

U.S. Laws in the Rainforest: Can a U.S. Court Find Liability for Extraterritorial Pollution Caused by a U.S. Corporation?

An Analysis of *Aguinda v. Texaco, Inc.*

INTRODUCTION

Before 1972, the members of the United Nations passed few international environmental agreements. In 1972, several members of the United Nations met in Stockholm to discuss issues relating to the environment and signed a declaration committing the United Nations to environmental concerns.¹ The international community has subsequently enacted numerous multilateral and bilateral conventions that deal with environmental issues.²

These environmental conventions are not binding on states that do not ratify them, on private parties, or on multinational corporations (multinationals).³ The United Nations has recommended a code of conduct for multinationals to address this problem.⁴ The code specifically includes provisions that relate to the environment.⁵

Corporations that cause environmental damage are often not held liable for their actions. Even where environmental regulations exist, enforcement of penalties for transnational environmental violations is problematic because courts are uncertain whether they have jurisdiction.⁶ In the United States, the application of the doc-

¹ *Report of the U.N. Conference on the Human Environment*, Stockholm Declaration of the United Nations Conference on the Human Environment, 27th Sess., U.N. Doc. A/Conf. 48/14 (1972).

² From 1972 to 1979, at least 35 such treaties were signed. In the 1980s, at least 48 were signed. See Edith Brown Weiss, ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 482-90 app. B (Edith Brown Weiss ed., United Nations University Press 1992) [hereinafter ENVIRONMENTAL CHANGE].

³ See BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 11 (1990). Throughout this Note, the term "multinational corporation" is used synonymously with "transnational corporation," and designates corporations with a main corporate entity in one country, and branches, subsidiaries, and partnerships within other sovereigns.

⁴ See generally *Commission on Transnational Corporations: Report on the Special Session*, U.N. ESCOR, 38th Sess., Supp. No. 7, U.N. Doc. E/1983/17/Rev.1 (1983) [hereinafter Draft Code]. This code is in no way binding and has not been adopted by the U.N. General Assembly.

⁵ *Id.* § 43-45.

⁶ For example, in *Amlon Metals, Inc. v. FMC Corp.*, after a British court denied jurisdiction to order the removal of toxins because they originated in the United States, the U.S. district

trine of *forum non conveniens* virtually guarantees that U.S. multinationals receive little or no penalty for damages inflicted when something goes awry overseas.⁷

On November 3, 1993, Ecuadoran nationals filed a class action suit (Aguinda Complaint) in the Southern District of New York, alleging that Texaco, Inc., caused extensive environmental damage in Ecuador.⁸ There may be no remedy available to the plaintiffs in Ecuador: the Ecuadoran Constitution guarantees the right to a clean environment, but class actions are not allowed and there is no meaningful discovery in Ecuadoran courts.⁹ There may also be no remedy for the Ecuadorans—or any foreign victim of a toxic tort—in the U.S. courts.

This Note will analyze whether there is currently any remedy available in U.S. courts to foreign nationals who sue U.S. multinationals for environmental damage within a foreign sovereign. Part I explains the allegations set forth in the Aguinda Complaint. Part II explains the theory of extraterritorial jurisdiction, focusing on how U.S. courts apply the doctrine in various contexts. Part III discusses U.S. environmental statutes that might apply to acts like those alleged in the Aguinda Complaint, had they occurred within the United States. Part III also discusses the Alien Tort Claims Act (ATCA), one of the theories under which the Aguinda plaintiffs brought suit in U.S. courts. Part IV analyzes whether a cause of action will stand under these theories of extraterritorial jurisdiction. This Note concludes that there is a remedy available to aliens situated similarly to the Aguinda plaintiffs, if the actions alleged are violations of international law.

I. THE COMPLAINT: *AGUINDA V. TEXACO, INC.*

Texaco obtained a concession agreement from Ecuador to drill oil in 1964.¹⁰ Texaco, as minority partner in Petroecuador, drilled oil from 1972 to 1992.¹¹ The Aguinda Complaint alleges that during

court also denied jurisdiction because the toxin was located in Great Britain. 775 F. Supp. 668, 670, 672 (S.D.N.Y. 1991).

⁷ See, e.g., *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December, 1984, 809 F.2d 195 (2d Cir.), cert. denied, 484 U.S. 871 (1987).

⁸ *Aguinda v. Texaco Inc.*, No. 93 Civ. 7257 (S.D.N.Y. Nov. 3, 1993) [hereinafter *Aguinda Complaint*].

