S.-Ecuador Free Trade Agreement should the Lago Agrio court find the company liable). *See* Isikoff, *supra* note 87.

210. *See* Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000) (Posner, J.) (foreign judgments under UFMJRA entitled to full faith and credit).

211. *Id.* (citing Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 687-88 (7th Cir. 1987)).

212. *See id.* ("Rather than trying to impugn the English legal system *en gross*, the defendants argue that the Illinois statute requires us to determine whether the particular judgments that they are challenging were issued in proceedings that conform to the requirements of due process of law as it has come to be understood in the case law of Illinois and other American jurisdictions. The statute, with its reference to 'system,' does not support such a retail approach, which would moreover be inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions—which would in effect give the judgment creditor a further appeal on the merits. The process of collecting a judgment is not meant to require a second lawsuit.").

213. *See* Boyd, *supra* note 24, at 70 (arguing, inter alia, that "modern modes of transportation, multilateral treaties providing for service abroad and other procedural mechanisms for international litigation, render *Gilbert*'s private interest analysis, virtually obsolete").

process suggests that refraining from filing an FNC petition is a viable option. And, to the extent that defendants anticipate they may raise a particular claim or counterclaim that can only be pursued in the United States and that will not interfere with proceedings abroad, they may say so. As district courts have discretion to tailor dismissal orders (assuming the "case and controversy" standard remains uncodified), particularized factors can be taken into account and the dismissal stipulations narrowed accordingly. Similarly, if foreign joinder mechanisms upon which stipulations depend are shown not to exist, then the district court can take this into account and alter its order accordingly.

Finally, FNC orders often provide backstops against faulty process through "return clauses" that permit parties to come back to "the dismissing court should the law suit become impossible in the foreign forum."[214] While return clauses remain controversial in some jurisdictions—and are in considerable tension with *Carbide*—they do suggest the possibly that the district court could resume jurisdiction over the proceedings abroad if a catastrophic event, such as a civil war or severe natural disaster, rendered the foreign system *as a whole* incapable of continuing to entertain the case.

C. Avoiding Prejudice to Third Parties

The final thread left hanging by the "case and controversy" standard is potential interference with suits in other jurisdictions brought by victims of the same human rights abuses. In ChevronTexaco's case, other individuals and classes sued the oil company in a different region of Ecuador, in Texas, and in California.[215] Judge Rakoff's dismissal opinion closely tracked the Texas case, illustrating the highly persuasive effect FNC dismissals may have on similar suits (an effect magnified by fears of plaintiff forum shopping).

Further, there is the obvious problem that if a corporation is not allowed to crossclaim or counterclaim in suits brought against it in another jurisdiction, as opposed to suits initiated by it, it may well be unable to mount an adequate defense (though likely it could appeal based on domestic standards of due process and possibly get an injunction against the district court's mandate). As such, other district courts are likely to consider the third-party factor as militating against such aggressive stipulations. To address this problem, courts can narrow the stipulations, perhaps using the "same nucleus of operative fact" standard. Similarly, courts might create an exception to the dismissal

214. Heiser, *supra* note 26, at 615 nn.37-38 (noting, in addition, that that "failure to include a return jurisdiction clause [can] constitute[] a per se abuse of discretion" in some jurisdictions). *But see* Leetsch v. Freedman, 260 F.3d 1100, 1104 (9th Cir. 2001) (failure to include "return clause" is not an abuse of discretion; such a requirement would contravene Supreme Court precedent emphasizing flexibility and tailored analyses that are the touchstone of FNC).

215. *See, e.g.*, Sequihua v. Texaco, Inc., 847 F. Supp. 61, 63 (S.D. Tex. 1994); Doe v. Texaco, Inc., No. C 06-02820 WHA, 2006 WL 2917581 (N.D. Cal. Oct. 11, 2006).

stipulation, allowing corporations to defend themselves against the underlying allegations, but not to raise counterclaims against third parties (a standard that would have prevented the *ROE* counterclaims from being filed).

Alternatively, the district court granting the original dismissal order might see the existence of third parties as counseling in favor of FNC. Dismissal in this case promotes consolidation of claims abroad, promoting efficiency as well as diminishing the chances of inconsistent judgments against corporations. It should be remembered that joinder need not require all parties be roped together like mountain climbers. Indeed, parties can proceed to trial separately should conflicts of interest arise; some plaintiffs, for example, might desire settlement while others wish to seek injunctive relief. Thus, consolidation is not necessarily onerous to third parties, assuming they retain control of the litigation strategy in their own case.

CONCLUSION: LESSONS FOR THE FUTURE

ROE indicates a sea of change in the broader arena of human rights and development. Chevron's legal maneuvering insidiously inaugurates a strategy for corporate avoidance, drawing a blueprint for other multinational business entities accused of violating various norms abroad. The New York court's agreement to entertain the oil giant's counterclaims sets the standard for other companies to relocate suits to developing nations upon proclaiming their judicial impartiality. These businesses may undermine foreign continuations by pressuring and manipulating government officials, very often through less than ethical business tactics, to sign release agreements that can subsequently be used to nullify, or significantly delay, enforcement of proceedings abroad.[216] This strategy is likely to gain traction given the trend toward procedural reforms abroad. Ecuador's own court system underwent sweeping changes in 2004.[217] Other judiciaries in developing countries—most notably India—have proven particularly eager to tackle the unique issues presented by multinational enterprise.[218]

The solutions proposed by this Comment are most certainly not a panacea for many of these broader problems because they do not insulate legislators and executive officials from undue influence. However, they can, at the very least, assure that players are abiding by the same set of rules, and that corporate defendants and plaintiffs from the Global South know the game they are playing. After having once granted an FNC motion, it makes sense for a court to hem all related matters into a single proceeding rather than allowing disparate ones to unfold simultaneously.

216. *See* Casey & Ristroph, *supra* note 8, at 43-44; Alford, *supra* note 15, at 526.
217. *See* Plaintiffs' *ROE III* Brief, *supra* note 15 (collecting expert testimony).
218. *See* Daschbach, *supra* note 38, at 55.

Regardless of the fine details of barring boomerang litigation, what remains clear from *Aguinda* and *ROE* is the pressing problem facing courts today. Judges must be willing to do everything possible to assure that foreign continuations can proceed without the interference of deep-pocketed defendants engaging in reverse forum shopping. As FNC increasingly facilitates dismissals, courts must devise a workable standard for protecting the integrity of offshoot litigation, for failure to do so risks entrenching the harms the FNC doctrine seeks to prevent.