

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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

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

January 25, 1999

**KING & SPALDING**

191 Peachtree Street, NE  
Atlanta, Georgia 30303  
(404) 572-4600

- and -

1185 Avenue of the Americas  
New York, New York 10036  
(212) 556-2100

*Of Counsel:*

Griffin B. Bell  
George S. Branch  
Daniel J. King (DK6533)  
Edward G. Kehoe (EK2615)  
Richard T. Marooney, Jr. (RM0276)

**KAYE, SCHOLER, FIERMAN,  
HAYS & HANDLER, LLP**

425 Park Avenue  
New York, New York 10022  
(212) 836-8000

*Of Counsel:*

Paul J. Curran (PC9851)  
Milton J. Schubin (MS2834)

**TEXACO INC.**

1111 Bagby  
Houston, Texas 77002  
(713) 752-6026

*Of Counsel:*

Lawrence R. Jerz (LJ0561)  
Assistant General Counsel

TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES.....	ii - iv
I. Summary of Argument.....	1
II. Argument.....	3
A. Ecuador and Peru Provide Adequate Alternative Forums.....	3
1.Law No. 55 Does Not Bar an Alternative Forum in Ecuador .....	3
2.Ecuador Recognizes Tort Claims.....	5
3.Ecuador's Judicial Procedures Do Not Make It "Impossible to Litigate These Tort Actions There" .....	6
4.Ecuadorian and Peruvian Courts Can Compel Discovery .....	8
5.The Absence of Class Action Procedures Does Not Make Ecuador and Peru Inadequate Forums .....	10
6.Ecuador is an Adequate Alternative Forum for the <i>Jota</i> Plaintiffs .....	12
7.Peru Also Provides an Adequate Alternative Forum.....	12
B. The Private Interest Factors Warrant Dismissals.....	14
1.The Treaty of Peace, Friendship, Commerce and Navigation Does Not Require a U.S. Forum .....	14
2.Texaco's Headquarters in New York Does Not Make This Forum More Convenient .....	14
3.The "Principal Tort" Did Not Occur in the United States .....	15
4.Choice of Law Considerations Favor Forum Non Conveniens Dismissals .....	20
5.Texaco Has Not "Decided to Contest Any Possible Negative Ruling" .....	21
6.The Balance of Private Interest Factors Favor Litigation in Ecuador, Not New York .....	22
C. The Public Interest Factors Favor Litigation in Ecuador....	24
D. Plaintiffs' ATCA Claim Does Not Preclude Dismissals.....	25
E. International Comity Provides An Alternate Ground For Dismissal.....	32
III. Conclusion.....	35

**TABLE OF AUTHORITIES**

*Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996) .....32

*Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527, 1994 WL 716025  
(S.D.N.Y. Dec. 17, 1994) .....11

*Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527, 1994 WL 142006  
(S.D.N.Y. Apr. 11, 1994) .....31

*AmChem Products, Inc. V. Windsor*, 521 U.S. 591 (1997) .....11

*Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991) .....29

*Barnes v. The American Tobacco Company*, 161 F.3d 127 (3d Cir. 1998)  
.....11

*Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362 (E.D. La. 1997)  
.....2, 29, 31

*Blanco v. Banco Industrial of Venezuela, S.A.*, 997 F.2d 974 (2d Cir. 1993)  
.....14

*Bolanos v. Gulf Oil Corp.*, 502 F. Supp. 689 (W.D. Pa. 1980), *aff'd*, 681 F.2d  
804 (3d Cir. 1982)) .....7

*Boughton v. Cotter Corp.*, 65 F.3d 823 (10th Cir. 1995) .....11

*Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996) .....25, 27

*Capital Currency Exchange, N.V. v. National Westminster Bank PLC*,  
155 F.3d 603 (2d Cir. 1998) .....26

*Castano v. The American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) .....11

*Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111 (Fla. Dist. Ct. App.  
1997) .....15

*Cruz v. Maritime Co. of Philippines*, 655 F. Supp. 1214  
(S.D.N.Y. 1987) .....5

*Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995) .....*passim*

<i>Doe v. Hyland Therapeutics Division</i> , 807 F. Supp. 1117 (S.D.N.Y. 1992) ...	10
<i>Don King Prods., Inc. v. Haugen</i> , No. 91 Civ. 5554, 1992 WL 58875 (S.D.N.Y. March 13, 1992) .....	9, 28
<i>Eastman Kodak Co. v. Kavlin</i> , 978 F. Supp. 1078 (S.D. Fla. 1997) .....	25, 27
<i>Filartiga v. Pena-Irala</i> , 630 F.2d 876 (2d Cir. 1980) .....	29
<i>Flatow v. Islamic Republic of Iran</i> , 999 F. Supp. 1 (D.D.C. 1998) .....	27
<i>Guidi v. Inter-Continental Hotels</i> , No. 95 Civ. 9006, 1997 WL 411469 (S.D.N.Y. July 18, 1997) .....	7
<i>Gulf Oil v. Gilbert</i> , 330 U.S. 501 (1947) .....	3, 24, 26, 28
<i>In Re Union Carbide Corp. Gas Plant Disaster at Bhopal</i> , 634 F. Supp. 842 (S.D.N.Y. 1986), aff'd as modified, 809 F.2d 195 (2d Cir. 1987) .....	7, 10, 21
<i>In re American Medical Systems, Inc.</i> , 75 F.3d 1069 (6th Cir. 1996) .....	11
<i>In re Estate of Ferdinand Marcos, Human Rights Litigation</i> , 25 F.3d 1467 (9th Cir. 1994) .....	29
<i>In re Rhone-Poulenc Rorer, Inc.</i> , 51 F.3d 1293 (7th Cir. 1995) .....	11
<i>Intercontinental Dictionary Series v. De Gruyter</i> , 822 F. Supp. 662 (C.D. Cal. 1993) .....	28
<i>Ionescu v. E.F. Hutton &amp; Co. (France) S.A.</i> , 465 F. Supp. 139 (S.D.N.Y. 1979)	7
<i>Jota v. Texaco Inc.</i> , 157 F.3d 153 (2d Cir. 1998) .....	2
<i>Kadic v. Karadzic</i> , 70 F.3d 232 (2d Cir. 1996) .....	28
<i>Norsul Oil &amp; Mining Co. v. Texaco Inc.</i> , 641 F. Supp. 1502 (S.D. Fla. 1986) .....	20
<i>Patrickson v. Dole Food Co.</i> Civil Action No. 97-01516 (D. Haw. 1998) .....	<i>passim</i>

<i>Phoenix Canada Oil Co. v. Texaco Inc.</i> , 78 F.R.D. 445 (D. Del. 1978)	20
<i>Piper Aircraft Co. v. Reyno</i> , 454 U.S. 235 (1981)	28
<i>Polanco v. H.B. Fuller Co.</i> , 941 F. Supp. 1512 (D. Minn. 1996)	7
<i>Redland Soccer Club, Inc. v. Dep't of Army of U.S.</i> , 55 F.3d 827 (3d Cir. 1995)	11
<i>Simcox v. McDermott Int'l, Inc.</i> , 152 F.R.D. 689 (S.D. Tex. 1994)	7
<i>Torres v. Southern Peru Copper Corp.</i> , 965 F. Supp. 899 (S.D. Tex. 1996)	12
<i>Transunion Corp. v. PepsiCo., Inc.</i> , 811 F.2d 127 (2d Cir. 1987)	26
<i>United States v. Bestfoods</i> , 118 S.Ct. 1876 (1998)	18, 19
<i>United States v. National City Lines Inc.</i> , 334 U.S. 573 (1948)	26
<i>Xuncax v. Gramajo</i> , 886 F. Supp. 162 (D. Mass. 1995)	29

**STATUTES**

Alien Tort Claims Act, 28 U.S.C. § 1350	<i>passim</i>
Fed. R. Civ. P. 12(b) (6)	28
N.Y.C.P.L.R. § 5301 et seq. (McKinney 1998)	21

**OTHER AUTHORITIES**

Douglas W. Dunham and Eric F. Gladbach, <i>Forum Non Conveniens and Foreign Plaintiffs in the 1990s</i> , 24 Brook. J. Int'l L. 665 (1999)	2
<i>Report to Congress, Management of Wastes from the Exploration, Development, and Production of Crude Oil, Natural Gas, and Geothermal Energy</i> , EPA/530-88-003 (Dec. 1987)	16, 17
Colo. Oil & Gas Comm. Rules & Regs., Series 902.5	17
Wyo. Rules of the Oil and Gas Conservation Comm., Chap. 4	17

*Oil and Gas Exploration and Production Waste Management:  
A Seventeen State Study, (June 1995) .....17*

*Philippe Sands, Principles of Int'l Environmental Law, Volume I, (1995) ..31*

*Restatement (Third) of the Foreign Relations Laws  
of the United States.....30, 31*

## I. Summary of Argument

After years of litigation and three prior rounds of briefing these same issues, plaintiffs' opening brief is most noteworthy for its omissions.