⁹ ECUADOR CONST. art. 19 ¶ 2; DECREE No. 374: Act for the Prevention and Control of Environmental Pollution, 97 R.O. 6 (1976), translated in *FOOD AND AGRICULTURAL LEGISLATION VOL. XXVI* #1, 120-133 (Food & Agricultural Organization of the U.N., Rome, Italy 1977).

¹⁰ *Aguinda Complaint*, *supra* note 8, at 4.

¹¹ *Ecuadorian Indians Sue Texaco for Damage to Rivers, Land in Amazon Basin*, INT'L ENVTL.

that time Texaco improperly handled wastes, several oil spills occurred, and pipelines burst, all of which resulted in extensive environmental damage.¹²

The ground water in the area is now polluted with toxins that are known cancer causing agents.¹³ The native peoples' children are covered in growths and the local water is not fit for bathing or consumption.¹⁴ Collected rainwater is their only water supply—and the rainwater itself was tested and found to contain toxins.¹⁵

Texaco no longer participates in the oil drilling operations in Ecuador; all contractual relationships ended in June 1992.¹⁶ The local people are left with a hazardous environment and potentially no remedy. The plaintiffs seek damages under a variety of common law tort theories.¹⁷ They seek both compensatory and punitive damages from Texaco.¹⁸

II. EXTRATERRITORIAL JURISDICTION

A. *Definitions and Problems: Doctrines of Extraterritorial Jurisdiction*

Extraterritorial jurisdiction¹⁹ is a form of jurisdiction under which one sovereign claims the right to regulate activities outside its sovereign borders.²⁰ This may create conflicts because the sovereign in which the activity occurs may also claim jurisdiction. The *Restatement (Third) of Foreign Relations (Restatement (Third))*, recognizes extraterritorial jurisdiction under a number of principles.²¹ These include: the territorial principle, the effects principle, the nationality principle, the passive personality principle, and the protective principle.²²

DAILY (BNA), Nov. 5, 1993, *available in* LEXIS, Intlaw Library, Interv File [hereinafter *Indians Sue*]. Texaco, holding a 37.5% share in Petroecuador, ran the oil drilling operations until June 1990. *Id.*; see also Aguinda Complaint, *supra* note 8, at 4.

¹² Aguinda Complaint, *supra* note 8, at 4–5.

¹³ *Id.* at 5.

¹⁴ *Id.* at 5, 6–18.

¹⁵ *Id.* at 12.

¹⁶ See *Indians Sue*, *supra* note 11.

¹⁷ Aguinda Complaint, *supra* note 8, at 5.

¹⁸ *Id.* at 37.

¹⁹ Extraterritorial jurisdiction is often called jurisdiction to prescribe and is sometimes discussed under the rubric of a general conflict of laws analysis. The question of extraterritorial or prescriptive jurisdiction is different from, but includes, a traditional conflict of laws analysis. See ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATIONS OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 515–83 (1991).

²⁰ *Id.* at 515.

²¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 402 cmts. c–g. [hereinafter RESTATEMENT (THIRD)].

²² *Id.*

International law most commonly recognizes the territorial and nationality principles as justifications for extraterritorial jurisdiction.²³

Most assertions of jurisdiction are based on the territorial principle—jurisdiction over actions and actors located within the territory of the sovereign at the time the disputed activities occurred.²⁴ In the United States, the territorial principle has an expanded definition under the effects doctrine, which extends jurisdiction over activities that have effects within the borders of the sovereign.²⁵ Under the effects doctrine, the United States may assert jurisdiction even if no acts occurred within its borders.

The nationality principle is based on the nationality of the person who committed the acts in question.²⁶ “International law has increasingly recognized the right of a state to exercise jurisdiction on the basis of domicile or residence, rather than nationality. . . .”²⁷ The nationality principle applies to corporations, other business entities, and natural persons.²⁸

In addition to extraterritorial jurisdiction based on territory and nationality, U.S. courts may assert jurisdiction under the protective principle (based on interests of national security), or the passive personality principle (based on the nationality of the victim).²⁹ The protective principle is invoked when an activity that occurred outside the sovereign somehow threatens or endangers the viability of the sovereign.³⁰ The protective principle is very narrow and only includes actions directed at state security, such as espionage,³¹ I.R.S. issues,³² and the falsification of official documents.³³ The passive personality principle allows a court to assert jurisdiction over defendants when the victim is a national of the country that asserts such jurisdiction.³⁴ This latter principle is most often used in criminal law.³⁵

²³ *Id.* at cmt. a.

²⁴ *Id.* at cmt. c.

²⁵ *Id.* at cmt. d.

²⁶ See RESTATEMENT (THIRD), *supra* note 21, § 402 (e).

²⁷ *Id.* § 402 cmt. e.

²⁸ *Id.*

²⁹ *Id.* at cmts. f, g.

