UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARIA AGUINDA, et al.,	:	
Plaintiffs,	:	
v.	:	93 CIV. 7527 (JSR)
TEXACO INC.	:	
Defendant	:	
GABRIEL ASHANGA JOTA, et al.,	:	
Plaintiffs,	:	
v.	:	94 CIV. 9266 (JSR)
TEXACO INC.	:	
Defendant	:	

TEXACO INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS RENEWED MOTIONS TO DISMISS BASED ON FORUM NON CONVENIENS AND INTERNATIONAL COMITY

January 11, 1999

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TABLE OF CONTENTS

Page

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* The Appendix is referred to herein as "App. ___."

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INDEX TO APPENDIX

18. Texaco Inc.'s Notice of Agreements in Satisfying Forum Non Conveniens and International Comity Conditions in *Aguinda*

19. Texaco Inc.'s Notice of Agreements in Satisfying Forum Non Conveniens and International Comity Conditions in *Jota*

20. *Aguinda* Plaintiffs' Unverified Responses to Texaco's First Set of Interrogatories

21. Stipulation and Order of Magistrate Judge Smith, July 12, 1995

22. Relevant Excerpts from *Amazon Crude*

23. *Aguinda* Plaintiffs' Responses to Texaco's First Request for Admissions

24. *Aguinda* Plaintiffs' Unverified Responses to Texaco's Second Set of Interrogatories

25. *Patrickson v. Dole Food Co.* (Civ. No. 97-01516)

26. *Espinola-E v. Coahoma Chemical Co.* (Civ. No. 1:96cv360rr)

27. Affidavit of Juan Guillermo Lohmann

28. *Sequihua* Complaint

29. Transcript of Hearing, November 17, 1998

30. Restatement 3d Foreign Relations Law §403

I. INTRODUCTION

Seventy-six residents of the Oriente region of Ecuador filed *Aguinda v. Texaco Inc.* on November 3, 1993 against Texaco Inc. ("Texaco") on behalf of a putative class of 30,000 Oriente residents. On December 28, 1994, 27 plaintiffs filed a virtually identical class action, *Jota v. Texaco Inc.*, except the *Jota* plaintiffs reside in Peru and seek certification of a class of 25,000 Peruvian residents.

Neither lawsuit alleges injury to persons, property or commerce in the U.S. Instead, plaintiffs claim personal injuries and property damage in Ecuador and Peru stemming from oil production activities on government-owned lands in Ecuador by a former Consortium that Ecuador's Government regulated, funded and principally owned since the 1970's and exclusively operated since July 1, 1990. The Consortium members included Ecuador's national oil company (Petroecuador), as the majority owner, and Texaco Petroleum Company ("TexPet"), a fourth-tier Texaco subsidiary, until its interest ceased entirely in 1992.

Except for its investment in TexPet's minority share, Texaco owned no interest in any operations from which plaintiffs' injuries allegedly flowed. It was not licensed to do business in Ecuador, and it did none. Nonetheless, Texaco is the sole defendant in both cases. The Government of Ecuador and Petroecuador refuse to waive sovereign immunity or be bound by this Court's orders.

Based on an overwhelming record and the case law, Texaco respectfully requests this Court dismiss *Aguinda* and *Jota* on forum non conveniens grounds. Ecuador provides an adequate alternative forum for plaintiffs in both cases, and all public and private interest factors support dismissals under the U.S. Supreme Court's forum non conveniens

test. Peru also provides an adequate alternative forum for the *Jota* plaintiffs. In the event of dismissals, Texaco will accept jurisdiction in Ecuador and Peru to litigate plaintiffs' claims. *See* App. 18 & 19.

Alternatively, Texaco requests dismissals on international comity grounds. Both Complaints implicate Ecuador's laws and policies governing its lands, resources, environment, indigenous people, and national oil company. Under the case law, this Court should defer to Ecuador's courts where all appropriate parties can be heard and these issues adjudicated under Ecuador's laws.

II. STATEMENT OF THE CASE

A. OVERVIEW OF *AGUINDA*: *Aguinda* overwhelmingly involves Ecuador's residents, territory, environment, and resources, as the Complaint reflects. All plaintiffs and putative class members are either immigrants to the Oriente or indigenous people from eight different groups in that region. *Aguinda* Compl. ¶¶11-27, 38. There are no U.S. plaintiffs. Plaintiffs claim personal injury and property damage exclusively in Ecuador from Consortium activities there starting in the 1970's and continuing with Petroecuador's operations today. *Id.* ¶¶40-50.

The only relationship to this forum is plaintiffs' allegation that Texaco, the parent company of a minority participant, somehow "directly operated" the Consortium's oil facilities from New York despite Petroecuador's controlling interest, its daily participation, and the Government's regulatory supervision for over 20 years. *Aguinda* Compl. ¶¶42,10; *Jota* Compl. ¶25. Two years of voluminous document and deposition discovery leave plaintiffs' conjecture unsupportable.[1] In any

[1] As this Court noted previously, Judge Broderick "accorded plaintiffs unusual leeway, through discovery and otherwise, to try to

event, Ecuador remains the appropriate forum given the totality of circumstances that tie this case to Ecuador, as this Court found previously. *Aguinda*, 945 F. Supp. at 627.

B. OVERVIEW OF *JOTA*: *Jota* essentially copies *Aguinda*. It attacks the same Consortium operations; asserts the same claims; seeks certification of a class of foreign residents; and demands monetary damages plus

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prove that this seemingly Ecuadoran-centered lawsuit properly belonged here." *Aguinda v. Texaco Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996). Texaco produced over 71,000 pages of documents and 147 pages of written discovery responses in response to 81 document requests and 143 interrogatories directed, among other issues, to the question of Texaco Inc.'s direction of Consortium operations. *See* Aff. of Daniel J. King (App. 1). Plaintiffs' counsel also deposed five former senior officers and a former Managing Director of TexPet, whose terms spanned the Consortium's history. In addition, plaintiffs' counsel deposed a former Director of Environmental Affairs from Texaco's research facilities and served document subpoenas on third parties. *Id.*

Commenting on Texaco's production during a September 28, 1995 hearing, Magistrate Judge Smith stated that Texaco had "proceeded in good faith" even beyond the requirements of Judge Broderick's Order. *See* Transcript of Status Conference Before the Honorable Lisa Margaret Smith, App. 16 at 34; and *Aguinda v. Texaco Inc.*, No. 93 Civ. 7527, 1994 WL 142006 at *1 (S.D.N.Y. April 11, 1994) (describing discovery permitted by Judge Broderick).

extraterritorial equitable relief, including halting Petroecuador's ongoing disposal activities. *See infra* n.4.

Only two distinctions are noteworthy. First, the 30,000 putative class members in *Aguinda* reside in Ecuador, while the 25,000 *Jota* putative class members reside in Peru, including "approximately 15,000 Quichua Indians, 700 Orejone Indians, 1,000 Yagua Indians, 300 Secoya Indians, and approximately 8,000 immigrants from other parts of Peru to the region." *Jota* Compl. ¶27. Second, *Jota* seeks relief in both Peru and Ecuador (*id.* ¶95), while *Aguinda* seeks relief in Ecuador only.

C. PROCEDURAL HISTORY: This Court is familiar with the history of these cases, which the Second Circuit summarized in its remand. *Jota v. Texaco Inc.*, 157 F.3d 153, 155-58 (2d Cir. 1998).

Regarding forum non conveniens, the Second Circuit held that dismissal was erroneous unless Texaco agrees to litigate plaintiffs' claims in Ecuador. *Id.* at 159. (The Second Circuit made no reference to Peru.) The Court also instructed the District Court to reweigh the forum non conveniens factors independently of the dismissal in *Sequihua v. Texaco Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994), and to consider the following distinctions between *Sequihua* and *Aguinda/Jota* urged by plaintiffs: (i) the *Aguinda/Jota* plaintiffs allege a violation of the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, in addition to other causes of actions[2]; and (ii) the *Aguinda/Jota* plaintiffs challenge decisions allegedly made by Texaco within the U.S. *Jota*, 157 F.3d at

[2] The *Aguinda* plaintiffs allege negligence (Count I), public nuisance (Count II), private nuisance (Count III), strict liability (Count IV), medical monitoring (Count V), trespass (Count VI), "civil conspiracy"(Count VII), and violation of the ATCA (Count VIII). *Jota* includes the same claims.

159. The Second Circuit "express[ed] no view on these distinctions," *id.*, and did not suggest that dismissal would be improper if Texaco consented to jurisdiction and this Court weighed the forum non conveniens factors independently.

Regarding comity, the Second Circuit held that a comity-based dismissal also requires consent to jurisdiction in Ecuador. Finally, it instructed this Court to reconsider its comity dismissal after determining Ecuador's current litigation position. *Id.* at 160-61.

Following remand, Texaco's counsel told this Court at a hearing on November 17 that Texaco would litigate the *Aguinda* plaintiffs' claims in Ecuador and the *Jota* plaintiffs' claims in Ecuador or Peru. *See* App. 29 at 7. Similarly, Ecuador's Ambassador to the U.S. informed this Court in a November 11, 1998 letter that Ecuador refuses to waive sovereign immunity or subject itself to this Court's orders. *See* App. 17. Three weeks later, Ecuador's press reported that its Attorney General, who the Second Circuit agreed does not "represent [Ecuador's] position before foreign courts" (*Jota*, 157 F.3d at 163), sent a separate letter to this Court repeating his predecessor's letter to this Court. *See Aguinda v. Texaco Inc.*, 175 F.R.D. 50, 52 (S.D.N.Y. 1997) (quoting the former Attorney General's ambiguous April 22, 1996 letter and finding that it did not waive Ecuador's sovereign immunity.)

With this Court's permission, Texaco now renews its motions to dismiss based on forum non conveniens or, in the alternative, comity.

III. STATEMENT OF THE FACTS

A. OWNERSHIP HISTORY OF THE CONSORTIUM: On March 5, 1964, Ecuador signed a Concession Agreement authorizing oil exploration in a limited

area in the Oriente by subsidiaries of Texaco and Gulf Oil, Inc.[3] *See*

[3] The Oriente covers 32 million acres in the Amazon basin of eastern Ecuador, but the entire concession area included only 3.8% of the Oriente. Of that, the actual area of operations was approximately 6,000 acres, i.e. .02% of the Oriente. Dep. of Robert M. Bischoff ("Bischoff"), App. 6, at 193; Dep. of William C. Benton ("Benton") App. 3 at 213, 215. Contemporaneously, Ecuador also opened other areas of the Oriente for exploration and production by other companies, and it continues to do so today. Dep. of Robert C. Shields ("Shields"), App. 8, at 306-307; App. 3 (Benton) at 213-214. *See* Concession Map of Ecuador, attached as Exhibit A to the TexPet Aff. (App. 2).