They argue that Ecuador and Peru are inadequate alternative forums without citing the numerous federal court decisions holding the contrary, including this Court's decisions. While claiming that Ecuador "for all practical purposes does not recognize tort claims," (Pl. Br. at 7), they disregard the many tort suits filed there by Ecuadorians, including putative class members, against Texaco Petroleum Company ("TexPet"), Petroecuador, and other companies. Plaintiffs' brief never mentions Petroecuador, let alone its majority and now exclusive ownership and operation of the former Consortium facilities, or its continuing oil field practices today that plaintiffs would have this Court declare a violation of "the law of nations." See *infra* n.14. Nor do they address the impact of Ecuador's "urgent national priority" of colonizing and developing the Oriente, the Government's regulatory oversight of past Consortium activities and Petroecuador's ongoing conduct, or its comprehensive settlement with TexPet and Texaco relating to Government lands and former Consortium facilities. Tx. Br. at 10-12.

While plaintiffs insisted on broad discovery and then obtained more than 71,000 pages of documents from Texaco and its subsidiaries, 1,000 pages of depositions from former Texaco and TexPet employees, and 150 pages of Texaco interrogatory responses devoted to their allegation that Texaco directly operated Consortium facilities, their opening brief all but ignores that discovery. See App. 1 (King Aff.) ¶¶1-17 (describing discovery). They cite no actual evidence of "decisions made by Texaco within the United States," *Jota v. Texaco Inc.*, 157 F.3d 153, 159 (2d

Cir. 1998), to support their invented allegation that "Texaco *directly operated* the oil facilities in Ecuador." *Aguinda* Compl. ¶42 (emphasis added). Instead, they rely upon unsupported attributions of Consortium activities to Texaco in New York and unwarranted inferences drawn from extraneous materials such as EPA and State of Louisiana regulations, patent filings, and the like. See Pl. Br. at 6, nn.3-5.

Plaintiffs' Alien Tort Claims Act ("ATCA") argument never discusses a recent federal district court dismissal of similar environmental tort claims based on the ATCA against another U.S. corporation. *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 382-84 (E.D. La. 1997). Instead, they direct the Court's attention to a state attorney general's advisory opinion in 1907 on a matter unrelated to environmental torts. See Tx. Br. at 38-40; and Pl. Br. at 18.

These and other omissions reviewed below underscore plaintiffs' refusal to come to grips with the fundamental facts of these lawsuits and the long line of legal authorities that support forum non conveniens and comity-based dismissals under even less compelling circumstances than those presented here. See generally Douglas W. Dunham and Eric F. Gladbach, *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, 24 Brook. J. Int'l L. 665 (1999) (discussing clear trend in the 1990's for American courts to dismiss on forum non conveniens grounds tort actions brought by foreign plaintiffs).

## **II. Argument**

Texaco addresses below each of plaintiffs' arguments in their Opening Brief. We have re-grouped their forum non conveniens points to follow the *Gilbert* analytical framework; *i.e.* (i) adequacy of the alternative forum; (ii) review of the private interest factors; and (iii) review of the public interest factors.

**A. Ecuador and Peru Provide Adequate Alternative Forums**

Plaintiffs have demonstrated none of the "rare circumstances" that the case law requires to disprove Ecuador's or Peru's adequacy as alternative forums. See Tx. Br. at 19. Instead, the record proves that Ecuador's and Peru's courts provide adequate forums and analogous causes of action to litigate personal and property injury claims, as other federal courts have held. *Id.* at 13-17; 19-23; nn.8, 9.

**1. Law No. 55 Does Not Bar an Alternative Forum in Ecuador:**

Plaintiffs' discussion of "Law No. 55" is incomplete.<sup>1</sup> Pl. Br. at 1. That law is under attack in Ecuador on multiple grounds, and legislation is pending in Ecuador's Congress to repeal Law No. 55 in any event. See Reply Aff. of Dr. Adolfo Callejas Ribadeneira ("Callejas Reply Aff."), attached as Exhibit 1, ¶12 ("Legislation to revoke Law No. 55 is pending before Ecuador's National Congress"); App. 10 (Ponce y Carbo Aff.) ¶¶20-32; and Decl. of Dr. Jimenez-Carbo ¶7 (noting constitutional attacks on Law No. 55 by jurists and legal scholars in Ecuador); and Tx. Br. at 22, n.14. Furthermore, Law No. 55 has no bearing upon the *Jota* plaintiffs' ability to pursue their claims in Peru, where Law No. 55 would not apply even if it were constitutional and retroactive (which it is not).<sup>2</sup>

As noted in the affidavit of a former Ecuadorian Supreme Court Justice, "[s]everal recent lower court decisions, and at least one appellate court decision, have ruled that Interpretive Law No. 55 does not apply to cases that have been re-filed in Ecuador subsequent to being

---

<sup>1</sup> "Interpretive Law of Articles 27, 28, 29 and 30" (as referred to in Pl.'s Br. at 1) is known as "Law No. 55." See App. 10 (Ponce y Carbo Aff.) ¶20; Decl. of Dr. Jimenez-Carbo ¶7.

<sup>2</sup> Plaintiffs' counsel filed *Aguinda* more than four years (Nov. 1993) and *Jota* more than three years (Dec. 1994) before Law No. 55's publication on January 30, 1998. See App. 10 (Ponce y Carbo Aff.) ¶20; Exh. A to Decl. of Dr. Jimenez-Carbo (noting Law No. 55's date).

dismissed in the United States on forum non conveniens grounds." App. 10 (Ponce y Carbo Aff.) ¶32 (attaching October 13, 1998 appellate court opinion). Other courts in Ecuador have reached different results, including an appellate court decision last July. See Callejas Reply Aff. ¶¶6-11, and Reply Aff. of Dr. Enrique Ponce y Carbo, attached as Exhibit 2 (criticizing July appellate court's opinion). In sum, different appellate courts have reached different decisions and Ecuador's Supreme Court has not resolved the issue of Law No. 55's constitutionality.<sup>3</sup>

In rejecting plaintiffs' Law No. 55 argument last year in favor of litigation in Ecuador, the federal district court in *Patrickson v. Dole Food Co.* held that plaintiffs could "return to this Court and, upon proper motion, the Court will resume jurisdiction over the action as if the action had not been dismissed on forum non conveniens" in the event "the highest court of any foreign country finally affirms the dismissal for lack of jurisdiction of any action commenced by a plaintiff in this action in his home country...." *Patrickson*, App. 25 at 63. Another federal court included a similar provision in its dismissal of that case to Ecuador and other countries. See *Delgado v. Shell Oil Co.*, 890 F.

---

<sup>3</sup> The First Chamber of Ecuador's Supreme Court declined ten days ago to hear an appeal from the July appellate court decision, but its decision did not resolve the applicability of Law No. 55. The First Chamber's action does not constitute an endorsement of Law No. 55's validity or retroactivity under Ecuadorian law. Callejas Reply Aff. ¶¶7-8. In fact, the opinion never mentions Law No. 55. In any event, the First Chamber cannot decide the constitutionality of Ecuadorian laws. Only Ecuador's Constitutional Tribunal may do so, and it has not yet addressed the issue. *Id.* ¶9.

Supp. 1324, 1375 (S.D. Tex. 1995). A similar ruling here would protect plaintiffs while avoiding the necessity of this Court's enmeshing itself in ongoing legal and political questions in Ecuador that its courts and Congress are addressing currently and best able to resolve. (The pending legislation in Ecuador, if enacted, will repeal Law No. 55 and thus make the issue moot.) Such an approach could also avoid the necessity of addressing a separate question posed by Law No. 55; *i.e.* whether a U.S. court's jurisdiction can be manipulated by foreign legislation enacted for the purpose of forcing federal courts to hear suits that clearly belong elsewhere.

In the event of dismissals by this Court, however, plaintiffs must use their best efforts to support the jurisdiction of Ecuador's courts. See *Cruz v. Maritime Co. of Philippines*, 655 F. Supp. 1214, 1215-16 (S.D.N.Y. 1987) (Leval, J.) (refusing to reinstate New York federal court action after plaintiff had procured dismissal of his own suit in the Philippines "to force the U.S. Court to accept jurisdiction").

**2. Ecuador Recognizes Tort Claims:** Extrapolating from the relative infrequency of tort cases on the docket of Ecuador's Supreme Court, plaintiffs infer that Ecuador's trial courts must have "zero knowledge or understanding about the duty relationships between noncontractual parties." Pl. Br. at 7. This inference is unwarranted even under their own questionable methodology, but it is particularly so in light of past and ongoing tort litigation in Ecuador.