³⁰ See *id.* at cmt. f.

³¹ See *generally* United States v. Zehe, 601 F. Supp. 196 (D. Mass 1985).

³² See *generally* In re Marc Rich & Co., A.G., 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1961).

³³ See *generally* United States v. Pizzarusso, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); Rocha v. United States, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961).

³⁴ RESTATEMENT (THIRD), *supra* note 21, § 402 cmt. g.

³⁵ *Id.*

The *Restatement (Third)* also recognizes jurisdiction over so-called “universal crimes.”³⁶ Also called *jus cogens*, these are activities defined by the international community as so offensive that they are crimes in any state, and any sovereign may assert jurisdiction over the offender.³⁷ Any treaty made in violation of *jus cogens* is void *ab initio* as a violation of international law.³⁸ The types of crimes the international community considers violations of *jus cogens* include piracy, genocide, and torture.³⁹

Within the United States, extraterritorial jurisdiction may be exercised by legislative enactment, executive order, or judicial proceedings; the latter two must be pursuant to a statute.⁴⁰ Its exercise is not without limits: issues of comity and conflict of laws require states to limit their exercise of extraterritorial jurisdiction.⁴¹ If one sovereign has a significant interest in the activity, it may protest that its sovereign rights are being violated if extraterritorial jurisdiction is exercised.⁴² U.S. courts assume that Congress does not intend conflicting jurisdiction, and thus will interpret legislation so that it will not conflict with international law or the law of other sovereign nations.⁴³

When the party over whom the sovereign wishes to assert extraterritorial jurisdiction is a juridical person, the issue of jurisdiction may be more complex.⁴⁴ A juridical person is an entity that has certain legal rights or responsibilities such as a corporation, subsidiary, or partnership.⁴⁵ “[A] state may exercise jurisdiction to prescribe

³⁶ *Id.* § 404. Section 404 states:

[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

Id.

³⁷ See WESTON ET AL., *supra* note 3, at 127–28 (citing J. STARK, AN INTRODUCTION TO INTERNATIONAL LAW 53–54 (9th ed. 1984)).

³⁸ See *id.* at 127 (quoting J. STARK, AN INTRODUCTION TO INTERNATIONAL LAW 53–54 (9th ed. 1984)).

³⁹ See RESTATEMENT (THIRD), *supra* note 21, § 404.

⁴⁰ See *id.* § 402 cmt. i.

⁴¹ See *id.* § 403. For a discussion of comity, see generally ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 50–68 (1993); see also *infra* notes 134–158 and accompanying text.

⁴² For an example of such a conflict, see generally The Case of the S.S. “Lotus” (France v. Turkey), 1927 P.C.I.J. (ser. A), No. 10 (Oct. 12).

⁴³ See, e.g., United States v. Harvey, 2 F.3d 1318, 1327 (3d Cir. 1993).

⁴⁴ See RESTATEMENT (THIRD), *supra* note 21, § 414.

⁴⁵ Compare the definition of natural person in BLACK’S LAW DICTIONARY 1142 (6th ed. 1990).

for limited purposes with respect to activities of foreign branches of corporations organized under its laws."⁴⁶

A corporation often organizes its activities in a series of subsidiaries and branches in order to minimize its liability. The *Restatement (Third)* states that a sovereign may not "ordinarily regulate activities of corporations organized under the laws of a foreign state on the basis that they are owned or controlled by nationals of the regulating state."⁴⁷ The *Restatement (Third)* does specify exceptions to that limitation,⁴⁸ including the application of certain accounting and disclosure laws for the sake of uniformity.⁴⁹

B. *Application of Extraterritorial Jurisdiction by the United States*

The United States exercises extraterritorial jurisdiction in a number of ways. The legislative branch may pass laws that implicitly or explicitly extend beyond the boundaries of the United States.⁵⁰ For example, customs regulations impose duties that necessarily have an extraterritorial effect because they create competitive barriers to foreign companies.

Another example is the Export Administration Act of 1979.⁵¹ This Act authorizes controls over goods or technology "subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States" in certain circumstances involving "national security."⁵² This type of extraterritorial jurisdiction is generally considered acceptable by the international community.⁵³

The executive branch may issue decrees that have an extraterritorial impact if it has authorization from Congress to do so.⁵⁴ For example, the Reagan administration imposed economic sanctions against the Soviet and Polish governments in the early 1980s.⁵⁵

⁴⁶ RESTATEMENT (THIRD), *supra* note 21, § 414(1).

⁴⁷ *Id.* § 414(2).