Thus, plaintiffs' portrayal of this Consortium as the sole party responsible for production activities in the Oriente misstates both the historical record and their own authority. Plaintiffs relied in past briefs and discovery responses on a publication entitled Amazon Crude authored by Ms. Judith Kimerling, an American lawyer consulting with plaintiffs' counsel. *See, e.g.*, App. 20; response to interrogatory no. 1. In her publication, Ms. Kimerling points to activities by other oil companies allegedly impacting the Oriente and its residents. *See* App. 22 at 43-44 (Chevron, Amoco, Occidental, Exxon, Conoco, British Petroleum, ARCO, Unocal and Tenneco obtained concessions or signed oil exploration service contracts with Ecuador and built pipelines and refineries); and 87 (noting concessions granted by Ecuadorian government in Huaorani territory of the Oriente to Petro-Canada, Elf Aquitaine, Petrobras, and

TexPet Aff. (App. 2) ¶4. Ecuador, however, demanded a 25% participating share when operations began in 1974. As a result, the Consortium members and their participating interests were: TexPet -- 37.5%; Ecuador Gulf -- 37.5%; and Petroecuador (then known as "CEPE") -- 25%. Petroecuador acquired Gulf's share in 1976, raising its interest to a 62.5% majority share seventeen years before plaintiffs filed their first lawsuit. *Id.* ¶7; App. 3 (Benton) at 201.

On March 1, 1986, Petroecuador went on to acquire 100% of the trans-Ecuador pipeline and, on June 7, 1992, 100% of all remaining Consortium facilities when TexPet and Petroecuador dissolved their relationship. Petroecuador assumed sole responsibility for pipeline operations on October 1, 1989 and all other Consortium operations on June 30, 1990, more than three years before these lawsuits. App. 2 (TexPet Aff.) ¶¶8-9. Thus, "it is undisputed that Ecuador at all times held the predominant, and now the sole ownership of the oil-drilling consortium of whose activities plaintiffs here complain," *Aguinda*, 175 F.R.D. at 51, and that Petroecuador alone operated the Consortium facilities long before plaintiffs filed their Complaints. *See* timeline of key events, attached as Exhibit B to the TexPet affidavit (App. 2). Given these facts and Petroecuador's preeminent role, it seems remarkable that the *Aguinda*

Conoco "seriously threaten the cultural and even physical survival of the Huaorani").

Complaint contains no reference to Petroecuador or the Government's majority interest.

B. CONSORTIUM OPERATIONS: Plaintiffs contend Texaco "directly operated oil facilities in Ecuador" from New York (*Aguinda* Complaint ¶42), but the record is otherwise. Consortium employees conducted field operations, established procedures, and produced oil under the regulatory oversight of Ecuadorian authorities. Dep. of William P. Doyle ("Doyle") App. 5 at 101, 104, 109; App. 6 (Bischoff) at 219; Dep. of McNeill Watkins ("Watkins") App. 7 at 78-79; App. 8 (Shields) at 57, 136, 142, 184-85; App. 3 (Benton) at 202, 206. In a 1973 Executive Decree, the Government mandated that Consortium employees include, directly or through sub-contractors, "a minimum of Ecuadorian nationals equivalent to 95% of the labor force, 90% of administrative personnel, and 75% of technical personnel...." Executive Decree No. 925 of the President of the Republic ("Exec. Decree No. 925"), App. 4 ¶36.1. This work force included trained geologists, engineers, field managers and other technical personnel and professionals. Deposition of Denis LeCorgne ("LeCorgne") App. 9 at 45; App. 7 (Watkins) at 25-27. They staffed all Consortium operations, including testing, drilling, construction, and maintenance. App. 9 (LeCorgne) at 45; App. 7 (Watkins) at 25-27. The Consortium's Manager, who was an Ecuadorian national, had responsibility for the entire operation. App. 6 (Bischoff) at 220; App. 9 (LeCorgne) at 72-3; App. 3 (Benton) at 204. He and his field managers had key operating roles. App. 5 (Doyle) at 253-58.

As the regulator and majority owner, the Government monitored and principally funded all aspects of the Consortium's operations and had a controlling voice in its activities, decisions, and budgets. This

supervision included the review and approval of design specifications for the trans-Ecuador pipeline's construction, which plaintiffs' Complaints attack. *See* App. 4 (Exec. Decree No. 925) ¶18.2 (stating that the pipeline had been constructed "in accordance with specifications approved by the Government. . . and under official control of costs and techniques by the Government."); *Aguinda* Compl. ¶¶41 & 43(g); *Jota* Compl. ¶42. The Government separately oversaw the Consortium's operations and approved its work plans, drilling locations, well completions, road construction, and other operations. App. 4 (Exec. Decree No. 925) ¶¶21-22; App. 3 (Benton) at 205-06, 208-09. No operations proceeded without Government approval. *Id.* at 205. Government inspectors at all times monitored the Consortium's on-site operations, including environmental matters. *Id.* at 206.

By contrast, Texaco conducted no business in Ecuador. It was neither a party to the Consortium's operating agreements nor its agreements with contractors, (App. 1 (King Aff.) ¶18), and its employees did not direct the Consortium's operations. App. 3 (Benton) at 209-211. TexPet's former Managing Director in Ecuador testified that he knew no instance when Texaco directed Consortium personnel regarding environmental practices, drilling, or other matters. *Id.* at 209-10. Plaintiffs' claims center on the treatment and disposal of produced water in the Oriente, (*Aguinda* Compl. ¶¶6-7, 43(a)), but no one in the United States made operational decisions regarding produced water from field operations. App. 3 (Benton) at 170-79; Dep. of Richard K. Meyers ("Meyers") App. 11 at 149-51; 69-70; 74-75. The same is true regarding other decisions attacked by plaintiffs such as whether to line separation

pits or where to put roads. *Aguinda* Compl. ¶43(c); App. 3 (Benton) at 179-84.

When Texaco sought to determine through interrogatories the basis, if any, for plaintiffs' assertion of parent company direction, it received unverified responses devoid of supporting facts. App. 20, Responses to Interrogatories 7 & 9. Texaco then sought the deposition of four, randomly selected *Aguinda* plaintiffs in order to pose the question directly. To avoid depositions, plaintiffs stipulated through counsel that they had no information to substantiate their allegation, leaving Texaco to wonder why they made it in the first instance. *See* Stipulation and Order, entered by Magistrate Judge Smith on July 12, 1995. App. 21. In summary, plaintiffs' claim that the parent company "directly operated oil facilities in Ecuador," (*Aguinda* Compl. ¶42), appears to have been based on conjecture, coupled with a hope that discovery might bolster their supposition.

C. ECUADOR'S SOVEREIGN INTERESTS: In addition to its past and continuing ownership and operation of the production and pipeline facilities, Ecuador's sovereign interests make Ecuador the most appropriate forum for plaintiffs to pursue their claims against all interested parties. Those interests include the right to enact laws and establish policies relating to its oil fields, lands, economy, and environmental priorities. Like all nations, Ecuador sets the scope, pace, and standards of development within its borders, and it chooses its priorities in doing so. These cases implicate those sovereign decisions

because plaintiffs' claims impact Government lands and policies in addition to Petroecuador's past and ongoing practices.[4]

[4] *See, e.g., Aguinda* plaintiffs' Memorandum in Support of Their Motion for Temporary Restraining Order at 5 (Dkt. 77) (Petroecuador's plan for future disposal of produced water "is clearly *unacceptable to plaintiffs*"); *Aguinda* plaintiffs' Response to Request for Admissions (No. 6)(App. 23)("plaintiffs seek equitable relief. . . to prevent like injuries from being inflicted *in the future*").

Similarly, *Jota* plaintiffs ask this Court "to *halt* the dumping of 'production water' into the *Ecuadorian* Amazon environment and, thereby, into the Napo River of Peru, and to remedy the contamination and spoilation of plaintiffs' properties, water supplies, and environment" *in Peru*. *See Jota* Compl. ¶95; *see also id.*, "Prayer for Relief" (seeking "a medical monitoring program in the Napo River region of Peru where

plaintiffs and the class reside . . .", the installation of re-injection facilities in all of the former Consortium's oil wells, and the "clean-up" of lands *in Ecuador*).

For decades, Ecuador has encouraged the aggressive development of its petroleum resources in the Oriente and a supporting infrastructure because oil is vital to its economy. Numerous constitutional and statutory provisions confirm oil's importance, which has provided nearly 50% of Ecuador's annual budget. Aff. of Dr. Vicente Bermeo Lanas ("Bermeo Aff.") App. 14 ¶¶3-5. Under Ecuador's laws, the Republic owns all subsurface minerals, including petroleum, and virtually all surface lands in the Oriente for which plaintiffs demand money damages and equitable relief.[5] App. 4 (Exec. Decree No. 925) ¶2.2; App. 14 ¶¶3, 9. Through its Ministry of Energy and Mines, the Government regulated Consortium activities, including production and pipeline operations. App. 14 ¶¶4-7. By law, the Government must monitor operations to ensure that damages do not result to "persons, property, or the environment as a result of petroleum related activities." *Id.* ¶10. Ecuador's Constitution also guarantees "the right to live in an environment free of contamination. *It is the duty of the State* to ensure that this right is

[5] By interrogatory, Texaco requested the *Aguinda* plaintiffs to identify the specific lands, if any, they actually own to determine whether they have standing to recover for property damage. Again, Texaco received an unverified answer that identified no specific properties. *See* App. 24, Response to Interrogatory 2. To date, plaintiffs have informed neither Texaco nor the Court whether they own any land, much less lands throughout the Oriente for which they seek monetary damages and equitable relief. *See Aguinda* Compl. ¶¶40-50; *Jota* Compl. ¶¶41-57 (seeking damages for properties throughout the Ecuadorian and Peruvian Amazon region).

not infringed upon and to promote the preservation of the natural world." *Id.* (quoting Ecuador's Constitution) (emphasis added).

Oil production is centered in the Oriente, and Ecuadorian law classifies most of the Oriente as "tierras baldias" (unoccupied lands) that the Government owns. *Id.* ¶9. Ecuador's official policy, embodied in legislation, is that the development of these lands is "an urgent national priority." *Id.* Thus, it encourages oil production, agriculture, ranching, mining, logging and other development in the area, and it "offer[s] land title only to settlers who clear the rainforests for crops or pastures." *Id.* The Government insisted by Executive Decree that TexPet perform mandatory "compensation works" in the Oriente as part of its Consortium obligations, such as building $20 million of access roads, airport and river ports "for public use," bridges, and other facilities to assist this government-sponsored colonization and development. App. 4 (Exec. Decree No. 925) ¶¶30.1, 45.1.

Here again, plaintiffs' claims call into question these policies and decisions. Plaintiffs attack Texaco for causing changes to the indigenous population's "diet," "culture" and "way of life," (*Aguinda* Compl. ¶20), but the Government has fostered (indeed, subsidized) these changes for years and does so today.[6]

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[6] *See, e.g.*, App. 22 (Amazon Crude) at 39, where Ms. Kimerling emphasizes the negative impact of government policies on the Oriente

culture and lifestyle, ("The national government of Ecuador, however, continues to view the Oriente as a frontier to be conquered, much as the United States at one time viewed its western regions. As a result, *Oriente peoples are increasingly threatened by aggressive government policies that seek to 'develop' and colonize their lands and to assimilate them into the dominant Ecuadorian culture*.... For Amazonian peoples, assimilation means rejecting their traditional beliefs and ways of life....") (emphasis added).