They have overlooked: (i) prior tort cases against TexPet, Petroecuador, and other companies in Ecuador resulting in judgments and settlements in favor of plaintiffs in similar personal injury and environmental cases; (ii) the pendency of similar cases against TexPet in Ecuador today; (iii) TexPet's settlements, which plaintiffs' counsel

sought unsuccessfully to enjoin (Dkt. 77), of tort cases filed by various municipalities in the Oriente relating to Consortium operations; and (iv) recent federal court decisions holding that Ecuador's courts provide adequate forums in tort cases. See Tx. Br. at 14-16; and App. 10 (Ponce y Carbo Aff.) ¶14 ("Civil actions for property damage and personal injury are commonly brought by Ecuadorian citizens against corporate entities, including those engaged in the oil business"); and Callejas Reply Aff. ¶¶2-5. In fact, another Oriente resident sued TexPet just this month relating to the former Consortium's operations. *Id.* ¶3, and Exh. "A" (attaching the complaint). This evidence refutes plaintiffs' argument.

**3. Ecuador's Judicial Procedures Do Not Make It "Impossible to Litigate These Tort Actions There":** Plaintiffs claim that a tort case "is simply not prosecutable in Ecuador" (Pl. Br. at 9), but prior judgments and settlements in tort cases in Ecuador prove the contrary.<sup>4</sup> See Tx. Br. at 15-16. While procedural differences exist between Ecuador's civil law rules and the Federal Rules of Civil Procedure, they do not render a civil law forum inadequate.<sup>5</sup> As the court stated in *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512, 1527 (D. Minn. 1996) (quoting *Bolanos v.*

---

<sup>4</sup> The tort cases filed by municipalities against TexPet were resolved by settlements within two years of filing. App. 13 (Callejas Aff.) ¶¶2-3, and Exhs. A-I.

<sup>5</sup> Plaintiffs argue (Pl. Br. at 9) that Ecuador is an inadequate forum because plaintiffs (as opposed to the court) cannot call witnesses and conduct oral cross examination under Ecuador's civil law. Those procedural differences do not make an Ecuadorian court inadequate. See *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 right to present live testimony or cross-examine witnesses does not make Egypt an inadequate forum).

They also claim that Ecuadorian law requires the filing of environmental contamination cases with administrative agencies in lieu of courts. Pl. Br. at 9. Numerous cases against TexPet in the Oriente prove otherwise. See App. 13 (Callejas Aff.) ¶¶1-6 (describing lawsuits) and Exhibits A-I (attaching copies of the complaints and settlements); and Exh. 1 (Callejas Reply Aff.) ¶3 (rebutting Professor Wray's statement).

*Gulf Oil Corp.*, 502 F. Supp. 689 (W.D. Pa. 1980), *aff'd*, 681 F.2d 804 (3d Cir. 1982)):

"We must be careful not to let our justifiable pride in the English common law system... obscure the fact that much of Western Europe and other South American countries besides Guatemala are firmly grounded in the Civil Law tradition [which relies on written submission of evidence, restricts cross-examination, and does not provide a jury trial]."

See also Tx. Br. at 20-21, and nn.11 & 12.<sup>6</sup>

Plaintiffs rely upon the Affidavits of Professor Alberto Wray, Dr. Julio Cesar Trujillo and Dr. Ramiro Larrea Santos, signed in 1994. Pl. Br. at 8-10; and Pl. Exhs. 4 and 5. In 1995, however, the federal district court in *Delgado*, 890 F. Supp. at 1359-60 (S.D. Tex. 1995), dismissed a class action tort case on forum non conveniens grounds in favor of litigation in Ecuador and other countries after reviewing affidavits from Professor Wray and Dr. Trujillo and rejecting their conclusions. (Plaintiffs' brief never cites *Delgado*.) Indeed, this Court previously reviewed these same 1994 affidavits of Dr. Trujillo and Dr. Wray, as well as the same affidavits of Mr. Donziger (Exh. 6), Ms. Shelton (Exh. 24), Ms. Yopez Silva (Exh. 8), Dr. Koons (Exh. 10), Dr.

---

<sup>6</sup> See also *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 634 F. Supp. 842, 867 (S.D.N.Y. 1986) (dismissing action and describing as "imperialism" the idea that an American court should "inflict[] its rules, its standards, and values on a developing nation"), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987); and *Simcox v. McDermott Int'l, Inc.*, 152 F.R.D. 689, 696 (S.D. Tex. 1994) ("[I]t would be the height of arrogance to insist on the 'parochial concept that all disputes must be resolved under our laws and in our courts and that anything short of American justice is inadequate"), quoting *Ionescu v. E.F. Hutton & Co. (France) S.A.*, 465 F. Supp. 139, 146 (S.D.N.Y. 1979).

Bannett (Exh. 13), and General Pazzos (Exh. 14), in connection with the last round of dismissal motions and correctly concluded on that record that Ecuador was an acceptable alternative forum. Nothing has changed to warrant a different result today. To the contrary, federal courts have issued important judicial decisions in the interim, rejecting plaintiffs' forum non conveniens and ATCA arguments.

**4. Ecuadorian and Peruvian Courts Can Compel Discovery:** Plaintiffs are also wrong that discovery is effectively unavailable in Ecuador. Pl. Br. at 13. Under Ecuador's civil law, plaintiffs have the opportunity for pre-trial discovery, including document production, site visits, and other discovery. See App. 10 (Ponce y Carbo Aff.) ¶¶8, 10, 12-15, 17, 18. Civil courts in Ecuador and Peru have subpoena power over evidence and witnesses, and they inspect property and review evidence. *Id.* Most witnesses and evidence are located in Ecuador and subject to the compulsory process of Ecuadorian courts but not U.S. courts. *Id.* ¶¶17 (Ecuadorian court has full range of subpoena powers) and 18, and Tx. Br. at 29 and n.19. The Government, Petroecuador, and other potentially responsible parties are also subject to suit or impleader in Ecuador but not here. Petroecuador, in fact, has been sued for environmental claims and was joined as a defendant in one municipality's lawsuit against TexPet. App. 13 (Callejas Aff.) ¶2. See Tx. Br. at 31 and n.21.

The non-binding offer of Ecuador's current Attorney General to provide information voluntarily from government files is no substitute for a court's power to compel appropriate discovery and ensure compliance, particularly when Texaco's and Petroecuador's interests may conflict. See Decl. of Dr. Jimenez-Carbo at ¶4(e). As this Court is all too familiar from the Government's shifting positions to date, nothing would prevent a future Ecuadorian Administration, Attorney

General, or Petroecuador official from reversing course yet again, particularly when Texaco seeks discovery to prove that Petroecuador may have caused the alleged injuries. An Ecuadorian court, by contrast, would have the essential supervisory powers to enforce appropriate discovery without regard to the Government's or Petroecuador's self-interest. See *Don King Prods., Inc. v. Haugen*, No. 91 Civ. 5554, 1992 WL 58875 at \*5 (S.D.N.Y. March 13, 1992) (granting motion to transfer notwithstanding non-party's representation to appear voluntarily at trial; noting that the voluntary offer "does not bind" non-party, and that "[non-party] might later decide that he is unable or unwilling to appear at trial").

Finally, plaintiffs fault Texaco for not agreeing to "proceed with discovery [in Ecuador] as if these actions were pending in a United States Court" (Pl. Br. at 14) without acknowledging the voluminous discovery already in their possession. Under these circumstances in particular, there is no reason to mandate U.S. discovery techniques. See *Doe v. Hyland Therapeutics Division*, 807 F. Supp. 1117, 1132-33 (S.D.N.Y. 1992):

"[W]e share defendants' concern that this District not become a way-station for plaintiffs world-wide, who choose to stop at Foley Square just long enough to obtain a grant of federal discovery with their forum non conveniens dismissal. The filing of suits in a forum known to be inconvenient, under hopes of being guaranteed certain procedural advantages in conjunction with a dismissal order, serves only to waste valuable judicial resources, and further congest an already crowded docket."

See also *Patrickson*, App. 25 at 48-49 (rejecting argument based on Ecuador's more limited discovery as compared to the U.S.; "The forum non conveniens doctrine would be essentially eliminated if the adequacy of a foreign forum depended on the availability of comparable discovery"); and authorities cited in Tx. Br. at 20-21, nn.11, 12.

**5. The Absence of Class Action Procedures Does Not Make Ecuador and**

**Peru Inadequate Forums:** Plaintiffs also argue that Ecuador's courts are inadequate because "Texaco has *failed to note a single class action for torts*" in Ecuador. Pl. Br. at 7-9 (emphasis in plaintiffs' brief). Again, they overlook U.S. case law, including decisions in this district, holding that the absence of class action procedures does not make a foreign forum inadequate. See *Union Carbide Corp.*, 634 F. Supp. at 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 alternate forum"), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987). Federal courts dismissed *Delgado* and *Patrickson* on forum non conveniens grounds in favor of litigation in Ecuador, and both cases were putative class actions. See *Delgado*, 890 F. Supp. at 1335 (consolidation of personal injury suits, including uncertified class action cases); *Patrickson*, App. 25 at 3.