⁴⁸ *Id.*

⁴⁹ *Id.* § 414(2)(a). THE RESTATEMENT (THIRD) also recognizes jurisdiction in various situations when the state requires compliance with a regulatory scheme. *Id.* § 414(2)(b). This section lists relevant factors for consideration by a state which intends to so assert jurisdiction. *Id.* For a discussion and critique of the extraterritorial application of U.S. laws over foreign subsidiaries, see generally Robert B. Thompson, *United States Jurisdiction Over Foreign Subsidiaries: Corporate and International Law Aspects*, 15 LAW & POL'Y INT'L BUS. 319 (1983).

⁵⁰ For example, the Internal Revenue Code, Subchapter N, Part 1 lists the laws relevant to foreign income. I.R.C. § 861 *et seq.* (1993).

⁵¹ 50 U.S.C.A. § 2401-2420 (West 1993).

⁵² *Id.* § 2404(a)(1).

⁵³ For example, the General Agreement on Tariffs and Trade (GATT) is a multilateral agreement which provides for international cooperation in the setting of tariff schedules in order to facilitate international trade.

⁵⁴ RESTATEMENT (THIRD), *supra* note 21, at § 402 cmt. i.

⁵⁵ 47 Fed. Reg. 141-45 (Jan. 5, 1982), *amending* 15 C.F.R. pts. 379, 385, 390, 399 (1981)

Under the apparent authority of the Export Administration Act, the Reagan administration prohibited the sale of oil, gas, and certain equipment and technology to the Soviet Union and Poland.⁵⁶ The administration attempted to block both U.S. companies and their European subsidiaries from supplying technology and equipment to complete the Euro-Siberian pipeline.⁵⁷ The administration extended its authority over these foreign companies under the auspices of existing jurisdiction over foreign subsidiaries and technology licensed in the United States and exported abroad.⁵⁸

These actions were condemned by the international community as violations of international law. Both the European Community and several individual European governments expressed their position that the export controls were invalid.⁵⁹ One company, Dresser (France), was forced to comply with either French law (by shipping goods) or U.S. law and chose to comply with the laws of France, the country in which it was incorporated.⁶⁰ This brought subsequent sanctions from the United States.⁶¹ Ultimately there was such an international outcry that the United States repealed its regulations.⁶²

The judiciary also exercises extraterritorial jurisdiction.⁶³ Like the executive branch, the judiciary needs a legislative mandate to exercise such jurisdiction.⁶⁴ The courts have developed a series of tests to determine whether an exercise of extraterritorial jurisdiction is valid, and have exercised extraterritorial jurisdiction under a variety of statutory schemes, including the criminal code,⁶⁵ the Sherman Act,⁶⁶ and the Securities Exchange Act.⁶⁷

(amended June 22, 1982, repealed Nov. 17, 1982); see also Kenneth W. Dam, Extraterritoriality and Conflicts of Jurisdiction, Address to ASIL (Apr. 15, 1993), in 83 DEP'T ST. BULL., June 1983, at 48, 50.

⁵⁶ 47 Fed. Reg. 141-45 (Jan. 5, 1982) (amending 15 C.F.R. pts. 379, 385, 390, 399 (1981) (amended June 22, 1982, repealed Nov. 17, 1982)).

⁵⁷ 47 Fed. Reg. 27, 250-252 (June 24, 1982) (amending 15 C.F.R. pts. 376, 379, 385 (repealed Nov. 16, 1982)).

⁵⁸ See *id.*

⁵⁹ See Patrizio Merciai, *The Euro-Siberian Gas Pipeline Dispute—A Compelling Case for the Adoption of Jurisdictional Codes of Conduct*, 8 MD. J. INT'L L. & TRADE 1, 13-14 (1984).

⁶⁰ See *id.* at 15.

⁶¹ 47 Fed. Reg. 39, 708 (Sept. 9, 1982).

⁶² Merciai, *supra* note 59, at 16-18.

⁶³ See generally LOWENFELD, *supra* note 41, at 47-146.

⁶⁴ RESTATEMENT (THIRD), § 402 cmt. i.

⁶⁵ See generally *United States v. Harvey*, 2 F.3d at 1318 (1993); *United States v. Felix-Gutierrez*, 940 F.2d 1200 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 2332 (1993); *Rivard v. United States*, 375 F.2d 882 (5th Cir.) *cert. denied*, 389 U.S. 884 (1967).

⁶⁶ 15 U.S.C.A. § 1, 2 (West 1993).

⁶⁷ 15 U.S.C.A. § 78(a) *et seq.* (West 1981).