D. TEXACO'S CONSENT TO JURISDICTION IN ECUADOR AND PERU: If this Court dismisses these cases on forum non conveniens or comity grounds, Texaco will agree as follows: (i) first, it will accept service of process in Ecuador and not object to the civil jurisdiction of a court of competent jurisdiction in Ecuador as to the *Aguinda* and *Jota* plaintiffs; alternatively, Texaco will accept service of process in Peru and not object to the civil jurisdiction of a court of competent jurisdiction in Peru as to those *Jota* plaintiffs who might prefer to litigate in their home forum; (ii) second, Texaco will waive statute of limitations-based defenses that may have matured between the dates when the *Aguinda* and *Jota* plaintiffs filed their Complaints in this Court (*i.e.*, November 3, 1993, and December 28, 1994, respectively) and 60 days after dismissals by this Court to give plaintiffs an opportunity to re-file in Ecuador or Peru; (iii) third, plaintiffs and Texaco may utilize the extensive discovery obtained to date in lawsuits to be filed in Ecuador or Peru, *see supra* n.1 (describing discovery); and (iv) fourth, Texaco will satisfy judgments that might be entered in plaintiffs' favor, subject to Texaco's rights under New York's Recognition of Foreign Country Money

Judgments Act, N.Y.C.P.L.R. § 5301 et seq. (McKinney 1998).[7] These agreements exceed the Second Circuit's requirement.

[7] *See* App. 18 & 19 (Texaco's "Agreements Regarding Conditions of Dismissal" to be signed and filed with this Court in *Aguinda* and *Jota*, respectively, if the Court conditionally dismisses these actions); *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195, 204 (2d Cir. 1987) (noting the applicability of New York's Recognition of Foreign Country Money Judgments Act in a forum non conveniens dismissal.)

E. ECUADOR'S JUDICIAL SYSTEM: Ecuador's judicial system provides a fair and adequate alternative forum, as Dr. Enrique Ponce y Carbo, a former Justice of Ecuador's Supreme Court and a former law professor at the Catholic University of Ecuador, has attested. *See* App. 10. Numerous federal courts have so held, including two within the last year.[8]

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[8] *See Patrickson v. Dole Food Co.*, Civil Action No. 97-01516 (D. Haw. 1998) (slip op. at 41-51, attached at App. 25) (dismissing class action alleging injuries in Ecuador from defendants' pesticide manufactured and marketed from the U.S.); *Espinola-E v. Coahoma Chemical Co.*, Civil Action No. 1:96-cv360RR (S.D. Miss. 1998) (slip op. at 5-9, attached at App. 26) (same); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1359-60 (S.D. Tex. 1995)(same); *Sequihua v. Texaco Inc.*, 847 F. Supp. 61, 64 (S.D. Tex. 1994) (dismissing environmental and personal injury claims against Texaco and others by a putative class of Oriente residents); *Immobleria Barcanona, CIA, LTDA v. Citibank*, 634 F. Supp. 782, 785 (S.D. Fla. 1986)(dismissing breach of contract action concerning land in Ecuador, finding that an action involving property in Ecuador "is absolutely a matter of local interest"); *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So.2d 1111, 1115-17 (Fla. Dist. Ct. App. 1997)(dismissing action by Ecuadorian shrimp farmers alleging injuries in Ecuador from defendants' fungicide); *Comre-Secor CIA LTDA v. Prime Computer, Inc.*, No.

Ecuador is a constitutional democracy with executive, legislative and judicial branches. Its judicial branch, headed by the Supreme Court, includes special purpose and lower courts, which use a civil code based upon Roman law. Thus, Ecuadorian legal norms are patterned on those in many European nations, including Spain, France and Germany. Ecuador's Constitution guarantees due process and equal protection, and its courts provide important substantive and procedural rights. App. 10 ¶¶3-6.

Ecuador also provides causes of action for personal injury or property damages, including claims based on oil production and environmental contamination. No barriers preclude litigation in Ecuador. There are no filing fees, and contingent fees are permitted. Courts

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83-3131-MA, 1985 U.S. Dist. LEXIS 23055 (D.C. Mass. Jan. 29, 1985) (dismissing action regarding parties' distribution agreement).

The only contrary authority is a 1978 decision in a breach of contract case before Ecuador became a constitutional republic. *See Phoenix Canada Oil Co. v. Texaco Inc.*, 78 F.R.D. 445 (D. Del. 1978). That case, like *Norsul Oil & Min. Co., Ltd. v. Texaco Inc.*, 641 F. Supp. 1502 (S.D. Fla. 1986), involved contractual (royalty) disputes and private, non-Ecuadorian parties.

provide interpreters equipped to translate native dialects. Civil courts have subpoena power over witnesses and evidence, and they inspect property and other evidence. A plaintiff in Ecuador has the opportunity for pretrial discovery, including document production, site visits, and other discovery. App. 10 ¶¶8, 10, 12-15, 17, 18.

Ecuador also provides an adequate forum for *Jota* plaintiffs. Ecuador's Constitution gives non-Ecuadorian plaintiffs the same rights as Ecuadorians to sue in Ecuador's courts. App. 14 (Bermeo) ¶12. Thus, *Jota* plaintiffs may seek relief in Ecuador for personal injuries and property damage from Consortium activities. In addition, they would not be subjected to violence or intimidation. *See* Aff. of Dr. Adolfo Callejas Ribadeneira ("Callejas Aff.") App. 13 ¶¶11-13; App. 10 (Ponce y Carbo) ¶¶9-11, 14.

Many individuals have sued multi-national corporations in Ecuador, and such actions are pending currently. *See* Aff. of Dr. Jose Maria Perez-Arteta ("Perez-Arteta Aff.") App. 12 ¶4. Ecuadorian residents have sued TexPet in Ecuador's courts for Consortium activities, and three such actions are pending today. *See* Aff. of Dr. Rodrigo Perez Pallares ("Perez Aff.") App. 15 ¶4; App. 13 (Callejas Aff.) ¶5. Litigants challenging Consortium activities have been treated fairly by Ecuadorian courts, and suits have proceeded without violence or threats. App. 10 (Ponce y Carbo Aff.) ¶11; App. 15 (Perez Aff.) ¶10. Plaintiffs have obtained judgments against the Government, Petroecuador, and private entities for environmental claims relating to oil exploration. App. 14 (Bermeo Aff.) ¶¶11, 13; App. 13 (Callejas Aff.) ¶4.

In 1996, TexPet settled four lawsuits brought by Oriente municipalities after direct negotiations with their elected officials.

App. 13 (Callejas Aff.) ¶3. (Plaintiffs' counsel attempted unsuccessfully to enjoin those negotiations when *Aguinda* was pending before Judge Parker. (Dkt. 77).) TexPet also entered into a comprehensive settlement in 1995 with the Government and Petroecuador that released Texaco and TexPet from all claims relating to government-owned lands and water, which comprise virtually all of the Oriente. App. 2 (TexPet Aff.) ¶15. In return, TexPet financed remediation and socio-economic projects required by the Settlement Agreement. *Id.* ¶17. On September 30, 1998, the Government and Petroecuador executed a final release certifying that TexPet had complied with all obligations under the Settlement Agreement. *Id.*; and App. 17 (Nov. 11, 1998 letter from Ecuador's Ambassador).

F. PERU'S JUDICIAL SYSTEM: Peru provides another adequate alternative forum for *Jota* plaintiffs who may prefer their home courts. U.S. courts have held, explicitly and implicitly, that Peru provides an adequate alternative forum.[9]

Peru has had democratically elected governments since 1980. It is a good standing member of numerous international organizations and a party to international human rights treaties. Its government, like Ecuador's,

[9] *See, e.g., Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876 (5th Cir. 1987); *Torres v. Southern Peru Copper Corp.*, 965 F. Supp. 899, 903 (S.D. Tex. 1996); *Vargas v. M/V Mini Lama*, 709 F. Supp. 117, 118 (E.D. La. 1989).

is comprised of executive, legislative and judicial branches. While Peru's Congress and President are elected by popular vote, an independent body appoints members of the judiciary. *See* Affidavit of Juan Guillermo Lohmann Luca de Tena ("Lohmann") App. 27 ¶¶3-4.

No barriers preclude suit in Peru. As in Ecuador, there are no filing fees, and contingency fees are permitted. Spanish is Peru's official language, but Quichua and other native dialects are also official languages in the regions where they predominate. Peruvian courts provide interpreters to translate native dialects. App. 27 ¶¶12-13.

Peru's legal system, like Ecuador's, is based on civil law, and thus provides similar causes of action and relief for personal injury and property damage. App. 27 ¶¶15-22. Like Ecuador's courts, Peru's courts have subpoena power over witnesses and evidence. *Id.* ¶11. A trial court's decision is appealable to the Superior Court, and, ultimately, to the Supreme Court. *Id.* ¶8. All court decisions must be supported by the court's reasoning, and all private and governmental bodies must respect and fulfill the courts' decisions. *Id.* ¶5.

IV. ARGUMENT

A. THIS COURT SHOULD DISMISS ON FORUM NON CONVENIENS GROUNDS: A district court has broad discretion to decline jurisdiction on forum non conveniens grounds where "dismissal would 'best serve the convenience of the parties and the ends of justice.'" *Murray v. British Broad. Corp.*, 81 F.3d 287, 290 (2d Cir. 1996) (affirming forum non conveniens dismissal), quoting *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 527 (1947).

The forum non conveniens inquiry has two steps. First, the court must determine that an adequate alternative forum exists. *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73 (2d Cir. 1998). Second, "[t]he trial court should consider and weigh all relevant public and private interest factors that bear upon the relative convenience of the forums, rather than compare the rights, remedies, and procedures in the forums that might advantage or disadvantage the respective parties." *In re Silicone Gel Breast Implants Products Liability Litigation*, 887 F. Supp. 1469, 1474 (N.D. Ala. 1995); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-12 (1947) (listing the relevant private and public interest

factors);[10] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981); *PT United Can Co.*, 138 F.3d at 73.

[10] The *Gilbert* private interest factors include: (1) "relative ease of access to sources of proof;" (2) "availability of compulsory process for attendance of unwilling" witnesses; (3) "the cost of obtaining [the] attendance of willing" witnesses; (4) the "possibility of [a] view of [the] premises, if [a] view would be appropriate [in] the action;" and (5) "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil Corp.*, 330 U.S. at 508-09.

The *Gilbert* public interest factors include: (1) local interest in the controversy; (2) the administrative difficulties caused by the congestion of local court dockets with foreign lawsuits; (3) the avoidance of unnecessary problems in choice of law and the application of foreign law; and (4) the imposition of jury duty on residents of a jurisdiction having little relationship to the controversy. *Id.*

Under this analysis, Ecuador provides an adequate alternative forum, and the *Gilbert* factors overwhelmingly favor litigation there, as reviewed below. Alternatively, Peru provides an adequate forum for *Jota* plaintiffs. In any event, a U.S. district court in New York is the least convenient or practical forum for myriad reasons, as this Court concluded previously.