In any event, class certification would be highly improbable even if these cases were to remain in the United States, as Judge Broderick stated repeatedly. *Aguinda*, 1994 WL 716025 at \*1 (denying motion for plaintiffs' creation of structure among putative class counsel; "judicial approval of such a structure in the present case might suggest erroneously that a class action is likely to be certified notwithstanding the difficulties involved in pursuit of such a case in this instance as set forth in the prior rulings in this case.")<sup>7</sup>

---

<sup>7</sup> A legion of federal courts have held recently that "mass tort" class actions should not be certified, particularly when, as here, plaintiffs seek certification of personal and property injury and medical monitoring claims arising out of exposure to alleged toxins and contaminants. Such claims raise too many individual issues regarding the fact, amount and duration of exposure, fact of injury, severity of injury, cause in fact, proximate cause, damages, affirmative defenses, and statute of limitations for common issues to predominate. In addition,

---

class certification is not the superior method for adjudicating such disputes, which present intractable manageability problems. See *AmChem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Barnes v. The American Tobacco Company*, 161 F.3d 127, 142-44 (3d Cir. 1998); *Castano v. The American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1084-85 (6th Cir. 1996); *Redland Soccer Club, Inc. v. Dep't of Army of U.S.*, 55 F.3d 827, 834 n.2 (3d Cir. 1995); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995); *Boughton v. Cotter Corp.*, 65 F.3d 823, 826-27 (10th Cir. 1995).

**6. Ecuador is an Adequate Alternative Forum for the Jota Plaintiffs:**

Plaintiffs have cited no authority to rebut the clear showing that Ecuadorian courts are available to the *Jota* plaintiffs. They rely, instead, on a newspaper article published two years ago, stating that "[t]ensions are arising along the Peru-Ecuador border...." Pl. Br. at 12, n.7. They never mention that Peru and Ecuador signed a comprehensive peace treaty last October resolving their border disputes.

The record shows that the *Jota* plaintiffs can obtain relief in Ecuador's courts, and they would not be subjected to violence or intimidation there. See Tx. Br. at 15 and App. 13 (*Callejas Aff.*) ¶¶11-13, and App. 10 (*Ponce y Carbo Aff.*) ¶¶9-11,14.

**7. Peru Also Provides an Adequate Alternative Forum:** Plaintiffs' argument (Pl. Br. at 12) that Peru does not provide an adequate alternative forum is also unfounded, and they continue to disregard federal court decisions holding the contrary. One federal court so held three years ago in a similar environmental tort case relating to mining operations in Peru. See *Torres v. Southern Peru Copper Corp.*, 965 F. Supp. 899, 903 (S.D. Tex. 1996); and Tx. Br. at 16, n.9.

Plaintiffs' reliance on U.S. State Department criticism that Peru's judicial system is "inefficient" (Pl. Br. at 12) does not establish that Peru is an inadequate forum. Indeed, plaintiffs' selections from the U.S. State Department's 1997 Report omit the passage noting that Peru's 1993 Constitution created new systems and institutions to enhance the independence and professionalism of the judiciary:

The new systems and institutions include an improved method for the selection of judges; a Constitutional Tribunal to rule on the constitutionality of congressional legislation and government actions; a National Judiciary Council to test, nominate, confirm, evaluate and discipline judges and prosecutors; a Judicial Academy for training judges and prosecutors; and an autonomous Human Rights Ombudsman. To increase the overall efficiency of the judicial branch, in

1995 the President created the Judicial Coordination Council to serve as an umbrella over a number of these new and other already existing judicial bodies. At the same time, he appointed an Executive Commission of the Judicial Branch whose mission is to implement wide-ranging reforms in the judicial system.

See Pl. Exh. 28 at 7. Likewise, plaintiffs' statement that indigenous Peruvians are regarded as "less than 'full citizens'" (Pl. Br. at 13) is quoted out of context. See Pl. Exh. 28 at 18 (stating in full that "Many indigenous people lack such basic documents as a birth certificate or a voter's registration card that would normally identify them as *full citizens* and enable them to play their part in society.") (emphasis added.)

No country's judicial system--including the United States'--is free from criticism.<sup>8</sup> Prior federal court decisions, coupled with Texaco's affidavits on Peru's judicial system (Tx. Br. at 16-17 and App. 27), provide compelling authority that Peru provides the *Jota* plaintiffs another adequate alternative forum if they prefer not to pursue their claims in Ecuador.

#### **B. The Private Interest Factors Warrant Dismissals**

**1. The Treaty of Peace, Friendship, Commerce and Navigation Does Not Require a U.S. Forum:** Plaintiffs' argument based upon the Treaty of Peace, Friendship, Commerce, and Navigation (Pl. Br. at 2) addresses a non-issue. Texaco is not arguing that this Court must "discount" plaintiffs' choice of forum because of their non-resident status. *Blanco v. Banco Industrial of Venezuela, S.A.*, 997 F.2d 974, 981 (2d Cir. 1993).

---

<sup>8</sup> See, e.g., Barbara Crossette, *Dictators (And Some Lawyers) Tremble*, N.Y. Times, Nov. 29, 1998 ("In international human rights bodies, including the United Nations Human Rights Commission and the General Assembly when it sits as a human rights committee, the United States has been regularly attacked by developing nations determined to prove Americans no better than other nations in rights protection.")

On the other hand, the treaty does not require this Court to accept plaintiffs' choice of forum. The *Gilbert* factors still apply with equal force.

**2. Texaco's Headquarters in New York Does Not Make This Forum More**

**Convenient:** Plaintiffs argue that New York is more convenient because it is Texaco's home "where copies of all documents are kept." Pl. Br. at 3.

Their sole support is the same 1994 declaration of a former TexPet social worker in Ecuador, who "think[s]" copies of **TexPet's** files might be located in the Latin America/West Africa division of Texaco in the United States. See Pl. Exh. 8, ¶4. Apart from Texaco's Latin America/West Africa division being headquartered in Coral Gables, Florida and not New York (App. 6 (Bischoff) at 19, 24), a TexPet social worker's speculation as to where she "thinks" **TexPet** documents might be located is not probative evidence that New York is the more accessible forum for litigating plaintiffs' claims against **Texaco**. See Tx. Br. at 23-29; and App. 1 (King Aff.) ¶¶20-31.

There is a striking inconsistency between plaintiffs' allegations and brief on these points. On the one hand, they want this Court to find that Texaco (not TexPet) contaminated lands and water throughout the Ecuadorian and Peruvian Amazon environment, and their submissions are replete with pictures, videos, and embellished descriptions of alleged injuries to lands, water, and persons in those countries. On the other hand, the location of those same lands, water, persons, and other evidence in foreign countries is seemingly unimportant in their convenience analysis, which contradicts the case law and common sense. See Tx. Br. at 25, 30; *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So.2d 1111, 1119 (Fla. Dist. Ct. App. 1997) (dismissing pesticide tort case on forum non conveniens grounds because, among other reasons, "[a]ll

physical evidence in this case is found in the farms and streams of Ecuador").

**3. The "Principal Tort" Did Not Occur in the United States:** Texaco's opening brief anticipated plaintiffs' contention that the U.S. is a more convenient forum based on plaintiffs' theory that Texaco "directly operated oil facilities in Ecuador" from New York.<sup>9</sup> See Tx. Br. at 26-28; Pl. Br. at 3-7. Even accepting that erroneous contention for argument purposes, plaintiffs still must prove a chain of causation from New York through the events at issue in Ecuador and Peru, which requires the proof in Ecuador and Peru described in Texaco's Opening Brief at pages 26-27 and n.8. See also App. 1 (King Aff.) ¶¶20-31.

Beyond the problems in their legal analysis, plaintiffs have pointed to nothing in the voluminous discovery to support their contention that **Texaco**, the parent company in New York, made a "**conscious decision** to dump instead of to reinject produced water" in Ecuador (Pl. Br. at 14) (emphasis added), which they describe as their "principal allegation." *Id.* at 3. As the Second Circuit noted, plaintiffs "are challenging **only** decisions made **by Texaco** within the United States," *Jota* 157 F.3d at 159 (emphasis added), yet they cite no evidence of any such "conscious

---

<sup>9</sup> See *Aguinda* Compl. ¶42 ("Texaco directly operated oil facilities in Ecuador up to July 1990") (emphasis added); *id.* ¶28 ("Texaco operated oil exploration, drilling and crude transportation activities in the Oriente region of Ecuador") (emphasis added); *Jota* Compl. ¶25 ("Texaco operated oil exploration, drilling, extraction and crude transportation activities in the Oriente region of Ecuador, which activities were directed, designed, controlled and conceived by [Texaco] in the United States") (emphasis added).

decision" by Texaco after five years of litigation and extensive discovery aimed at this very issue. This Court may reasonably infer under the circumstances that plaintiffs found nothing worth bringing to the Court's attention.