C. *When Will the United States Judiciary Exercise Extraterritorial Jurisdiction?*

When corporations engage in activities abroad, jurisdictional issues are complex and problematic for the courts. Jurisdictional conflicts have become more frequent because a growing number of corporations engage in multinational transactions and transportation and telecommunications have advanced. Regional trade agreements such as the North American Free Trade Agreement (NAFTA), creating an economic union in North America; the Maastricht Treaty, creating the European Union, an economic community, in Europe; and the Association of South-East Asian Nations (ASEAN), creating an economic association in South East Asia, indicate the diminishing significance of national boundaries in a business context. The elimination of economic borders will lead to more difficult jurisdictional problems in the future.

1. *Forum Non Conveniens*

The doctrine of *forum non conveniens*⁶⁸ is a common law doctrine based on the convenience of both parties.⁶⁹ If a court otherwise has jurisdiction, it may nonetheless dismiss a case if it finds that it can be litigated more efficiently in another forum.⁷⁰ The court may

⁶⁸ The doctrine of *forum non conveniens* was brought from admiralty law into federal common law in the companion cases of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1946) and *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518 (1946). Subsequent cases cite Justice Jackson's decisions because he clearly explicated the tests to be applied. See generally *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), *reh'g denied*, 455 U.S. 928 (1982); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December, 1984, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

Some states have abolished the doctrine. For example, the Texas legislature passed a statute which abolished the doctrine of *forum non conveniens* in wrongful death and personal injury actions arising out of an incident in a foreign state or country. See TEX. CODE ANN. § 71.031; see also *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 674 (Tex. 1990). The Fifth Circuit has not determined whether the federal or state law on *forum non conveniens* will apply in a conflict of laws analysis. Similarly, a line of cases in the Florida courts have restricted the doctrine of *forum non conveniens* to cases in which neither party to an action is a resident of Florida. See *Sempe v. Coordinated Caribbean Transport, Inc.*, 363 So.2d 194, 196 (Fla. Dist. Ct. App. 1978). The Eleventh Circuit determined that the doctrine of *forum non conveniens* applies at the federal level, rather than at the state level, in a conflict of laws analysis. See *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir. 1985).

⁶⁹ E.g., *Reyno*, 454 U.S. at 249; *Gilbert*, 330 U.S. at 508; *Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1991), *cert. denied*, 114 S. Ct. 179 (1993); *Overseas Programming Cos., Ltd. v. Cinematographische Commerzanstalt*, 684 F.2d 232, 234 (2d Cir. 1982).

⁷⁰ E.g., *Reyno*, 454 U.S. at 241; *Koster*, 330 U.S. at 524.

dismiss a case on the basis of *forum non conveniens* if the defendant consents to jurisdiction in the alternative forum.⁷¹ A court will not, however, dismiss the case if the plaintiff has no effective remedy in the alternative jurisdiction.⁷²

A court first determines if another adequate forum exists.⁷³ If such a forum does exist, the court will engage in a balancing test: the court will weigh the plaintiff's choice of forum, private factors, and public factors to determine whether litigating the case in the plaintiff's chosen forum will be "oppressive."⁷⁴ If the court finds that the balance favors dismissal, the court may conditionally dismiss, and the plaintiff may file in an alternative forum.⁷⁵

2. The Sherman Act and Antitrust Laws: Development of the Approach to Extraterritorial Jurisdiction

The Court first addressed the extraterritorial reach of U.S. laws and, specifically, the Sherman Act, in *American Banana Co. v. United Fruit Co.*⁷⁶ In that case, Justice Holmes declined jurisdiction to review the legality of the seizure of a U.S. owned plantation located on the border of Panama and Costa Rica.⁷⁷ The plaintiff claimed that its

⁷¹ See, e.g., *Union Carbide*, 809 F.2d at 202. The court in *Union Carbide* held that India was an adequate forum because the corporation consented to jurisdiction. *Id.*; see also *Reyno*, 454 U.S. at 254, n.22; *Gilbert*, 330 U.S. at 506-07.

⁷² *Reyno*, 454 U.S. at 254. "[I]f the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice." *Id.*

⁷³ *Reyno*, 454 U.S. at 254, n.22; *Union Carbide*, 809 F.2d at 202; accord *Borden, Inc. v. Meiji Milk Prods. Co., Ltd.*, 919 F.2d 822, 828 (2d Cir. 1990), cert. denied, 111 S. Ct. 2259 (1991). The court in *Meiji Milk Products* held that courts must determine whether an alternative forum exists, but that the analysis is not fatal if this is not done first. 919 F.2d at 828.