1. Ecuador is an Adequate Alternative Forum in Both Cases: Courts have found an alternative forum to be inadequate only in "rare circumstances" where the remedies available are "clearly inadequate." *McLaughlin v. Bankers Trust Co. of New York*, No. 97 Civ. 9312, 1998 WL 355419 at *2 (S.D.N.Y. July 2, 1998), *quoting Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981). *See also Potomac Capital Inv. Corp. v. Koninklijke Luchtvaapt Maatschapplj N.V.*, No. 97 Civ. 8141, 1998 WL 92416 at *4 (S.D.N.Y. Mar. 4, 1998) (alternative forum is adequate unless "the remedy offered by the other forum is clearly unsatisfactory"), quoting *Murray*, 81 F.3d at 292. Such "rare circumstances" do not exist here, and Ecuador meets the adequacy test by all standards.

First, Texaco will consent to jurisdiction in Ecuador and accept other terms not required on remand. *See* App. 18 & 19. Second, Ecuador provides all plaintiffs with causes of action and remedies for their alleged injuries. App. 10 ¶¶12-15. Indeed, litigants in Ecuador have sued and prevailed by judgment or settlement on similar claims against Petroecuador, TexPet, and other entities. App. 15 (Perez Aff.) ¶¶4,8; App. 14 (Bermeo Aff.) ¶¶11-13. They need not sue in the U.S. to assert their claims. U.S. courts have recognized that Ecuador provides adequate remedies based upon negligence and other tort actions. *See Ciba-Geigy Ltd.*, 691 So.2d at 1117 (acknowledging that "the Civil Code of Ecuador

allows actions for negligence and strict liability in tort"), and *supra* n.8 (listing other personal injury and property damage cases dismissed in favor of litigation in Ecuador); *see also PT United Can Co.*, 138 F.3d at 74 (finding Indonesia an adequate forum where causes of action "available in Indonesian courts adequately address the underlying controversy expressed in plaintiff's complaint"); *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 835 (5th Cir. 1993) (affirming dismissal on forum non conveniens ground where Germany had analogous causes of actions).[11]

[11] The alternative forum need not provide identical causes of

action in order to be adequate. *See PT United Can Co.*, 138 F.2d at 74 ("availability of an adequate alternative forum does not depend on the existence of the identical cause of action in the other forum"); *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 829 (2d Cir. 1990) (noting that an alternative forum need not "provide precisely the same remedies and in the same time-frame").

An alternative forum is adequate even if its law may be less favorable for plaintiff. *See Piper Aircraft*, 454 U.S. at 250 ("if conclusive or substantial weight were given to the possibility of a change in law, the forum non conveniens doctrine would become virtually useless"); *McLaughlin*, 1998 WL 355419 at *3 ("The prospect of lesser recovery does not justify refusing to dismiss on grounds of forum non conveniens"); *Lana Int'l Ltd. v. Boeing Co.*, No. 93 Civ. 7169, 1995 WL 144152 at *2 (S.D.N.Y. March 30, 1995) ("The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry").

The same rule applies to procedural differences, including the unavailability of class actions in a foreign forum. *See In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 851 (S.D.N.Y. 1986) ("[t]he absence of a rule for class actions which is identical to the American rule does not lead to the conclusion that India is not an adequate alternative forum"), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987). Even if Ecuador's procedures might be less satisfactory to plaintiffs than those provided by U.S. district courts, this does not render that forum inadequate. *See, e.g.*, *Blanco*, 997 F.2d at 982 ("some inconvenience or the unavailability of beneficial litigation procedures, similar to those available in the federal district courts does not render an alternative forum inadequate"), *quoting Borden Inc.*, 919 F.2d at 829; *Guidi v. Inter-Continental Hotels*, No. 95 Civ. 9006, 1997 WL 411469 at *2 (S.D.N.Y. July 18, 1997) (assertions that Egypt denies plaintiffs the right to present live testimony or cross-examine witnesses does not make Egypt an inadequate forum).

Third, no procedural barriers prevent *Aguinda* and *Jota* plaintiffs from refiling in Ecuador. There are no filing fees; contingent fees are permitted; and Texaco will toll the limitations period. Ecuador's courts must provide interpreters for plaintiffs speaking Quichua or other Oriente dialects, pre-trial discovery is permissible, and the court has subpoena power over witnesses and documents and a right to inspect property.[12] App. 10 (Ponce y Carbo Aff.) ¶¶8, 10, 17-18.

Fourth, *Jota* plaintiffs confront no procedural or substantive impediments in Ecuador's courts because non-residents enjoy the same rights as Ecuadorian residents. App. 14 (Bermeo) ¶12. Peruvian

[12] Courts in this district have held repeatedly that the unavailability of American-style discovery does not make a foreign forum inadequate. *Potomac Capital Inv. Corp.*, 1998 WL 92416 at *5 (S.D.N.Y. March 4, 1998)("were a forum considered inadequate merely because it did not provide for [American] style discovery, few foreign forums could be considered 'adequate' -- and that is not the law"); *Lan Assocs. XVIII, L.P. v. Bank of Nova Scotia*, No. 96 Civ. 1022, 1997 WL 458753 at *4 (S.D.N.Y. Aug. 11, 1997) (finding Turks & Caicos an adequate forum "even assuming that discovery is more limited"); *Doe v. Hyland Therapeutics Division*, 807 F. Supp. 1117, 1124 (S.D.N.Y. 1992) ("Consequently, the fact that Ireland's procedures provide less extensive discovery devices, or otherwise limit the scope of discovery, does not constitute a colorable basis for the conclusion that Ireland is less than an adequate forum"); *In Re Union Carbide*, 809 F.2d at 205-06 (foreign forum not inadequate despite more limited discovery); *Ernst v. Ernst*, 722 F.Supp. 61, 67 (S.D.N.Y. 1989)(same).

plaintiffs may assert the same causes of action as *Aguinda* plaintiffs, and would not be subjected to violence or intimidation. App. 13 (Callejas) ¶¶11-13; App. 10 (Ponce y Carbo) ¶¶9, 11, 14.

Finally, *Aguinda* plaintiffs argued previously that Ecuadorian courts might apply retroactively a recent Ecuadorian statute ("Law No. 55") in order to preclude them from bringing claims in Ecuador.[13] Various trial courts in Ecuador, however, have rejected this argument, and an Ecuadorian appellate court recently affirmed, holding on October 13, 1998 that Law 55 does not preclude Ecuadorian jurisdiction following a U.S. court dismissal. *See* App. 10 (Ponce y Carbo Aff.) ¶32. Two federal district courts recently found Ecuador to be an adequate alternative forum, and one court expressly rejected jurisdictional arguments based on Law No. 55 in the process.[14] In addition, Law No. 55's constitutionality is subject to serious doubt, as Ecuadorian legal scholars have opined.

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[13] This statute purports to strip Ecuadorian courts of jurisdiction as to claims by Ecuadorians who elect to file their claims elsewhere, hoping thereby to compel U.S. courts to exercise subject matter jurisdiction. For Law No. 55's text, *see Patrickson v. Dole Food Co.*, Civil No. 97-01516 (D. Ha. 1998) at 42-43 (App. 25).

[14] *See Patrickson v. Dole Food Co.*, Civil No. 97-01516 at 41-44 (D. Ha. 1998)(reviewing Law 55 and concluding "[the court] has no basis for concluding that the courts of Ecuador are not available . . . ."); *see also Espinola-E v. Coahoma Chemical Co.*, Civil Action No. 1:96cv360RR (S.D. Miss. Mar. 30, 1998). The *Patrickson* and *Espinola-E* opinions are attached at App. 25 & 26, respectively.

Among other reasons, the law was enacted without a presidential signature and is thus invalid under Ecuadorian law. *Id.* ¶¶20-25. Legislation also is pending in Ecuador's Congress to repeal Law No. 55. *Id.* ¶31. Finally, Law No. 55 has no bearing in any event upon the *Jota* plaintiffs' ability to sue in Peru.

2. Peru is an Adequate Forum for the *Jota* Plaintiffs: Alternatively, Peru provides an adequate forum, as federal courts have held. *See supra* Part III.F; and n.9. While Peru provides an adequate alternative forum for *Jota* plaintiffs, Ecuador remains the most appropriate forum for both lawsuits under the *Gilbert* factors reviewed below. *Jota* plaintiffs, like their *Aguinda* counterparts, have expressed their primary goal of stopping Petroecuador's current practices in Ecuador. *See supra* n.4. They can sue all essential parties in Ecuador (but not in Peru or the U.S.) and thereby address both ongoing and past practices, as their Complaint demands. *Id*.

Because Ecuador and Peru both provide adequate alternative forums, we turn now to a review of the *Gilbert* private and public interest factors. *See supra* n.10 (listing the *Gilbert* factors).

3. The *Gilbert* Private Interest Factors Dictate Dismissal

(a) Relative Ease of Access to Sources of Proof: A lawsuit should be adjudicated in a foreign forum when most relevant evidence is located there.[15] Here, most evidence is far more accessible in Ecuador.

[15] *See Potomac Capital Inv. Corp.*, 1998 WL 92416 at *7 (S.D.N.Y. March 4, 1998) ("If the location of witnesses and sources of proof are strongly in favor of one forum, the matter likely should be adjudicated there"); *Feinstein v. Curtain Bluff Resort*, No. 96 Civ. 8860, 1998 WL 458060 at *5 (S.D.N.Y. Aug. 5, 1998) (where access to evidence is "far easier" abroad, case should be dismissed on forum non conveniens grounds).

(i) *Aguinda* Evidence: Practically all witnesses reside in Ecuador, including: (i) all plaintiffs; (ii) witnesses to the alleged occurrences over a twenty-year period; (iii) Petroecuador employees, who participated in past and continuing operations; (iv) Government officials, who regulated, monitored and approved past Consortium operations as well as Petroecuador's post-Consortium practices; (v) persons with knowledge of plaintiffs' conduct and claims; and (vi) medical personnel who treated

plaintiffs.[16] This evidence directly relates to plaintiffs' causation and damages claims. App. 1 (King Aff.) ¶¶20-25.

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[16] *See Feinstein*, 1998 WL 458060 at *5 (dismissing on forum non conveniens grounds in part because "most of the witnesses are residents of Antigua"); *Lana Int'l Ltd.*, 1995 WL 144152 at *4 (dismissing on forum non conveniens ground in part because "the bulk of the potential witnesses in this case" are located in Canada).

In past briefs, plaintiffs argued that Texaco must submit affidavits identifying specific foreign witnesses by name and their evidence in order to meet its burden of proof for a foreign non conveniens dismissal. This is not the law and certainly not in toxic tort cases of this alleged duration and magnitude. *See Piper Aircraft v. Reyno*, 454 U.S. at 257 (rejecting requirement that defendants seeking a forum non conveniens dismissal must submit affidavits identifying witnesses to be called and

testimony they would give), and *id.* at 257, n. 26 (noting that the Second Circuit expressly rejected such a requirement in *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 451 n. 3 (1975)).

