

instrumental in the decisions of an Ecuadorian-based state-sponsored and state-regulated oil consortium to extract Ecuadorian oil in ways that contaminated Ecuadorian lands and rivers and caused injury to Ecuadorian inhabitants and their Peruvian neighbors – have everything to do with Ecuador and very little to do with the United States. Moreover, the notion that a New York jury (which plaintiffs have demanded) applying Ecuadorian law (which likely governs the claims here made) could meaningfully assess what occurred in the Amazonian rainforests of Ecuador in the late 1960's and early 1970's is problematic on its face.

Very recent events, however, have reviewed lingering questions about the ability of the Ecuadorian (and Peruvian) courts to dispense independent, impartial justice in these cases. This issue was first raised, somewhat equivocally, in plaintiffs' opposition papers to defendant's original motion to dismiss. See, Pls.' Mem. In Opp. To Texaco, Inc.'s Mots. To Dismiss, dated February 20, 1996 ("Pl. 1996 Mem.") at 40-41. Noting that a U.S. federal court in 1978 had found Ecuador to be an inadequate alternative forum partly because of the military's control of the judiciary, see Phoenix Canada Oil Co. v. Texaco, Inc., 78 F.R.D. 445, 455-56 (D. Del. 1978), plaintiffs argued that "[e]ven since the military junta relinquished power in 1979, corruption has tainted the Ecuadorian judiciary." Pls.' 1996 Mem. at 40 n.72. Plaintiffs further argued that there was a reasonable possibility that the Ecuadorian military, which is funded directly from oil revenues, would harass the plaintiffs if they attempted to bring these suits in Ecuador. See id. at 38-39.

Subsequently, plaintiffs appeared effectively to abandon these points, relegating them in their appeal to the Second Circuit to suggestions in a footnote that

questions might be raised on these points. Pls.' Br. at 28 n.16, Jota (No. 97-9102), and not mentioning the points at all in their memorandum in opposition to Texaco's instant motion, see Pls.' Mem In. Opp. To Def. Mot. To Dismiss, dated January 11, 1999 ("Pls.' 1999 Mem."). This could hardly have been an oversight, since in the same memorandum plaintiffs attacked the adequacy of the Peruvian alternative forum on the ground, inter alia, that the Peruvian judiciary lacks independence and impartiality. See id. at 12-13. Possibly, however, plaintiffs' decision not to pursue these points may have reflected not only that Ecuador had become a functioning democracy but also that by early 1999, when the instant motion was briefed and argued, the then-current government under President Jamil Mahuad appeared to be taking significant steps toward improving the independence of the judiciary (see infra).

On January 21, 2000, however, a military coup deposed Mr. Mahuad. See, e.g., Ecuador Coup Shifts Control to No. 2 Man, N.Y. Times, Jan. 23, 2000, at 1. While eventually he was replaced by the elected vice-president, Gustavo Noboa Bejarano, see id., the events were widely reported as evidence of a resurgent military involvement in civilian affairs. See, e.g., Ecuador's Coup alerts Region to a Resurgent Military, N.Y. Times, Jan. 30, 2000, at 3. Furthermore, one of the leaders of the coup was a former justice of the Supreme Court of Ecuador. See Ecuador Coup Shifts Control to No. 2 Man, supra.

Shortly before these events, on January 3, 2000, the Second Circuit Court of Appeals rendered a decision in the case of Bridgeway Corp. v. Citibank, ___ F.3d ___, No. 99-7504, 2000 WL 1673 (2d Cir. Jan. 3, 2000), in which it affirmed Judge Chin's conclusion that a judgement of the Supreme Court of Liberia should not be

enforced in the United States because the Liberian judicial system, during the relevant period, was not “a system that . . . provide(s) impartial tribunals or procedures compatible with the requirements of due process.” Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 288 (S.D.N.Y. 1999). In so affirming, the Court of Appeals expressly approved Judge Chin’s heavy reliance on the so-called “Country Reports,” i.e., the annual reports of the U.S. State Department prepared pursuant to statute that undertake to assess, inter alia, whether the judicial institutions of various nations provide at least a modicum of fundamental fairness to litigants. See Bridgeway, 2000 WL 1673, at *6-8.

The combination of the foregoing circumstances has led this Court, sua sponte, to consult the latest available Country Report for Ecuador, viz., U.S. Department of State, Ecuador Country Report on Human Rights Practices for 1998, dated February 26, 1999, (published after the briefing on the instant motion).¹ A primary conclusion of that report is that “The most fundamental human rights abuse [in Ecuador] stems from shortcomings in [its] politicized, inefficient, and corrupt legal and judicial system.” See id. at 1/11. While the evidence set forth in the report in support of this strong statement largely relates to criminal cases, the Court does not believe that, even in the very different context of the instant lawsuits, it can ignore without further inquiry a statement from a department of the U.S. Government that so fully casts doubt on the independence and impartiality of the principal courts to which the defendant seeks to remit these cases.

¹ The report is available online at www.state.gov/www/global/human_rights/1998_hrp_report/ecuador.html

Moreover, while the 1998 Country Report for Ecuador went on to state that Ecuador is taking important steps to strengthen and depoliticize its judiciary, see id. at 1/11; 5/11, those statements were made against the background of the then-quiet military and did not take account of the recent military coup.

Under these circumstances, this Court – with apologies for the further delays entailed and with full recognition of the caution and deference a United States court must exercise in even approaching the question of the independence and impartiality of a foreign court – is obliged, nonetheless, to reopen the record on the pending motion so as to receive any additional submissions the parties may wish to make regarding whether the courts of Ecuador and/or Peru might reasonably be expected to exercise a modicum of independence and impartiality if these cases were dismissed in contemplation of being refiled in one or both of those forums. Counsel for the respective parties (and for the Government of Ecuador, if it wishes to make a submission on this issue) should arrange to jointly telephone Chambers by no later than February 10, 2000 to discuss with the Court a suitable schedule for such submissions.

SO ORDERED.

Dated: New York, N.Y.
January 31, 2000

JED S. RAKOFF, U.S.D.J.