⁷⁴ E.g., *Reyno*, 454 U.S. at 241; *Gilbert*, 330 U.S. at 508; *Blanco v. Banco Industrial de Venezuela*, 997 F.2d 974, 980 (2d Cir. 1993); *Schertenleib v. Traum*, 589 F.2d 1156, 1160 (2d Cir. 1978). There are several private interest factors the courts analyze, including: (a) relative ease of access to sources of proof; (b) availability of compulsory process for attendance of unwilling witnesses; (c) cost of obtaining attendance of willing witnesses; (d) practical problems making trial of case easy, expeditious and inexpensive; (e) questions as to the enforceability of a judgment if one is obtained. *Gilbert*, 330 U.S. at 508. Public interest factors include: (a) administrative difficulties; (b) burden of jury duty to community which has no relation to litigation; (c) local interest in having localized controversies decided at home; (d) having trial in a forum which is familiar with the law that must govern the case. *Id.* at 508-09; see also *Blanco*, 997 F.2d at 980.

⁷⁵ *Union Carbide*, 809 F.2d at 203-204; *Schertenleib*, 589 F.2d at 1166. In *Schertenleib*, the court upheld a dismissal on the condition that the defendant submit to jurisdiction and that the alternative forum accept the case. 589 F.2d at 1166.

⁷⁶ 213 U.S. 347 (1909).

⁷⁷ *Id.* at 359.

competitor had persuaded the Costa Rican government to seize its property in violation of the Sherman Act, but the Court held that “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”⁷⁸

In 1945, the Second Circuit held that the Sherman Act applied extraterritorially in *United States v. Aluminum Corporation of America (ALCOA)*.⁷⁹ Judge Learned Hand articulated a two-part test for determining whether to give extraterritorial effect to an act of Congress: (1) determine whether Congress intended the statute to have an extraterritorial effect; (2) determine whether the actions were intended to and did, in fact, have an effect within the United States.⁸⁰

Courts currently analyze antitrust cases by a three-part test first articulated by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*⁸¹ *Timberlane* involved an alleged conspiracy to prevent the subsidiaries of Timberlane from milling lumber in Honduras.⁸² The court held that the Sherman Act applied outside the United States, albeit in a somewhat more limited capacity than it applied within the United States.⁸³ The court stated that for the law to apply extraterritorially there must be some effect, either actual or intended, on U.S. foreign commerce.⁸⁴ The court rejected a “substantial effects” test in favor of a three-part test: (1) was there an effect, or an intended effect, on U.S. foreign commerce; (2) was the effect a cognizable violation of the Sherman Act; and (3) is the assertion of extraterritorial jurisdiction reasonable or prudent with respect to potential conflicts with the laws of the foreign sovereign.⁸⁵

⁷⁸ *Id.* at 356.

⁷⁹ 148 F.2d 416 (2d Cir. 1945). ALCOA, a Delaware Corporation, created Aluminum Limited, a Canadian corporation. *Id.* at 439. The Canadian corporation then entered into a cartel with British, French, German, and Swiss companies to limit aluminum production. *Id.* at 442.

⁸⁰ *See id.* at 443–44.

⁸¹ 549 F.2d 597 (9th Cir. 1976).

⁸² *Id.* at 601. Timberlane alleged that the Bank of America, acting through various contacts in Honduras, disrupted the operations of Timberlane’s Honduran subsidiary, Maya. *Id.* at 604–5. The Bank of America’s Honduran affiliates foreclosed on a lien, disregarding Timberlane’s repeated offers to pay the amount due, and employed guards and troops to shut down Timberlane’s milling operations. *Id.*

⁸³ *See id.* at 608–609.

⁸⁴ *Id.* at 613.

⁸⁵ *Id.* at 615.

3. Extraterritorial Application of Other U.S. Laws and the Three-Part Test

a. *Intent*

To determine whether a law applies extraterritorially, courts first determine whether there is congressional intent for the law to so apply.⁸⁶ There is a presumption against such an intent.⁸⁷ There is also a narrow category of congressional statutes, at least within the Third Circuit, which apply extraterritorially with no explicit congressional intent.⁸⁸ The Eighth Circuit has also held that an individual who willfully conspires to commit a crime is under the jurisdiction of the sovereign in which the effect is felt, regardless of where the acts of conspiracy took place.⁸⁹

In a recent criminal case, the Third Circuit found congressional intent without an express congressional mandate.⁹⁰ *United States v. Harvey* involved the Protection of Children Against Sexual Exploitation Act.⁹¹ The court held that when a U.S. citizen is the defendant, and the statutory scheme is broad, extraterritorial intent will be found if denying extraterritorial application will largely eviscerate the statute.⁹²

The court found that Congress intended the Act to greatly enhance the means with which to fight child pornography and child prostitution.⁹³ The court also found evidence in the congressional record that Congress intended the statute to address child pornography issues in areas never before within the purview of federal investigators.⁹⁴ The court noted that Congress specifically mandated the United States Customs Service to give a high priority to the interception of this pornographic material.⁹⁵ Citing *United States v. Bowman*,⁹⁶ the court declared that failure to apply the statute to

⁸⁶ *ALCOA*, 148 F.2d at 443.