After sifting through documents and taking depositions, plaintiffs direct this Court to (i) media videos of Petroecuador-owned and operated oil fields, featuring interviews with plaintiffs' counsel, filmed years after the Consortium (and thus TexPet's interest) had ended; (ii) generalized references to blueprints with "legends on them [showing] that they originated *in the United States*" (although not with Texaco Inc.); (iii) third-party affidavits that are silent on the issue of the parent company's operational role (Pl. Exhs. 10, 13); and (iv) conclusory references to what "Texaco" should have known about oil field technology based upon EPA rules, certain state regulations, and patent applications.<sup>10</sup> See Pl. Br. at 4-7.

---

<sup>10</sup> Plaintiffs' assertions concerning the legality of various oil field practices in the United States since the 1970's oversimplify the applicable laws and regulations. For example, the EPA prepared a report for Congress in 1987 that summarized the impact and effectiveness of then existing state regulations for the management of wastes in the oil, gas and geothermal energy industries. The report contained nearly 650 pages in three volumes and an executive summary. See, e.g., *Report to Congress, Management of Wastes from the Exploration, Development, and Production of Crude Oil, Natural Gas, and Geothermal Energy*, EPA/530-88-003 (Dec. 1987). The EPA Report noted that these waste management standards had changed over time. See, e.g., EPA Report, Exec. Summ. at 5; see generally, EPA Report, Vol. 3. Moreover, it has not been *per se* illegal in the United States or elsewhere to use open pits to manage produced water and other exploration and production wastes. Even unlined pits can be lawfully used to manage these wastes in 1999 in this country under certain circumstances. See, e.g., Colo. Oil & Gas Comm. Rules & Regs., Series 902.g.; see also, Wyo. Rules of the Oil and Gas Conservation Comm., Chap. 4, § 1(w). Similarly incorrect is plaintiffs' contention that state and federal laws since the 1970's have required the re-injection of produced water and other wastes. In fact, most oil and gas exploration and production waste management regulation in the United States occurs at the state level, see, EPA Report, Exec. Summ. at 5, and many states regulate management of these wastes on a case-by-case basis after considering site-specific factors such as soil characteristics, climate, topography, hydrology, the nature of the waste, and other relevant variables. See, *Oil and Gas Exploration and Production Waste*

---

*Management: A Seventeen State Study*, p.ES-3 (June 1993). Moreover, the EPA Report indicates that re-injection of these wastes can result in soil and groundwater contamination under some circumstances. EPA Report, Exec. Summ. at 16.

A detailed response to plaintiffs' technical claims is beyond the scope of these jurisdictional motions. Texaco will address plaintiffs' allegations at the appropriate time to the extent the issue of state and federal laws (as opposed to foreign law) may be applicable.

The actual discovery record demonstrates that Texaco did not direct the Consortium's oil field practices as to produced water or the other operational matters attacked by plaintiffs. See App. 3 (Benton) at 170-79; App. 11 (Meyers) at 69-70, 74-75, 149-51, Tx. Br. at 8-9. As TexPet's ultimate parent company, Texaco oversaw its investment in TexPet by: (1) approving the initial contracts that established Texaco Inc.'s investment through TexPet in the Consortium relationship with Ecuadorian Gulf and Petroecuador; (2) reviewing and approving TexPet's budgeted and non-budgeted expenditures; and (3) when requested by TexPet or other subsidiaries, providing centralized purchasing, advisory, administrative, or related services on a contractual basis. These types of parent company activities do not support plaintiffs' claims that Texaco "directly operated the oil facilities in Ecuador." See *supra* n.9. The U.S. Supreme Court so held last year in *United States v. Bestfoods*, 118 S.Ct. 1876 (1998), in an action involving a similar direct liability claim against a parent company for its subsidiary's pollution-causing activities.<sup>11</sup>

*Bestfoods* reiterates longstanding corporate law principals that

---

<sup>11</sup> In *United States v. Bestfoods*, the United States brought an action under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") against various companies, including CPC International ("CPC," now known as "Bestfoods"), seeking to recover funds expended to remediate a contaminated site. *Bestfoods*, 118 S.Ct. at 1881-83. Bestfoods' wholly owned subsidiary, Ott II, had manufactured chemicals and polluted the site when it occupied the site from 1965 - 1972. *Id.* at 1882. The issue presented to the Supreme Court was whether and to what extent Bestfoods, as the parent company of Ott II, should be held liable for its subsidiary's environmental wrongs. *Id.* at 1883.

Like plaintiffs here, the *Bestfoods* plaintiff argued that the parent company was directly liable as an operator of the facility because it tightly controlled its subsidiary. *Bestfoods*, 118 S.Ct. at 1888. Like these plaintiffs in the past, the plaintiff in *Bestfoods* stressed the parent's financial control of its subsidiary, its provision of services, and overlaps in the companies' officers. *Id.* The Supreme Court held that these activities are typical of a parent-subsidiary relationship and do not prove direct parent company liability for a subsidiary's activities. *Id.* at 1888-89.

distinguish between a parent company's control of its subsidiary as opposed to its alleged control of its subsidiary's activities. It holds that control of the subsidiary does not establish direct parent company liability for activities in which that subsidiary participated:

The issue before us . . . is **whether a parent company that actively participated in, and exercised control over, the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary.** We answer no, unless the corporate veil may be pierced.

*Bestfoods*, 118 S.Ct. at 1881 (emphasis added). Applying hornbook law, *id.* at 1884-85, the Supreme Court found that "'[a]ctivities that involve the facility [operations] but which are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability.'" *Id.* at 1889 (emphasis added). These types of activities prove nothing about a parent company's alleged **direct** liability such as plaintiffs have claimed here. See *supra* n.9.

*Bestfoods'* holding applies here. Plaintiffs claim that Texaco "directly operated oil facilities in Ecuador," and they have not alleged a corporate veil theory. *Id.* They cite all manner of extraneous materials and legally irrelevant arguments under *Bestfoods*, but no evidence that Texaco "directly operated the oil facilities in Ecuador." *Id.*<sup>12</sup> This Court need not decide in this jurisdictional context whether

---

<sup>12</sup> In past briefs, plaintiffs loosely attributed to "Texaco" activities performed by the Consortium, TexPet, Texaco Pipeline Company, Williams Brothers (which designed and built the pipeline), or other non-defendants in the United States, hoping to blur the critical distinctions. Non-specific references to U.S. decisionmaking, U.S. approvals, U.S. personnel, or acts by U.S. companies in general do not prove that **Texaco Inc.**, the sole defendant here, "directly operated" the facilities in Ecuador. We respectfully urge the Court to examine plaintiffs' references to "Texaco" if their reply brief follows this path

Texaco did or did not "directly operate" Consortium activities in Ecuador because Texaco has not yet filed a motion to dismiss plaintiffs' claim on the merits. It suffices for purposes of these motions to note that plaintiffs have enjoyed unusually generous discovery opportunities to support their assertion and have examined not only Texaco's "headquarters" (New York) files but also its (and its subsidiaries') files in other U.S. locations. Nonetheless, they still have not pointed to specific evidence that substantiates the baseless claim for which they admit having no support when filed. See App. 1 (King Aff.) ¶¶6-11 (describing document searches in New York, Texas, and Florida); Tx. Br. at 9-10 (describing plaintiffs' stipulation). The Court should take this into account in evaluating where most evidence is likely to be located and the relative ease of access to proof in Ecuador and Peru as opposed to the United States. *Delgado*, 890 F. Supp. at 1370 ("The dearth of evidence linking plaintiffs' claims to Texas weighs heavily in favor of dismissal.")

**4. Choice of Law Considerations Favor Forum Non Conveniens Dismissals:**

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 these disputes. See Tx. Br. at 41. Nonetheless, plaintiffs conclude, without explanation, that this Court would not encounter problems in foreign law if these cases were to proceed here. Pl. Br. at 10.

That assertion is wrong. Plaintiffs' claims stretch back over more than two decades of Government-regulated activities in Ecuador and necessarily include the interplay of legal, regulatory, and policy issues

---

again.

under Ecuadorian law, coupled with individualized liability and site-specific causation issues, that courts there are best able to resolve. The issues in these cases are very different and vastly more complex than the breach of contract royalty disputes decided under Ecuadorian law in *Phoenix Canada Oil Co. v. Texaco Inc.*, 78 F.R.D. 445 (D. Del. 1978), and *Norsul Oil & Mining Co. v. Texaco Inc.*, 641 F. Supp. 1502 (S.D. Fla. 1986).