In addition to Petroecuador's activities, other companies have contributed to the alleged problems, according to plaintiffs' authority.[17] Those operations in the Oriente allegedly caused and continue to cause environmental harm, personal injuries, and an adverse impact on residents' culture and lifestyle. Witnesses to these events are in Ecuador. App. 1 (King Aff.) ¶22.

Most relevant documents also are located in Ecuador, including: (i) Consortium records; (ii) records concerning policies and regulations of the Republic regarding the Consortium and Oriente; (iii) records reflecting ownership of allegedly contaminated lands, (iv) plaintiffs' medical records; and (v) documents on Petroecuador's operations since 1990. App. 1 (King Aff.) ¶26. See *Delgado*, 890 F. Supp. at 1366-67 (dismissing on forum non conveniens grounds in part because majority of relevant documents were located in Ecuador and other foreign forums).

Aguinda alleges widespread property contamination, and all properties are in Ecuador. *Proyectos Orchimex de Costa Rica, S.A. v. E.I. dupont de Nemours* & Co., 896 F. Supp. 1197, 1202 (M.D. Fla. 1995) (in crop fungicide case, court gave significant weight to location of

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[17] *See, e.g.,* App. 22 (Amazon Crude) at 56 (complaining of Arco's seismic activities, and Occidental Petroleum's destruction of property in a Quichua community); 34-37 (complaining of oil exploration activities conducted by Occidental Petroleum and Peru's national oil company in portions of Oriente annexed by Peru); 75 (noting harm caused by "colonists, land speculators, loggers, ranchers, and agro-industry" in the Oriente); 100 (Petroecuador routinely dumps production wastes and is responsible for oil spills); 104 ("all of the oil companies should revamp their current operations to prevent further contamination and... develop waste handling and other operational procedures...."); 109 (listing six U.S. companies allegedly causing damages in Ecuador), and 129 (listing demands on the Government of Ecuador); plaintiffs' Exh. 6 (Koons Aff.) in support of plaintiffs' opposition to Texaco's previous motion to dismiss (stating that Petroecuador is currently discharging 170,000 barrels of production water into the Amazon environment daily).

property where crops were grown); *Ciba-Geigy Ltd.*, 691 So.2d at 1119 (dismissing pesticide case on forum non conveniens; "all physical evidence in this case is found in the farms and streams of Ecuador"). Fact determinations regarding preexisting and current conditions and usages of Oriente lands and water will occur in Ecuador, including relevant witness testimony going back over the 25 year history of the Consortium's and other companies' operations in Ecuador and forward through Petroecuador's and other companies' activities in the Oriente since June 1990. App. 1 (King Aff.) ¶¶30-31.

(ii) *Jota* Evidence: Many Ecuadorian witnesses required in *Aguinda* are equally essential in *Jota*, including Petroecuador employees, Ecuadorian officials, witnesses to the alleged events, and other participants in past and ongoing activities located between the former concession area and downstream lands and water in Peru. App. 1 (King Aff.) ¶¶27, 30. See *supra* n.17, and Concession Map of Ecuador, Exhibit A to the TexPet Aff. (App. 2) showing concessions adjoining the Napo River, which plaintiffs allege to be the contamination pathway. *Jota* Complaint ¶5. Other witnesses are located in Peru, including plaintiffs, medical personnel, and persons with knowledge of plaintiffs' claims and conduct. App. 1 (King Aff.) ¶28.

Much of the documentary evidence in *Jota* overlaps with *Aguinda* and thus is located in Ecuador. Other documents are located in Peru, including records reflecting ownership of the allegedly contaminated lands in Peru and plaintiffs' medical histories. App. 1 (King Aff.) ¶29.

(iii) Plaintiffs' Argument Concerning Evidence in the United States: Plaintiffs argued previously that the U.S. is a more convenient forum because they will rely upon U.S. witnesses and documents to prove that

Texaco designed and directed Consortium operations from New York. This argument, which litigants routinely assert in opposing forum non conveniens motions, does not alter the balance in favor of litigation in Ecuador.

Even assuming, *arguendo*, that plaintiffs' contention is factually accurate (which it is not), the argument ignores critical elements of proof relevant to plaintiffs' claims and Texaco's defenses, including causation, damages, contributory and intervening factors, and assumption of the risk. Allegations that Texaco may have directed former Consortium operations from New York, standing alone, prove nothing without tracing a chain of causation through the events at issue in Ecuador and Peru, including essential personal and property injury assessments on an individualized and site-specific basis. Case law and hornbook tort law so hold. *See Abouchalache v. Hilton International Co.*, 464 F. Supp. 94, 97 (S.D.N.Y. 1978) (dismissing on forum non conveniens grounds despite location of evidence in New York, noting "plaintiffs will be unable to establish a line of causation from the negligence in New York to the injuries suffered in London"); *Doe v. Hyland Therapeutics Div.*, 807 F.Supp at 1125 (dismissing in favor of litigation in Ireland; "On the other hand, evidence of defendants' negligence constitutes only one element of the case plaintiffs must present to sustain their burden of proof. Plaintiffs will also need to establish proof of causation, product identification, injury, and damages; evidence relating to these elements will be much more accessible from an Irish forum. [citations omitted].") Numerous courts have dismissed cases on forum non conveniens

grounds despite allegations that defective design, manufacture, or other negligence in the U.S. caused foreign injuries.[18]

[18] *See, e.g., Stewart v. Dow Chemical Co.*, 865 F.2d 103, 107 (6th Cir. 1989) (affirming forum non conveniens dismissal where "evidence of design and manufacture" was located in the United States, but majority of evidence was located in New Brunswick); *De Melo v. Lederle Laboratories*, 801 F.2d 1058, 1062-63 (8th Cir. 1986) (affirming forum non conveniens dismissal of action by Brazilian consumer for injury from drug developed, tested, patented, manufactured, and labeled in the U.S., but bulk of evidence relating to causation, damages and defenses was in Brazil); *Baumgart*, 981 F.2d at 836-37 (affirming forum non conveniens dismissal where, although liability evidence existed in forum, majority of evidence existed in Germany); *Value Partners S.A. v. Bain & Co.*, No. 98 Civ. 1562, 1998 WL 336648 at *5 (S.D.N.Y. June 22, 1998) (dismissing on forum non conveniens grounds despite plaintiff's argument that "tortious conduct was both 'hatched' and 'developed' in the United States" because such argument "ignores the fact that the most important event alleged . . .

took place entirely in Brazil"); *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512, 1527 (D. Minn. 1996) (dismissing on forum non conveniens grounds because majority of evidence was located in Guatemala, despite the fact that "the evidence relating to [defendant's] decision making will be found here"); *Delgado*, 890 F. Supp. at 1367 (dismissing on forum non conveniens grounds, rejecting plaintiffs' argument "that the evidence concerning manufacturing defendants' knowledge of [pesticide]'s dangerous characteristics, their decisions to continue marketing [pesticide] notwithstanding this knowledge, and documentary proof of distribution will be found only in the United States"); *Abiaad v. General Motors Corp.*, 538 F. Supp. 537, 542 (E.D. Pa. 1982) (forum non conveniens dismissal despite automobile's design and manufacture in the U.S.; "True, plaintiffs allege a products liability theory, and any plans, reports, records, or other documents of the defendant which bear on the alleged design defect are located in the United States..... Nevertheless, the overwhelming volume of evidence in Abu Dhabi far outweighs the evidence in this forum, and easily tips the balance of convenience toward the alternative forum.")

In addition, Texaco has responded already to extensive discovery on the issue of parent company operation of the oil field facilities. Unlike most forum non conveniens cases, Judge Broderick gave plaintiffs "unusual leeway through discovery and otherwise to prove that this seemingly Ecuadorian-centered lawsuit properly belonged here," and plaintiffs' counsel took full advantage even beyond Judge Broderick's Order. *See supra* n.1; and App. 1 (King Aff.) ¶¶2-17 (describing discovery). Whatever that discovery may or may not show, plaintiffs and Texaco can transport it to and use it in Ecuador or Peru at minimal cost. *See* App. 18 & 19; and *In re Silicone Gel Breast Implants Products Liability Litigation*, 887 F. Supp. at 1476 (documents and depositions had already been located and could be provided at "minimal cost" in foreign forum).

Finally, plaintiffs pointed in past briefs to the residence of potential expert witnesses in the U.S., but courts in this district give little weight to the location of expert witnesses. *See, e.g., Potomac Capital Inv. Corp.,* 1998 WL 92416 at *8 ("[t]he location of expert witnesses, however, is entitled to little weight"); *Balaban v. Pettigrew Auction Co.*, No. 96 Civ. 3177, 1997 WL 470373 at *3 n.1 (E.D.N.Y. June 27, 1997) ("it has repeatedly been held that '[t]he convenience of expert witnesses is of 'little or no significance' on a motion to transfer'").

(b) Availability of Compulsory Process for Witnesses: Most witnesses and evidence are located in Ecuador and subject to the process of Ecuadorian courts, but the same information is beyond this Court's compulsory power.[19] The same is true for witnesses and evidence located in Peru.

[19] In litigation in Ecuador, plaintiffs could obtain discovery through the court from Texaco, the Government, Petroecuador, and other

Thus, this factor favors dismissal.[20] In addition, plaintiffs already have Texaco's documents, interrogatory responses, and deposition testimony relevant to their allegation that Texaco operated the Consortium facilities in Ecuador.

(c) Cost of Obtaining Attendance of Witnesses: Litigation costs would be substantially less in Ecuador or Peru. Plaintiffs and other witnesses would be obliged to travel to New York for trial to prove or disprove personal injury and property claims. This expense and inconvenience during both the discovery and trial stages would be avoided by litigation in Ecuador or Peru. *See Allstate Life Ins. Co. v. Linter Group Ltd.*, 994

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potentially responsible third parties in Ecuador. *See* App. 10 (Ponce y Carbo) ¶18. In addition, letters rogatory are available to Ecuadorian courts to facilitate the obtaining of evidence and information located abroad. *Id.* ¶17; *Ciba-Geigy*, 691 So.2d at 1119, 1120 ("there is a proven procedure to secure documentation of evidence located in the United States . . . . There is no challenge to the proposition that an Ecuadorian court can order the production of documents from parties before it"). By contrast, neither the Republic nor Petroecuador are subject to discovery in U.S. litigation, and innumerable other witnesses and evidence also are beyond reach.

Voluntary offers to cooperate in discovery are no substitute for a court's power to compel discovery and oversee full compliance. This is particularly true when the cooperating parties are asserted to be liable for all or a significant portion of the alleged injuries and thus might be reluctant to provide evidence against their own interests. Here, the Republic and Petroecuador refuse to be bound by this Court's orders. *See* App. 17.

[20] *See Fitzgerald v. Texaco Inc.*, 521 F.2d 448, 541-52 (2d Cir. 1975) (affirming dismissal on forum non conveniens grounds where court had no subpoena power over witnesses); *Allstate Life Ins.* Co., 994 F.2d at 1001 (dismissing on forum non conveniens grounds, in part, because officers, directors and other employees of crucial non-party were beyond subpoena power of the court); Doe *v. Hyland Therapeutics* Div., 807 F. Supp. at 1126 ("it is of considerable importance that litigation in New York would deprive defendants of compulsory process for substantial evidence in Ireland in the control of third parties"); *Feinstein*, 1998 WL 458060 at *5 (dismissing on forum non conveniens grounds in part because significant evidence was in the hands of Antiguan government officials, "none of whom are subject to compulsory process in this jurisdiction"); *Delgado*, 890 F. Supp. at 1367 (same).