⁸⁷ *Harvey*, 2 F.3d at 1327; see also *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

⁸⁸ See *Harvey*, 2 F.3d at 1327 (citing *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549, 2559 (1993)).

⁸⁹ See *Rivard*, 375 F.2d at 887.

⁹⁰ *Harvey*, 2 F.3d at 1327 (1993).

⁹¹ *Id.* at 1320. The Protection of Children Against Sexual Exploitation Act is codified at 18 U.S.C.A. §§ 2251–58 (West 1993).

⁹² See 2 F.3d at 1327.

⁹³ *Id.* (citing S. Rep. No. 95–438, 95th Cong., 2d Sess. 10).

⁹⁴ 2 F.3d at 1327.

⁹⁵ *Id.*

⁹⁶ 260 U.S. 94 (1922).

foreign suppliers of child pornography would eviscerate the statute and therefore Congress must have intended it to apply extraterritorially.⁹⁷

The intent of Congress must be much more explicit in the context of labor law. *New York Central R.R. v. Chisholm* was the first case that dealt with the extraterritorial application of U.S. labor laws.⁹⁸ The U.S. Supreme Court followed *American Banana* and held that a U.S. citizen could not recover under the Federal Employers' Liability Act (FELA) in U.S. courts for a tort action against a U.S. corporation where the activity occurred within a foreign sovereign.⁹⁹ The injury at issue in *Chisholm* occurred thirty miles inside Canadian territory on a passenger train operating between New York and Montreal.¹⁰⁰ The Court found "no words which definitely disclose [congressional] intent to give [FELA] extraterritorial effect"¹⁰¹

The U.S. Supreme Court likewise refused to apply the Eight Hour Law extraterritorially in *Foley Bros. Inc. v. Filardo*,¹⁰² a case decided by the Court four years after *ALCOA*. The Court held that the Act did not apply to a U.S. citizen employed by a U.S. contractor who performed work in Iraq and Iran pursuant to a contract with the U.S. government.¹⁰³ The Court found no intent expressed by Congress for the law to apply extraterritorially, either in the Act itself, or in the legislative history.¹⁰⁴ The Court declined jurisdiction because there was no distinction between aliens and citizens in the statute.¹⁰⁵ The Court stated that, if they applied the law extraterritorially to cover a U.S. citizen, it would apply to all employees, regardless of citizenship, when a company contracted with the United States to work outside the United States.¹⁰⁶

⁹⁷ 2 F.3d at 1327. To support its position, the court cited a Ninth Circuit case, *United States v. Thomas*, 893 F.2d 1066 (9th Cir.), *cert. denied*, 498 U.S. 826 (1990). In *Thomas*, the defendant was convicted under 18 U.S.C. § 2251(a) for employing, persuading, or coercing a minor to engage in sexually explicit conduct in order to produce a visual depiction. *Id.* at 1068. The court held that the action applied, even though the acts allegedly took place in Mexico. *Id.* at 1068, 1069.

⁹⁸ 268 U.S. 29 (1925).

⁹⁹ *Id.* at 31–32.

¹⁰⁰ *Id.* at 30.

¹⁰¹ *Id.* at 31.

¹⁰² 336 U.S. 281, 284–85 (1948).

¹⁰³ *Id.* at 283, 285.

¹⁰⁴ *See id.* The Act applied to "[e]very contract made to which the United States is a party" *Id.* at 282. The contract between the contractor and the United States included a clause stating that they would "obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America." *Id.* at 283.

¹⁰⁵ *Id.* at 286.

¹⁰⁶ *Id.*

In the most recent Supreme Court decision on the extraterritorial application of U.S. labor laws, *E.E.O.C. v. Arabian American Oil Co. (Aramco)*,¹⁰⁷ the Court held that Title VII did not apply to U.S. citizens working for a U.S. corporation overseas.¹⁰⁸ Chief Justice Rehnquist authored the decision which held that there was no requisite congressional intent for the law to apply outside the territorial limits of the United States.¹⁰⁹ The Chief Justice articulated a new, higher burden of proof in extraterritorial jurisdiction cases: the petitioner must show an *affirmative intent* by Congress for a statute to apply outside the United States to overcome the presumption against extraterritorial application of U.S. laws.¹¹⁰ It is significant to note that this is the same test explicitly rejected in *Timberlane Lumber*.¹¹¹

Courts also hesitate to find congressional intent in environmental cases. In *Amlon Metals, Inc. v. FMC Corp.*,¹¹² the District Court in the Southern District of New York declined to apply the Resource Conservation and Recovery Act (RCRA)¹¹³ extraterritorially.¹¹⁴ The district court dismissed the case stating that RCRA generally did not apply extraterritorially.¹¹⁵ The plaintiff argued that the congressional record indicated the bill should help safeguard against the ill effects of hazardous waste—including those wastes bound for export—and,

¹⁰⁷ 499 U.S. 244 (1991).