**5. Texaco Has Not "Decided to Contest Any Possible Negative Ruling":**

Plaintiffs misstate Texaco's position on satisfying adverse judgments, if any, that might be entered by courts in Ecuador or Peru in plaintiffs' favor. They state that Texaco "has decided to contest **any** possible negative ruling of a possible Ecuadorian court...." Pl. Br. at 10-12 (emphasis added). This is not Texaco's position. See Tx. Br. at 12-13, and App. 18 & 19.

Rather, Texaco has agreed to satisfy any judgments in plaintiffs' favor, reserving its right to contest their validity only in the limited circumstances permitted by New York's Recognition of Foreign Country Money Judgments Act.<sup>13</sup> The Second Circuit has noted the applicability of this statute in a forum non conveniens context. See Pl. Exh. 27 at 3; and *Union Carbide Corp.*, 809 F.2d at 204.

---

<sup>13</sup> New York's Recognition of Foreign Country Money Judgments Act provides that a foreign country judgment is not to be recognized when, *inter alia*, (i) the judgment was obtained by fraud; or (ii) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to defend. See N.Y.C.P.L.R. §5304(a) & (b) (McKinney 1998).

**6. The Balance of Private Interest Factors Favor Litigation in Ecuador,**

**Not New York:** Among the more remarkable arguments in plaintiffs' brief is their assertion that media videotapes of Petroecuador's operations and oil fields today, filmed long after the Consortium had ended, provide a "demonstration as to why a view of the premises is not necessary." Pl. Br. at 15. Are plaintiffs seriously suggesting that such videotapes, prepared in consultation with plaintiffs' counsel, provide probative, admissible evidence relevant to the elements of proof necessary to establish their liability and damages claims under the federal rules of evidence? These cases will be tried in a court where plaintiffs must **prove** their allegations under appropriate evidentiary safeguards. Videotaped name-calling is not evidence. They may enjoy an unrestricted license to say anything to the media, but rules apply inside a court room.

If anything, plaintiffs' videotapes of land, residents, and Petroecuador's ongoing operations in the Oriente show why these cases should proceed in Ecuador or Peru. Toxic tort or property contamination cases of this nature necessarily require extensive testing centered at the site of the injury where the alleged exposure to toxic substances took place, where the alleged injury was identified and diagnosed, where the property is located, and where appropriate causation issues may be evaluated and determined in the proper context. See *Delgado*, 890 F. Supp. at 1366 (noting that toxic tort cases "are intensely fact specific.") In defending against these claims, Texaco is entitled to develop evidence regarding preexisting and current usages and conditions of allegedly injured lands and water. It also will need evidence as to how each individual plaintiff has allegedly been exposed to "toxic substances," what those "toxic substances" may have been on a site-

specific basis, and evidence relating to the length, method, degree and frequency of exposure, if any, encountered by each plaintiff over a 20-year period. See App. 1 (King Aff.) ¶¶20, et seq. Evidence to be obtained in Ecuador and Peru relating to the historical and current involvement of other parties, including Petroecuador and other operators and businesses in the Oriente, is critically relevant to causation, contributory or intervening negligence and other defenses.<sup>14</sup> *Id.*

Plaintiffs' remaining arguments concerning the private interest factors also lack merit. They cite the U.S. residence of potential experts as a factor favoring U.S. jurisdiction (Pl. Br. at 15), but courts give little weight to this issue. See Tx. Br. at 29. Without serious question, the expense and inconvenience during both the discovery and trial phases would be less in the countries where the alleged events

---

<sup>14</sup> See Tx. Br. at 5-6, n.3 and 24, n.17 (listing activities of Petroecuador and other companies that allegedly caused or contributed to personal and property injuries in the Oriente), and 30-31 (noting the importance of site visits and testing allegedly contaminated water and soil); and Pl. Exh. 10 (Koons Aff.) ¶¶13, 14 ("Thus, 140,000 barrels of 'production water' are **currently being discarded** [by Petroecuador] into the environment **daily**"; "700 barrels of oil per day... are being discharged **daily** into the Amazon environment in the former Texaco concession...") (emphasis added); and attachment to Pl. Exh. 13 (Bannett Aff.) at 28 (noting a spill in 1992, **after** Petroecuador had assumed sole ownership and operational responsibility for oil field operations, of an estimated 5,000 barrels that "pollut[ed] the Napo river," which the *Jota* plaintiffs allege to be the contamination pathway from the former Consortium area to Peru.)

actually occurred. *Id.* Plaintiffs' offer to bring "their witnesses" (but not Texaco's) to New York, (Pl. Br. at 15), does not resolve the problem given the enormity of plaintiffs' allegations and Texaco's need for "many thousand sources of proof [that] can only be found in the various countries" where plaintiffs lived. *See Delgado*, 890 F. Supp. at 1366 (finding that a similar offer did "not provide a realistic alternative to proceedings in plaintiffs' home countries," and did "not satisfy defendants' need to obtain access to information in the possession of non-parties....")

**C. The Public Interest Factors Favor Litigation in Ecuador**

Turning to the public interest factors under the *Gilbert* test, plaintiffs argue that "there is little question that all the public factors" weigh against dismissal because U.S. shareholders derived profits from the Consortium, thereby yielding higher U.S. taxes and salaries. Pl. Br. at 16. They cite no authority for this proposition, presumably because they found none.<sup>15</sup> If plaintiffs' argument were meritorious, few cases involving a U.S. corporation's foreign activities could be dismissed on forum non conveniens grounds, and the case law is clearly otherwise.

Plaintiffs' brief never discusses the public interest factors, recognized in the case law, that warrant forum non conveniens dismissals.

---

<sup>15</sup> Plaintiffs also cite no factual support for their assumption that Texaco earned vast profits, much less "billions of dollars" (Pl. Br. at 18), from TexPet's Ecuadorian operations, after deducting expenses, Ecuadorian taxes exceeding 87%, royalties, and Petroecuador's majority share. In fact, the reverse is true, as Texaco will prove if and when the issue becomes relevant.

They include Ecuador's and Peru's interest in resolving disputes over their lands, residents, and resources; Ecuador's sovereign interest in establishing its own economic and environmental policies and priorities; and the preeminent interest of Ecuadorian courts in setting negligence standards for conduct within Ecuador, including Petroecuador's past and current operations. See Tx. Br. at 32-35 and nn. 22, 23. They never mention this district's congested litigation docket, and they vastly underestimate the burden of imposing lengthy jury duty on New York residents. See *Delgado*, 890 F. Supp. at 1368 (dismissing a tort case involving only half the number of plaintiffs' putative class in *Aguinda*); and 1370 (discussing burdens that plaintiffs' personal injury claims would impose on U.S. jurors).

**D. Plaintiffs' ATCA Claim Does Not Preclude Dismissals**

Plaintiffs do not argue that the doctrine of forum non conveniens is *per se* inapplicable in all cases involving an ATCA allegation. See Pl. Br. at 22. Rather, they contend that when, as here, a plaintiff asserts an ATCA claim against an American defendant, the forum non conveniens defense "seems highly inappropriate." *Id.* at 23.

Our research has located no case holding that the forum non conveniens doctrine should not apply to ATCA cases against an American defendant, and neither plaintiffs' nor the Sierra Club's brief cites any.<sup>16</sup> To the contrary, courts have applied the *Gilbert* factors in ATCA cases without suggesting a different approach based upon the defendant's nationality. See Tx. Br. at 36-37 and n.25. The *Gilbert* analysis provides a federal

---

<sup>16</sup> Plaintiffs' opening brief attaches two lengthy amicus briefs on the ATCA filed in the Second Circuit. See Pl. Exhs. 25 and 26. Their Exhibit 26 alone is a 50 page brief from the Sierra Club, excluding attachments. Texaco respectfully submits that this tactic is an attempted end-run around this Court's express instructions limiting the Sierra Club's amicus brief to 10 pages rather than the 50 pages it requested.

court the necessary flexibility to determine on a case-by-case basis whether a plaintiff's ATCA claim may weigh in favor of retaining jurisdiction in each particular context. See *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1089 (S.D. Fla. 1997); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996). There is no need to endorse a hard and fast rule, such as plaintiffs suggest, that a forum non conveniens dismissal is "highly inappropriate" whenever plaintiffs allege a "colorable claim" against a U.S. company. Pl. Br. at 23.

Plaintiffs' argument rests upon their mistaken belief that a "plain tension" exists "between a statute which grants a federal forum (as well as a cause of action) to plaintiffs and a common law doctrine which may deny them the same forum based upon the purported inconvenience of a defendant . . . ." Pl. Br. at 19. The same argument, of course, could be made about numerous federal statutes granting a federal forum to pursue federal rights of actions (e.g. RICO, Sherman Act, federal securities laws, etc.), but courts have applied forum non conveniens in those contexts nonetheless. See Tx. Br. at 37, n.26 (citing cases holding that the United States' interest in applying its own laws is not a determinative factor in deciding convenience.)<sup>17</sup>

---

<sup>17</sup> Plaintiffs' brief (at 21, n.15) misstates current Second Circuit case law by citing *United States v. National City Lines Inc.*, 334 U.S. 573 (1948), in support of their erroneous contention that their ATCA claim precludes a forum non conveniens dismissal here. That case is no longer controlling law in this Circuit.