F.2d 996, 1001 (2d Cir. 1993) (dismissing action in part because of prohibitive cost of bringing witnesses to U.S.).

(d) View of the Premises: Any investigation, sampling, testing or viewing of site-specific environmental damage claims, as required here, could occur only in Ecuador and Peru. App. 10 (Ponce y Carbo) ¶17; App. 1 (King Aff.) ¶¶30-31. This is important because plaintiffs claim damage to land and water throughout the Oriente and in Peru, including continuing damage from Petroecuador's and other companies' operations. *Aguinda* Compl. ¶¶40-50; *Jota* Compl. ¶¶41-51; App. 20 (plaintiffs' response to interrogatory no. 1); *supra* nn.4, 17; *Proyectos Orchimex de Costa Rica*, 896 F. Supp. at 1202 (crop fungicide case dismissed on forum non conveniens grounds because costs associated with sampling, testing and analysis of the soil would be significantly less in foreign forum). By contrast, U.S. litigation would preclude essential site visits. *Blanco*, 997 F.2d 974, 975 and 982(2d Cir. 1993) (affirming forum non conveniens dismissal in part because view of premises in Venezuela was necessary).

(e) All other practical problems at trial: A defendant's inability to implead non-parties weighs heavily in favor of dismissal.[21] Despite its pivotal role in the activities at issue, the Government has made clear

[21] *See Piper Aircraft v. Reyno*, 454 U.S. at 259 ("inability to implead potential third-party defendants clearly supported holding the trial in Scotland"); *Guidi*, 1997 WL 411469 at *4 ("the 'inability to implead third party defendants is a factor weighing against the retention of jurisdiction'"); *Doe v. Hyland Therapeutics* Div., 807 F. Supp. at 1126 ("It is well established that inability to implead possible third party defendants is a factor weighing against the retention of jurisdiction [citations omitted]"); *Kilvert v. Tambrands Inc.*, 906 F. Supp. 790, 796 (S.D.N.Y. 1995)("lack of jurisdiction over a party directly involved in production and distribution . . . is a factor strongly favoring dismissal").

its unwillingness to participate in these cases or be bound by this Court's Orders. Both the Government and Petroecuador, however, are subject to suit and have been sued in Ecuador for similar claims. For example, an Ecuadorian court ordered the joinder of the Republic and Petroecuador as defendants in one municipality's lawsuit against TexPet. App. 13 (Callejas) ¶2. *See Polanco*, 941 F. Supp. at 1516, 1528; *Doe v. Hyland Therapeutic Div.*, 807 F. Supp. at 1126 ("the convenience of resolving all claims in one court in Ireland is another consideration mitigating in favor of dismissal [citations omitted]").

Indeed, it is doubtful that a trial here could provide Texaco with due process given Ecuador's and Petroecuador's preeminence in the activities at issue, including Petroecuador's control of post-Consortium activities in the Oriente. *Abiaad v. General Motors*, 538 F. Supp. at 543 ("Of particular concern to the court as well is the potential unfairness to the defendant of having to defend a products liability action with regard to a car over which it had no control once sold, in the face of the strong possibility that it would be unable to implead as third party defendants others whose own control may have contributed to or caused the accident.").

4. The *Gilbert* Public Interest Factors Favor Dismissal

(a) Local Interest in the Controversy

(i) The Interests of Ecuador and Peru: Ecuador's and Peru's interests far outweigh any interest this Court may have in adjudicating these disputes.

Ecuador's interests are obvious and substantial because plaintiffs' claims concern that nation's lands, people, environment, laws, national oil company, and its oil field practices today. Similarly, Peru's interests in *Jota* are significant to the extent that case involves Peru's

lands, environment and residents. *See, e.g.*, *Feinstein*, 1998 WL 458060 at *6 (public interest factors weigh in favor of dismissal where a suit "'raise[s] wider issues significantly touching' the interest of the foreign forum or its citizens"). There is a strong public interest in resolving disputes at their origin, particularly claims alleging injury to land. *See Gilbert*, 330 U.S. at 509 ("There is a local interest in having localized controversies decided at home"); *Immobleria*, 634 F. Supp. at 785 (S.D. Fla. 1986) (dismissing in favor of litigation in

Ecuador, holding that a cause of action involving property in Ecuador "is absolutely a matter of local interest").[22]

[22] Federal courts have long recognized that cases involving foreign lands implicate local interests and thus should be resolved in foreign courts. A separate jurisdictional doctrine, known as the Local Action Doctrine, holds that trespass and nuisance claims, such as plaintiffs assert here, should be brought where the property is located. *Pasos v. Pan American Airways, Inc.*, 229 F.2d 271 (2d Cir. 1956) (dismissing lawsuit involving land in Nicaragua for lack of jurisdiction under Local Action Doctrine). The Local Action Doctrine applies particularly to actions involving foreign lands. *See Restatement (Third) of Foreign Relations Law of the United States*, §602 (1987) (states that have abolished the Local Action Doctrine should still refrain from entertaining actions involving property located in a foreign country).

Texaco previously filed a motion to dismiss based on the Local

Action Doctrine, which this Court did not reach when it dismissed these cases on other grounds. *See* Texaco Inc's Memorandum in Support of Motion to Dismiss, dated January 5, 1996, at pp. 40-42 (Dkt. 102).

Plaintiffs argued previously that this Court has an interest in adjudicating this dispute because tortious conduct allegedly emanated from the United States. Ecuador's interests, however, outweigh any interest New York may have in this case given the Government's role in encouraging, regulating, and conducting past Consortium activities, and in continuing to set standards today for activities essential to its economy. *See Guimond v. Wyndham Hotels* & Resorts, No. 95 Civ. 0428, 1996 WL 281959, at *4 (S.D.N.Y. May 29, 1996) (dismissing to Jamaica where accident within its borders concerned an industry essential to its economy); App. 14 (Bermeo) ¶¶3-5 (oil provides nearly 50% of Ecuador's annual budget). *See also Patrickson v. Dole Food Co.* (App. 25) at 58-59 (finding Ecuador's local interests predominate over Hawaii's and United States' interest despite plaintiffs' allegations that defendants manufactured, formulated and sold pesticides from Hawaii).

Ecuador's courts also have an interest in setting their own negligence standards. The standards applicable in a New York forum are not necessarily relevant in foreign forums, as numerous federal courts have held. Equally applicable here is Judge Conner's reasoning in *Doe v. Hyland Therapeutics Div.*, 807 F. Supp. at 1129-30 (S.D.N.Y. 1992), dismissing on forum non conveniens grounds product liability actions alleging negligent collection, manufacturing, processing, labeling, marketing, promotion, distribution, and sale of HIV-contaminated blood products by companies in the U.S. Rejecting the argument that U.S. courts should regulate U.S. conduct resulting in "the flow of defective products into the stream of world commerce," Judge Conner wrote:

> We are ill-equipped to enunciate the optimal standards of safety or care for products sold in distant markets, and ***thus***

choose to refrain from imposing our determination of what constitutes appropriate behavior to circumstances with which we are not familiar. While imposing our presumably more stringent standards to deter tortious conduct within our borders could afford a higher degree of protection to the world community, ***such an approach would also ignore the unique significance of the foreign forum's interest in implementing its own risk-benefit analysis, informed by its knowledge of its community's competing needs, values, and concerns.*** (emphasis added).[23]

(ii) <u>Plaintiffs' ATCA Argument</u>: Plaintiffs have contended previously that their ATCA claim gives this Court a dispositive interest in hearing this case, and thus precludes a forum non conveniens dismissal. They are wrong for several reasons, whether or not plaintiffs' environmental

[23] *See also Abiaad v. General Motors Corp.*, 538 F. Supp. at 543 ("The standards applicable in Pennsylvania and the United States simply have no relevance in Abu Dhabi. The balance of risks and benefits inherent in any products liability and negligence analysis is more properly determined by the locality in which they are to apply, for questions of the degree of protection from injury to be extended, and consequences of the liability to be imposed are matters of intense local concern."); *Doe v. Hyland Therapeutics Div.*, 807 F. Supp. at 1129-30 (public interest factors required dismissal in part because of the "foreign forum's interest in implementing its own risk-benefit analysis, informed by its knowledge of its community's competing needs, values, and concerns"); *In re Silicone Gel Breast Implants Products Liability Litigation*, 887 F. Supp. at 1477 (dismissing breast implant litigation on forum non conveniens grounds in part because foreign governments have a "significant interest" "in resolving claims relating to implantations performed in their jurisdiction, as well as in administering their own health-care systems"); *Polanco*, 941 F. Supp. at 1528 (D. Minn. 1996)("Guatemala's interest in setting the standards by which products manufactured there will be judged permeates this entire case [citations omitted]. . . . Perhaps Guatemala prefers economic growth to tort compensation of individuals. The Court does not know, and will not presume to decide for Guatemala where its interests lie. That choice is for Guatemalans.")

claims state a claim for relief under the "law of nations" (which they do not -- *see infra*).[24]

First, the forum non conveniens doctrine applies to actions brought under a federal statute unless that statute mandates venue in federal district courts. *See Creative Technology, Ltd. v. Aztech System PTE, Ltd*, 61 F.3d 696, 699-700 (9th Cir. 1995); Moore's *Federal Practice* 3d, § 111.76. The ATCA contains no such mandatory venue provision. Rather, it contains a general venue provision, providing that federal courts "shall have original jurisdiction" of actions under the statute. *See* 28 U.S.C. §1350 (1998). This language does not divest federal courts of their discretion to dismiss ATCA cases on venue or forum non conveniens

[24] The ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Plaintiffs do not claim a treaty violation, *Aguinda v. Texaco* Inc., No. 93 Civ. 7527, 1994 WL 142006 at *6 (S.D.N.Y. April 11, 1994) ("No violation of a treaty has been alleged"). Instead, they claim a breach of "the law of nations" without citing any specific international environmental principals allegedly violated. *See Aguinda* Compl. ¶86; *Jota* Compl. ¶91.

grounds. *See, e.g., Gulf Oil v. Gilbert*, 330 U.S. at 507 (court may dismiss on forum non conveniens grounds "even when jurisdiction is authorized by the letter of a general venue statute"); *Creative Technology Ltd.*, 61 F.3d at 700. Our research has uncovered no case holding that an ATCA claim vitiates the forum non conveniens doctrine.

To the contrary, federal courts have held the reverse.[25] They continue to weigh the *Gilbert* factors without regard to the inclusion of an ATCA claim, treating the ATCA claim as simply one element of the overall balancing analysis. One consideration in cases alleging an ATCA violation is whether a foreign plaintiff is subject to personal danger by proceeding in his home forum. *See, e.g., Cabiri, supra*. Past and ongoing litigation in Ecuador against Petroecuador, TexPet, and other companies provide compelling evidence that plaintiffs confront no risk there. *See* App. 15 (Perez) ¶4; App. 13 (Callejas) ¶5. Over the history of these cases, plaintiffs have claimed popular support from various government officials, past and current Attorney Generals, members of Ecuador's Congress, and indigenous groups.

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[25] *See, e.g., In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 500 (9th Cir. 1992) ("Such limitations as venue and the doctrine of forum non conveniens are available in § 1350 cases as in any other"); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (forum non conveniens is a "critical issue" on remand); *see also Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078,1082-87 (S.D. Fla. 1997) (while plaintiff alleged an ATCA claim, the court found "defendants easily bear their burden as to the balance of public and private interests;" court retained jurisdiction because Bolivia was inadequate forum and not because of ATCA claim); *Cabiri v. Asahie-Gyimah*, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996) (weighing *Gilbert* factors, retaining jurisdiction in part because Ghana was not an adequate forum). *See also Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) (noting that the U.S. government's "Statement of Interest" concerning the case "suggests the general importance of considering the doctrine of forum non conveniens").

Second, the Second Circuit recently held that it does not consider the United States' interest in applying its own laws to be a "determinative factor" in the forum non conveniens analysis.[26] *See also*

[26] *See Capital Currency Exchange, N.V. v. National Westminster Bank Plc.*, 155 F.3d 603, 611 (2d Cir. 1998) (dismissing Sherman Act case, noting "we have never held that the United States' interest in applying its laws is a determinative factor to be considered in weighing convenience"); *Alfadda v. Fenn*, 159 F.3d 41, 46 (2d Cir. 1998) (dismissing RICO case, rejecting plaintiffs' arguments "that the United States has a significant interest in applying RICO and securities laws to international transactions" and "that the United States' interest in applying its own securities and RICO laws . . . made the Southern District a more convenient forum"); *see also Allstate Life Ins. Co.*, 994 F.2d at 1002 ("While appellants are correct in asserting that United States courts have an interest in enforcing United States securities laws, this alone does not prohibit them from dismissing a securities action on the ground of *forum non conveniens*" [citations omitted].)

Piper Aircraft, 454 U.S. at 260-261 (rejecting as "insignificant" the "incremental deterrence that would be gained if this trial were held in an American court").

Third, plaintiffs' ATCA claim, which they pled as their eighth count, affords no special remedy or relief not already available through their other claims. Instead, it purports to provide federal question jurisdiction in addition to diversity jurisdiction, plus an alternate cause of action for alleged personal injuries and property damage. Both Ecuador and Peru, however, provide analogous personal injury and property damage causes of action for which other plaintiffs have recovered in the past. *See supra* at Part III.E. They can litigate the essential subject matter of their dispute in Ecuador or Peru. *Capital Currency*, 155 F.3d at 609-11; *see supra* Part IV.A.1 and n.11 (cause of action and litigation procedures in alternative forum need not be identical); *PT United Can Company*, 138 F.3d at 74 (same).

Finally, serious questions exist regarding the ATCA's applicability in any event, although the Court need not decide this merits issue in this jurisdictional context because the forum non conveniens doctrine warrants dismissals irrespective of the statute's questionable relevance.[27] Plaintiffs have specified no "decisions made by Texaco within the United States," *Jota*, 157 F.3d at 159, that purportedly violated the "law of nations." Rather, their ATCA claim relates to the Consortium's alleged oil field practices in Ecuador. Even assuming those practices were appropriately attributable to Texaco (which is not the

[27] Texaco previously moved to dismiss plaintiffs' ATCA claim pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. This Court chose not to reach that merits issue when it dismissed these cases on jurisdictional grounds, and it need not do so now for the same reason.

case), the alleged oil field practices do not violate the "law of nations" because there is no universal, definable, or obligatory standard for related environmental practices. *Beanal v. Freeport-McMoran, Inc.*, 969 F.Supp. 362, 370 (E.D. La. 1997), quoting *Filartiga v. Pena-Irala*, 630 F.2d at 876, 881 (2d Cir. 1980)(to be recognized as an international tort under § 1350, the alleged violation must be definable, obligatory and universally condemned). Environmental debates rage today among developed and underdeveloped nations and even among competing constituencies within those nations. What some nations prohibit, others encourage, and environmental priorities vary widely. Ecuador, in fact, continues to oversee and permit its own national oil company today to pursue the challenged practices, according to plaintiffs' authority. *See supra* nn. 4,6,17.

No case holds that the environmental wrongs alleged by plaintiffs violate the "law of nations." To the contrary, one federal district court recently dismissed similar environmental claims against a U.S. corporation relating to mining operations in Indonesia for failure to state a violation of the "law of nations" under the ATCA. *See Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 382-84 (E.D. La. 1997); *see also Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991) (complaint based upon environmental contamination failed to allege facts constituting a violation of the law of nations).

In addition, only governmental entities, not private corporations, could be found liable for violating such environmental principles under the ATCA absent a specific treaty, and plaintiffs claim no treaty violation. *See supra* n.24; *Beanal*, 969 F.Supp. at 384 ("A non-state corporation could be bound to such principles by treaty, but not as a

matter of international customary law . . . . Even assuming for purposes of this motion that Beanal's allegations are true, Freeport's alleged policies are corporate policies only and, however destructive, do not constitute torts in violation of the law of nations"); *Kadic*, 70 F.3d at 244 (only genocide and war crimes do not require state action).[28]

In summary, this Court should decline plaintiffs' invitation to find, in the face of contrary authority and global debates on environmental issues, that the ATCA applies here, particularly when the forum non conveniens doctrine warrants jurisdictional dismissals in any event.

[28] Plaintiffs' Complaints do not allege that Texaco is a state actor, and "[t]he facts forming a basis for state action must be discernible from the face of the complaint." *Beanal*, 969 F. Supp. at 374.

(b) Administrative Difficulties and Congested Local Docket: This Court needs no reminder that this District remains one of the most congested litigation centers, which Ecuador's courts are not. *See Red Rock Holdings, Ltd. v. Union Bank Trust Co.*, No. 97 Civ. 5008, 1998 WL 474094 at *10 (S.D.N.Y. Aug. 11, 1998) ("[i]t is 'undeniable, [that the Southern District of New York is] one of the 'congested centers' of litigation referred to in *Gilbert*'"); App. 13 (Callejas) ¶7 (Ecuadorian courts hear actions in a reasonable time period). These cases would continue to demand extensive time and resources from this Court, despite the minimal interest in adjudicating these disputes as compared to Ecuador. It makes more sense for these related claims to be pursued in that forum where all appropriate parties can be heard and sued, particularly when Ecuador's courts are already considering similar claims. App. 13 (Callejas) ¶¶2, 5; App. 15 (Perez) ¶4; *Guidi*, 1997 WL 411469 at *6 ("The strongest public interest favoring suit in Egypt is the fact that two related lawsuits are currently pending there").[29]

[29] *See also Allstate Life Ins.*, 994 F.2d at 1001-02(affirming dismissal of action in recognition of pending proceeding in Australia); *Caspian Investments Ltd. v. Vicom Holdings, Ltd.*, 770 F. Supp. 880 (S.D.N.Y. 1991) (action dismissed in deference to action pending in Ireland); *Continental Time Corp. v. Swiss Credit Bank*, 543 F. Supp. 408 (S.D.N.Y. 1982) (action dismissed due to pending litigation in Switzerland); *Kenner Products Co. v. Societe Fonciere Et Financiere* Agache-Willot, 532 F. Supp. 478 (S.D.N.Y. 1982) (district court deferred

to proceeding commenced in France); *Blanco v. Blanco Indus. de Venezuela, S.A.*, 141 B.R. 25 (S.D.N.Y. 1992), aff'd as modified, 997 F.2d 974 (2d Cir. 1993) (noting parallel action in Venezuela).

(c) Avoidance of Foreign Law: Under New York's choice of law rules, which this Court must apply under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), Ecuador's laws apply to all but plaintiffs' ATCA claims (to which the "law of nations" allegedly applies) because Ecuador has the most significant interest in this dispute.[30] *See Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 319, 618 N.Y.S.2d 609, 613, 642 N.E.2d 1065, 1069 (1994) ("Under interest analysis, controlling effect must be given to the law of the jurisdiction which 'has the greatest concern with the specific issue raised in the litigation'"); *Doe v. Hyland Therapeutics Div.*, 807 F. Supp. at 1130 & n.16. Therefore, Ecuador's courts are best equipped to adjudicate plaintiffs' claims.[31]

(d) Imposition of Jury Duty on New York Residents: Where New York residents have little or no relationship to the controversy, dismissal on forum non conveniens grounds is appropriate. Here, dismissal is appropriate because New York residents have a minimal interest as compared to Ecuador. *See Feinstein*, 1998 WL 458060 at *6 ("the citizens of New York should not have the burden of serving as jurors in a case

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[30] Even assuming Peruvian law applies to *Jota*, Peru's or Ecuador's courts, rather than this Court, would be the more appropriate forum to apply either Peruvian or Ecuadorian law, both of which use a similar civil code based upon Roman law. *See supra* at Part III.F.

[31] *See, e.g., Guidi*, 1997 WL 411469 at *6 (dismissing on forum non conveniens grounds in part because Egyptian law would likely apply, and Egyptian courts have a strong interest in supervising the application of Egyptian law"); *Beekmans v. J.P. Morgan Co.*, 945 F. Supp. 90, 94 (S.D.N.Y. 1996) ("Dutch courts are far better situated to apply and interpret Dutch law"); *Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 967 (2d Cir. 1980) (complex case involving Belgian law dismissed so it could proceed in Belgium); *Sibaja v. Dow Chemical Corp.*, 757 F.2d 1215, 1217 n.5 (11th Cir. 1985) (retaining jurisdiction "would force the Court to conduct a complex exercise in comparative law and consider a foreign law with which the Court is not familiar and which is in a foreign language. The avoidance of such comparisons is one of the objectives of the doctrine of forum non conveniens").

with so little relevance to this jurisdiction"); *Alfadda*, 159 F.3d at 46 ("The interest in protecting jurors from sitting on cases with no relevance to their own community weighs heavily in favor of France").

5. The Relevance of *Sequihua*: The *Gilbert* factors and case law overwhelmingly favor dismissals independently of Chief Judge Black's decision in *Sequihua v. Texaco Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994). Nevertheless, *Sequihua* is clearly relevant authority, and the similarities are striking. As here, plaintiffs in *Sequihua* attacked the same Consortium activities in the Oriente and sought certification of a class of Oriente residents alleging personal injuries and environmental damage. As here, Texaco was a defendant, and plaintiffs sought damages, medical monitoring, and equitable relief. As here, the private interest factors favored dismissal because all plaintiffs resided in Ecuador; all medical records were in Ecuador; a view of the premises was possible only in Ecuador; and the subject land, air and water were in Ecuador. *Id.* at 63; and App. 28 (*Sequihua* Complaint). In addition, the public interest factors favored dismissal because Ecuador has a substantial interest in having controversies regarding its air, land and water resolved in Ecuador, and Ecuador's Government had a prominent role in the activities at issue. 847 F. Supp. at 63.