In a recent decision, *Capital Currency Exchange, N.V. v. National Westminster Bank PLC*, 155 F.3d 603, 608 (2d Cir. 1998), the Second Circuit noted that it had "specifically **rejected** the argument that *National City I* foreclosed the availability of forum non conveniens when a statute has a 'special venue' provision . . .", citing *Transunion Corp. v. PepsiCo., Inc.*, 811 F.2d 127, 130 (2d Cir. 1987) (emphasis added). In *Capital Currency Exchange*, the Second Circuit rejected plaintiffs' argument that *National City* precluded a forum non conveniens dismissal of their Sherman Act claims. See *Capital Currency Exchange*, 155 F.3d at 609-612. See also Tx Br. at 36-37 and n.26.

In addition, plaintiffs are incorrect in suggesting that the ATCA contains a special venue provision mandating venue in federal district

---

courts. See Pl. Br. at 21-22; Tx. Br. at 36. The ATCA's language ("district courts shall have original jurisdiction....") tracks the general venue provisions in 28 U.S.C. §1331 (federal question jurisdiction) and 28 U.S.C. §1332 (diversity jurisdiction). See *Gulf Oil v. Gilbert*, 330 U.S. 501, 507 (1947) (courts may dismiss on forum non conveniens grounds "even when jurisdiction is authorized by the letter of a general venue statute.")

In addition, no "tension" exists between the doctrine and the ATCA because the forum non conveniens analysis includes the substantive safeguard of requiring an "adequate alternative forum" as a condition to dismissal.<sup>18</sup> If a plaintiff lacks an alternative forum to pursue claims that otherwise satisfy the ATCA's requirements, no forum non conveniens dismissal results. See, e.g., *Eastman Kodak Co.*, 978 F. Supp. at 1082-87; *Cabiri*, 921 F. Supp. at 1199. Unlike these cases, both Ecuador and Peru provide plaintiffs with adequate alternative forums, and they

---

<sup>18</sup> Plaintiffs' brief (at 22) mischaracterizes the minority opinion of Senators Simpson and Grassley in Senate Report No. 102-249, which discusses the Torture Victim Protection Act of 1991. First, there is nothing in the Senate Report suggesting that the doctrine of forum non conveniens is unavailable in an ATCA action. Second, plaintiffs have never asserted a TVPA claim in these cases. Third, even in a TVPA context (which this is not), the Senators' opinion does not preclude a defendant from asserting a forum non conveniens defense.

confront no personal risks or threats there. The record of litigation against TexPet, Petroecuador and others so demonstrates.<sup>19</sup> In addition, plaintiffs' ATCA claim affords them no special relief or remedy not already available through their other personal and property injury claims, which can be pursued in Ecuador and Peru. See Tx. Br. at 19-23.

---

<sup>19</sup> Plaintiffs and the Sierra Club analogize the ATCA to the state sponsored terrorism exception to the Foreign Sovereign Immunities Act, citing *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998). See Pl. Br. at 23; Brief of Sierra Club at 3-4. That case is distinguishable.

In *Flatow*, a U.S. citizen sued the defendant country pursuant to the "state sponsored terrorism exception" to the Foreign Sovereign Immunities Act, which Congress enacted to strip certain foreign governments of immunity for participation in terrorist acts that injure United States citizens. See *Flatow*, 999 F. Supp. at 10-16. The court noted that the forum non conveniens defense is inapplicable to "state-sponsored terrorism" actions because "even in the rare instance where there would be an adequate alternate forum for such a case, the interests of the United States in ensuring that its citizens have an opportunity to seek redress in the United States is paramount, and will inevitably exceed the interests of any other fora." *Id.* at 25 (emphasis added).

Unlike cases brought under the "state-sponsored terrorism exception," the United States' interests in cases involving ATCA allegations do not "inevitably exceed the interests of any other fora," which explains why courts have analyzed the *Gilbert* factors in cases where an ATCA claim is included. See Tx. Br. at 36, and n.25.

Plaintiffs' "law of nations" claim is highly suspect in any event, although the Court need not resolve this merits issue in this procedural context.<sup>20</sup> As Texaco noted in its initial brief (at 38-39), no case holds that environmental allegations violate the "law of nations," and one federal court recently held the reverse in a 1997 decision that plaintiffs have not discussed. 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).

For a tort to violate the "law of nations," the alleged offense must be "definable, obligatory (rather than hortatory), and universally condemned." *Beanal*, 969 F. Supp. at 370, citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980). Thus, the alleged offense must satisfy the following conditions in order to violate the law of nations:

---

<sup>20</sup> Plaintiffs assert that Texaco "cannot competently contravene" plaintiffs' experts' testimony regarding their "presumptively valid" ATCA claim because the Court must accept plaintiffs' allegations as true under Fed. R. Civ. P. 12(b)(6). See Pl Br. at 19.

They are incorrect for two reasons. First, the Second Circuit held in *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1996) that "it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations," and that an ATCA claim "requires a more searching review of the merits to establish jurisdiction than is required under the more flexible 'arising under' formula of section 1331" (citing *Filartiga*) (emphasis added).

Second, Texaco's renewed motions to dismiss on forum non conveniens and comity grounds are not Rule 12(b)(6) motions in any event. See *Intercontinental Dictionary Series v. De Gruyter*, 822 F. Supp. 662, 671 (C.D. Cal. 1993) (rejecting plaintiff's argument that, for purposes of forum non conveniens motion, the Court must accept allegations of the complaint as true); *Don King Prods., Inc. v. Haugen*, No. 91 Civ. 5554, 1992 WL 58875 at \*5 (S.D.N.Y. March 13, 1992) ("This Court is not obligated to accept plaintiff's allegations as true for the purposes of the motion to transfer, as it was obligated to do in connection with defendant's motion to dismiss" under Fed. R. Civ. P. 12(b)); *Phoenix Canada Oil Co.*, 78 F.R.D. at 451 (a forum non conveniens motion is not a 12(b)(6) motion, and a court is free to weigh the evidence with no presumption of truthfulness attaching to plaintiffs' allegations). The U.S. Supreme Court has instructed defendants to submit affidavits and other evidence to allow the court to balance the *Gilbert* factors. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258 (1981) ("defendants must provide enough information to enable the District Court to balance the parties' interests").

(1) no state condones the act in question,<sup>21</sup> and there is a recognizable "universal" consensus of prohibition against it; (2) there are sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the norm; and (3) the prohibition against it is nonderogable and therefore binding at all times upon all actors.

*Beanal*, 969 F. Supp. at 370 (citations omitted); *Xuncax v. Gramajo*, 886 F. Supp. 162, 185 (D. Mass. 1995) (listing same conditions). See also *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory").

Plaintiffs have never identified a definable, universal and obligatory norm allegedly violated by Texaco that could form the basis for their ATCA claim. Their Complaints allege in conclusory fashion that Texaco "violate[d] the law of nations, international law, [and] worldwide industry standards and practices." See *Aguinda* Compl. ¶85; *Jota* Compl. ¶90. Likewise, the affidavit of Dinah Shelton (Pl. Exh. 24) discusses various pronouncements and aspirational declarations regarding environmental objectives and policies, but identifies no specific, obligatory, universally accepted standard that Texaco allegedly violated.

See Rebuttal Aff. of Professor M.H. Mendelson ("Mendelson Rebuttal Aff.") ¶58A-W, attached as Exhibit 3, (rebutting the Shelton Affidavit).

---

<sup>21</sup> Ecuador continues to permit Petroecuador to pursue today the practices attacked by plaintiffs, including the discharge of produced water. See *supra* n.14; and Tx. Br. at 24, n.17; and 10, n.4. Nevertheless, plaintiffs urge the Court to declare this continuing practice an actionable violation of the "law of nations," while arguing inconsistently that this Court's actions would have no international comity implications as to Ecuador.

In fact, there are no definable, obligatory and universal standards for imposing liability for environmental wrongs. See Mendelson Rebuttal Aff. ¶¶6,41-51. Several principles embodied in United Nations Declarations (e.g., Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration) include broad pronouncements regarding each nation's right to develop its own natural resources while reducing adverse consequences to bordering nations, but they do not establish definable, universal standards of care and liability for environmental practices. See *id.* ¶¶44-50; *Amlon Metals*, 775 F. Supp. at 671 (noting Stockholm Principles "do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders").<sup>22</sup>

---

<sup>22</sup> The Restatement (Third) of Foreign Relations Law also fails to articulate specific, identifiable standards of environmental conduct that could form the basis for an ATCA claim. In fact, the Restatement excludes any reference to environmental wrongs in its list of practices that "violate international law." See Restatement §702 (listing genocide, slavery, murder or causing the disappearance of individuals, torture or cruel and inhuman punishment, arbitrary detention, systematic racial discrimination). Some of these activities have formed the basis of ATCA cases. While Restatement §§601 and 602 address in broad terms the obligations by individual nations (as opposed to private parties) to "conform to generally accepted international rules" to prevent injury to the environment of neighboring states, the Restatement does not identify specific, definable rules and practices. See Mendelson Rebuttal Aff. at ¶¶49-52.

Philippe Sands' treatise on international environmental law, cited by the *Beanal* court, agrees that there is no universal, definable standard for imposing liability for environmental wrongs:

The international community has **not** adopted a binding international instrument of global application which purports to set out the general rights and obligations of the international community on environmental matters. No equivalent to the Universal Declaration on Human Rights or the International Covenant on Civil and Political Rights or Economic and Social Rights has yet been adopted or appears imminent.

See Philippe Sands, *Principles of International Environmental Law, Volume 1*, at 185-86 (1995) (emphasis added). See also *id.* at 633 ("In defining environmental damage, treaties and state practice reflect various approaches"); at 635 ("There are no agreed international standards which establish a threshold for environmental damage which triggers liability and allows claims to be brought"); at 637 ("International law remains inconclusive on general rules governing the standard of care to be shown in fulfilling international environmental obligations.")

In sum, plaintiffs' ATCA claim lacks merit because there is no universal, definable standard for environmental practices. *Beanal*, 969 F. Supp. at 382-84.<sup>23</sup> In addition, even assuming, *arguendo*, that the activities of Texaco could constitute a violation of the laws of nations (which is untrue), only governmental entities could be found liable for violating environmental principles, and plaintiffs do not allege that Texaco is a state actor. See *id.*; Tx. Br. at 39-40. Finally,

---

<sup>23</sup> Plaintiffs' brief claims (at 19) that Judge Broderick "noted that plaintiffs' ATCA claim is supported by customary international law...." In fact, that opinion expressly reserved decision on the ATCA's applicability. *Aguinda*, 1994 WL 142006 at \*7. Judge Broderick's opinion also noted the broader implications of plaintiffs' ATCA claim. *Id.* ("Moreover, were conduct to occur exclusively in a foreign country, caution would be necessary where 28 U.S.C. 1350 is invoked, in order to assure that decisionmaking by other countries is not interfered with by adjudication in the United States under necessarily highly general concepts.")

plaintiffs' ATCA claim would fail, in any event, because the activities about which plaintiffs complain are not factually attributable to Texaco, the parent company, under the analysis articulated by the Supreme Court in *Bestfoods* and the extensive discovery record. See *supra* at 18-20. No matter how they label their causes of action, "plaintiffs' imaginative view of this Court's power must face the reality that United States district courts are courts of limited jurisdiction," as this Court stated previously. *Aguinda*, 945 F. Supp. at 628.

**E. International Comity Provides An Alternate Ground For Dismissal**

Like the *Patrickson* court, this Court need not reach the separate issue of international comity because plaintiffs have failed to rebut Texaco's showing that these cases should be dismissed on forum non conveniens grounds. See *Patrickson v. Dole Food Co.*, (App. 25) at 60, n.10. The comity doctrine, however, provides an alternate basis for dismissal.

Devoting only a half page to the issue, plaintiffs' comity argument ignores the *Timberlane* factors, the Restatement factors, the federal court's comity analysis in *Sequihua*, and the Government of Ecuador's overarching interest in questions this Court would be called upon to consider if these cases were to proceed in this forum. Texaco has discussed those factors and authorities in its opening brief (at 43-49) and will not repeat them here. They demonstrate that Petroecuador's conduct and the Government's laws, policies, and interests intersect with every important issue in these lawsuits and that this Court should defer to Ecuadorian courts where all appropriate parties can be heard and similar lawsuits against Petroecuador and TexPet are pending already.<sup>24</sup>

---

<sup>24</sup> Examples of potential conflicts between plaintiffs' claims and Ecuador's laws and policies include: (i) plaintiffs' claim that an

---

operator's failure to reinject produced water violates the "law of nations," when Petroecuador today is not reinjecting produced water in all fields and thus, according to plaintiffs, violating the "law of nations"; *supra* n.14; (ii) plaintiffs' demand that the court order a "halt" to Petroecuador's current disposal practices, which plaintiffs described as "clearly unacceptable" in a previous submission to this Court; Tx. Br. at 10, n.4; (iii) plaintiffs' claim that Texaco injured the "diet", "culture", and "way of life" of indigenous people by building roads and cutting the rain forest, *Aguinda* Compl. ¶¶38-39, when Ecuador's laws made opening the Oriente "an urgent national priority," gave land title to settlers who "clear the rainforest," and required TexPet to build roads and other infrastructure as mandatory "compensation works"; Tx. Br. at 11-12 and n.6; (iv) plaintiffs' claim that this Court should award funds to remediate Government lands and Petroecuador facilities when the Government, Petroecuador and Texaco have already negotiated a binding settlement on those issues, and the Government has "absolved, liberated, and forever freed" Texaco and TexPet, as Ecuador's Ambassador recently informed the Court; *id.* at 16; App. 17; (v) plaintiffs' claim that the pipeline was designed improperly when the Government expressly approved the pipeline's design specifications; Tx. Br. at 8; and (vi) the Government's regulation, oversight, and continuing participation (through Petroecuador) in Consortium practices throughout the Consortium's history. *Id.* at 8-9.

As Texaco explains in its separate response to the Attorney General's Declaration, the Government of Ecuador has registered unequivocal opposition to this Court's jurisdiction insofar as these cases may require its or Petroecuador's presence for a full and fair adjudication of plaintiffs' claims, as Texaco contends to be the situation in view of plaintiffs' claims and requested remedies. Contrary to the former Attorney General's position in 1996 urging this Court to accept jurisdiction, neither the Republic's Ambassador nor its Attorney General are now asserting any position on whether this Court should exercise jurisdiction, and the Government no longer seeks to intervene. In a letter to an Ecuadorian congressman (not addressed to this Court), the only guidance that Ecuador's Minister of Foreign Relations provides is a statement that the Court should apply applicable international comity rules in deciding whether to exercise jurisdiction: "the decision regarding the venue where the lawsuit should continue, whether in the United States or in Ecuador, *must be made by the courts of the United States in accordance with the rules of international procedure applicable to these cases.*" Pl. Exh. 21 ¶8 (emphasis added). He offers no recommendation as to what that decision should be when this Court applies those rules to these circumstances.

Thus, this Court is left to apply the international comity rules recognized in this Circuit, as discussed in Texaco's opening brief. Those rules favor dismissals. See Tx. Br. at 43-48. Plaintiffs have advanced no compelling arguments that warrant a different result.

### **III. Conclusion**

For all of the reasons stated in its Opening Brief and this Reply, Texaco requests dismissals on forum non conveniens or, alternatively, international comity grounds.

Dated: New York, New York  
January 25, 1999

Respectfully submitted,

**KING & SPALDING**

By: \_\_\_\_\_  
Griffin B. Bell

George S. Branch  
Daniel J. King (DK6533)  
Edward G. Kehoe (EK2615)  
Richard T. Marooney, Jr.  
(RM0276)

191 Peachtree Street  
Atlanta, Georgia 30303  
(404) 572-4600

-and-

1185 Avenue of the Americas  
New York, New York 10036  
(212) 556-2100

**KAYE, SCHOLER, FIERMAN,  
HAYS & HANDLER, LLP**

Paul J. Curran (PC 9851)  
Milton J. Schubin (MS 2834)  
425 Park Avenue  
New York, New York 10022  
(212) 836-8000

**TEXACO INC.**

Lawrence R. Jerz (LJ0561)  
1111 Bagby  
Houston, Texas 77002  
(713) 752-6026

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true copy of TEXACO INC.'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS RENEWED MOTIONS TO DISMISS BASED ON FORUM NON CONVENIENS AND INTERNATIONAL COMITY to be served upon the following by overnight delivery:

Joseph C. Kohn  
Martin J. D'Urso  
Craig W. Hillwig  
Kohn, Swift & Graf, P.C.  
1101 Market Street, Suite  
2400  
Philadelphia, Pennsylvania  
19107

Amy K. Damen  
Sullivan & Damen  
470 Mamaroneck Avenue  
White Plains, New York 10605

Cristobal Bonifaz  
Law Office of Cristobal  
Bonifaz, Esq.  
48 N. Pleasant Street  
Tucker Taft Bldg.  
Amherst, Massachusetts 01004

This 25th day of January, 1999.

\_\_\_\_\_  
Richard T. Marooney, Jr.