Plaintiffs' proffered distinctions between these cases and *Sequihua* do not change the analysis. They argue, first, that evidence of Texaco's decision-making may be located in the U.S., but this argument ignores essential elements of proof, the overwhelming weight of the evidence in the foreign forum, and plaintiffs' significant U.S. discovery to date. *See supra* Part IV.A.3(a)(iii), and nn.1,18. Likewise, plaintiffs' inclusion of an ATCA claim as a supplemental count does not preclude a

forum non conveniens dismissal, whether or not plaintiffs' environmental allegations state a claim for relief under the ATCA. *See supra* Part IV.A.4(a)(ii). *Sequihua* remains highly persuasive authority.

B. ALTERNATIVELY, THIS COURT SHOULD DISMISS PLAINTIFFS' COMPLAINTS ON INTERNATIONAL COMITY: International comity principles provide an alternate basis for dismissal if this Court does not dismiss on forum non conveniens grounds. *See Patrickson v. Dole Food Co.* (App. 25) at 60, n.10 (court found it unnecessary to address defendants' comity arguments because the forum non conveniens doctrine required dismissal).

The comity doctrine is a rule of "'practice, convenience, and expediency' rather than of law." *Pravin Banker Assocs. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997). It encourages federal courts to defer to the predominant interests of foreign nations and their tribunals in consideration of their legal, judicial, legislative, and administrative system of handling disputes when doing so would not prejudice U.S. interests. *Id. See, e.g., Emory v. Grenough*, 3 U.S. 369, 370 (1797); *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). In effect, comity permits judicial restraint in cases having strong foreign elements or relating to "matters concerning actions of the foreign state taken within or with respect to its own territory." *Jota*, 157 F.3d at 160.

In determining whether a comity dismissal is appropriate, courts in the Second Circuit weigh the factors listed in *Timberlane Lumber Co. v. Bank of America Nat'l Trust and Savings Ass'n*, 749 F.2d 1378 (9th Cir. 1984).[32] *See Trugman-Nash, Inc. v. New Zealand Dairy Bd., Milk Products*

[32] The *Timberlane* factors include, *inter alia*,: (1) "The degree of conflict with foreign law or policy;" (2) "the relative significance of effects on the United States as compared with those elsewhere;" and (3) "the relative importance to the violations charged of conduct within

Holdings (North America) Inc., 954 F. Supp. 733, 737 (S.D.N.Y. 1997) (finding *Timberlane* factors constitute controlling law in the Second Circuit). *See also* App. 30 (Restatement (Third) of the Foreign Relations Laws of the United States, §403(3)), listing comity factors considered by the *Sequihua* court, 847 F. Supp. at 63 ("Indeed, none of the factors favor the exercise of jurisdiction"); *Torres v. Southern Peru Copper*, 965 F. Supp. at 908-09 (S.D. Tex. 1996) (dismissing on comity and forum non conveniens grounds in favor of litigation in Peru). These factors favor dismissal of *Aguinda* and *Jota*.

1. Ecuador's Official Position Regarding These Lawsuits: Ambassador Baki's November 11, 1998 letter to the Court unambiguously states the Republic's current position. Communicating through its authorized representative, the Republic refuses "under any circumstance to waive its sovereign immunity or subject itself to rulings by Courts in the United States." *See* App. 17; *Jota*, 157 F.3d at 163. (Ecuador's Ambassador, not its Attorney General, "represent[s] the State's position before foreign courts").

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the United States as compared with conduct abroad." *Timberlane*, 749 F.2d at 1384-85.

In view of Ecuador's refusal, this Court can neither dictate Ecuador's environmental practices nor order Petroecuador to halt its current practices. *See supra* n.4. But even apart from injunctive relief, the basic determination of liability necessarily impacts comity and the *Timberlane* factors reviewed below. *Sequihua*, 847 F. Supp. at 62-63 ("[p]laintiffs' claims of nuisance and for injunctive relief require them as part of their *prima facie* case to challenge the policies and regulations of Ecuador....").[33] These cases present far more than private disputes among private parties with the Government and Petroecuador looking on as disinterested bystanders.

2. The *Timberlane* Factors Favor Dismissals

(a) The Degree of Conflict with Foreign Law or Policy: Every nation has "permanent sovereignty" over its natural resources. *See International Ass'n of Machinists and Aerospace Workers v. OPEC*, 477 F. Supp. 553, 567

[33] *Pravin Bankers* Assocs., 109 F.3d at 854 ("Under the principles of international comity, United States courts ordinarily refuse to review acts of foreign governments...."); *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir. 1956) (dismissing claim because injunction would be "fraught with possibilities of discord and conflict with the authorities of another country"), *cert. denied*, 352 U.S. 871 (1956); *Rivendell Forest Prods., Ltd. v. Canadian Forest Prods., Ltd.*, 810 F. Supp. 1116, 1119 (D. Colo. 1993) (dismissed on comity grounds because an award may require defendants to "change established practices in Canada which may conflict with the policies of the Canadian federal and provincial governments").

(C.D. Cal. 1979) ("The United Nations, with concurrence of the United States, has repeatedly recognized the principle that a sovereign state has the sole power to control its natural resources"), *aff'd*, 649 F.2d 1354 (9th Cir. 1981). Under this principle, only Ecuador may legislate and enforce laws and policies relating to its lands, resources, oil industry, environment, and economy without outside interference.

The Republic, through Petroecuador, owned the majority of the Consortium, and currently owns all former Consortium facilities. App. 2 (TexPet Aff.) ¶¶7-10. The Republic regulated, monitored, and funded all aspects of the Consortium's operations in the past, and it alone regulates oil field practices and other development in the Oriente today. It approved the Consortium's operations and pipeline design, and its inspectors monitored the Consortium's on-site practices, including environmental matters. App. 4 (Executive Decree No. 925) ¶¶ 18, 21-22; App. 3 (Benton) at 206. No operations proceeded then and nothing happens today without the Government's approval. *Id.* at 205-06. Ecuador's Constitution imposes a "duty" on the Government to safeguard its own environment. How Ecuador chooses to fulfill that duty in the context of its own economic and environmental priorities is an issue for that nation and its courts to decide. App. 14 (Bermeo Aff.) ¶10.

Plaintiffs' claims, therefore, necessarily require an examination of Ecuador's laws and policies and Petroecuador's practices from at least the mid-1970's to the present. By way of example, plaintiffs seek damages from Texaco for the Consortium's clearing of forest lands and for causing changes to the Oriente's environment and the indigenous population's "diet, culture, and lifestyle," yet the Republic continues to encourage and subsidize activities triggering these changes -- as

plaintiffs' own authority acknowledges. *See supra* n.6; *Aguinda* Compl. ¶20; *Jota* Compl. ¶9. *See also*, App. 14 (Bermeo Aff.) ¶¶4-9. Petroecuador also pursues oil field practices today that plaintiffs have described as "clearly unacceptable" and seek "to halt" through this litigation. *See supra* nn. 4,17. Plaintiffs also seek to "re-engineer" Petroecuador's pipeline, but Ecuador approved the pipeline's design specifications before its construction and has owned and maintained that pipeline for over a decade. *See supra* at Part III.C. Apart from their separate indispensable party problem, the relief plaintiffs request would require this Court to grant them a judgment that runs counter to the government's stated policies and practices as well as its binding settlement agreement with TexPet relating to Ecuador's own lands and properties.

In sum, it is impossible to resolve these disputes without considering "actions of the foreign state taken within or with respect to its own territory." *Jota*, 157 F.3d at 160. For that reason, *Aguinda* and *Jota* should be re-filed in Ecuador where all appropriate parties can be sued, courts are empowered to grant the requested relief, and plaintiffs' claims can be heard under Ecuador's laws based on a record that cannot be developed in the U.S.

(b) The relative significance of effects on the United States as compared with those elsewhere: Plaintiffs' own Complaints make clear that the alleged effects are unquestionably greater in Ecuador and Peru than in the U.S. *See Aguinda* Compl. ¶39 *et seq.*; *Jota* Compl. ¶41 *et seq.* Plaintiffs' Complaints do not even allege effects on U.S. persons, property or commerce.

(c) The relative importance to the violations charged of conduct within the United States as compared with conduct abroad: The record is overwhelming that Texaco had no operational responsibilities here or elsewhere. *See supra* Part III.B. By comparison, the conduct in Ecuador, involving three decades of government-regulated Consortium operations in the Oriente in addition to continuing operations by Petroecuador today, forms the essence of plaintiffs' claims.

(**d) Other *Timberlane* factors**: The remaining *Timberlane* factors also favor a comity dismissal. They include the nationality of foreign plaintiffs, the unenforceability in Ecuador and Peru of a U.S. court order granting plaintiffs' requested equitable relief, the lack of harm to U.S. commerce, and the pendency of similar litigation in Ecuador. *Timberlane*, 749 F.2d at 1384-85.

C. TEXACO'S ADDITIONAL GROUNDS FOR DISMISSAL: In the interest of judicial economy, Texaco is only renewing its motions to dismiss on forum non conveniens and comity grounds at this time. A case-dispositive ruling on either ground would avoid the necessity of renewing Texaco's other motions that the Court did not reach previously, or, in the case of Texaco's indispensable party motion, that the Second Circuit considered premature.

Nevertheless, plaintiffs' Complaints suffer from other jurisdictional and substantive defects reviewed in Texaco's previous motions to dismiss, i.e., (i) lack of subject matter jurisdiction under the Local Action Doctrine; (ii) expiration of the statute of limitations; and (iii) failure to state a claim upon which relief can be granted as to plaintiffs' ATCA and civil conspiracy claims. Texaco respectfully

requests the opportunity to renew those motions if this Court denies these forum non conveniens and comity motions.

In addition, plaintiffs have made no effort to refashion their equitable relief demands to change Petroecuador's and the Government's status as indispensable parties. *Jota*, 157 F.3d at 161-62. Accordingly, they still confront the indispensable party problems addressed by this Court previously. If this Court dismisses these cases on forum non conveniens or comity grounds, this Court need not address whether the prejudice to Texaco from plaintiffs' failure to join these parties can be "lessened or avoided" by "the shaping of relief, or other measures." *Id.*; Fed. R. Civ. P. 19(b). The necessity of reshaping could be avoided entirely or, in any event, significantly reduced in litigation in Ecuador where all parties can be sued and whose courts provide remedies similar to equitable relief in addition to monetary damages. *See* App. 10 (Ponce y Carbo) ¶¶12,14.

V. CONCLUSION

These lawsuits are "quintessential case[s] for the application of the forum non conveniens doctrine" by every reasonable measurement, based upon the record and case law. *Sussman v. Bank of Israel*, 990 F.2d 71, 72 (2d Cir. 1993). Texaco, therefore, requests dismissals of both actions on forum non conveniens grounds alone.

If this Court does not dismiss on forum non conveniens grounds, then Texaco requests dismissals based on international comity in the alternative.

Dated: New York, New York
January 11, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of Texaco Inc.'s Motion to Dismiss and supporting Appendix and Memorandum of Law to be served upon the following by overnight delivery:

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This 11th day of January, 1999.

_____
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