¹⁰⁸ *Id.* at 246–47. In *Aramco*, the petitioner, a naturalized U.S. citizen, was working for Aramco, a Delaware corporation, in Saudi Arabia when he was discharged, allegedly in violation of Title VII of the Civil Rights Act of 1964. *Id.* at 247. After filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), the employee instituted a suit in the U.S. District Court for the Southern District of Texas. *Id.*

¹⁰⁹ *Id.* at 259.

¹¹⁰ *See id.* at 249. The Court did not agree with the EEOC that the statute's "alien exemption" clause necessarily implied that Congress intended to protect U.S. citizens from employment discrimination by U.S. corporations abroad. *Id.* at 253. It is possible to interpret the alien exemption clause as an indication by Congress that it was aware of the Supreme Court's decision in *Foley Bros.* and, thus, intended to allow application of the law extraterritorially to U.S. citizens alone by drawing this line. The Court declined to impute from the statute's broad jurisdictional language any intention to give it extraterritorial effect. *Id.* at 251.

¹¹¹ *See supra* notes 81–85 and accompanying text.

¹¹² 775 F. Supp. 668 (S.D.N.Y. 1991).

¹¹³ 42 U.S.C.A. § 6901 *et seq.* (West 1983 & Supp. 1993) [hereinafter RCRA].

¹¹⁴ 775 F. Supp. at 676. FMC, a Delaware corporation, contracted with Amlon to ship copper residue for reclamation to Amlon in Great Britain. *Id.* at 669. Upon importation into Great Britain, a mysterious odor was detected and FMC admitted that contrary to their agreement there were toxins in the containers. *Id.* Amlon sued FMC in British courts for removal. *Id.* at 670. The court declined jurisdiction, as the bulk of the activity relevant to the case took place in the United States. *Id.* After the British courts determined that U.S. law controlled, Amlon filed suit in the United States under, among other things, the Alien Tort Claims Act and RCRA. *Id.*

¹¹⁵ *Id.* at 671, 676.

therefore, showed congressional intent for the 1984 RCRA amendments to apply extraterritorially.¹¹⁶ The court, however, linked these remarks to the waste export provision of the statute, not the citizen suit provision, and denied relief under the statute.¹¹⁷

b. *Actual or Intended Effects*

If a court finds congressional intent for the law to apply extraterritorially, the court will then examine whether there is an actual or intended domestic effect sufficient to apply the statute extraterritorially. In some contexts, minimal or no domestic effects are required.¹¹⁸ In others, the court requires substantial effects.¹¹⁹ Courts differ, depending on the context, on the issue of how extensive these effects must be to assert extraterritorial jurisdiction.

As seen above, under the Sherman Act, a court usually requires only an actual or intended effect that is a cognizable violation of the statute for the court to assert extraterritorial jurisdiction.¹²⁰ In *Conservation Council of Western Australia, Inc. v. Aluminum Co. of America (Alcoa)*,¹²¹ however, the District Court in the Western District of Pennsylvania declined to accept jurisdiction to enjoin mining operations in Australia absent substantial domestic effects.¹²² The court found no domestic effects alleged in the complaint and, therefore, dismissed the case.¹²³

In the criminal context, however, a court may assert jurisdiction without any domestic effect. The reasoning behind extraterritorial jurisdiction is often substantially similar to that applied under the Sherman Act, but jurisdiction is also asserted under the nationality

¹¹⁶ *Id.* at 674 (quoting 129 Cong. Rec. 27691 (1984)).

¹¹⁷ *Id.* at 674.

¹¹⁸ *Felix-Gutierrez*, 940 F.2d at 1205.

¹¹⁹ *Conservation Council of W. Austl. Inc. v. Aluminum Co. of Am. (Alcoa)*, 518 F. Supp. 270 (W.D. Pa. 1981).

¹²⁰ *Timberlane Lumber Co.*, 549 F.2d at 615; *see also supra* text accompanying notes 81–85.

¹²¹ 518 F. Supp. 270 (W.D. Pa. 1981).

¹²² *Id.* at 282. In an effort to enjoin the operation, some Australian conservationists filed suit in the United States against the parent companies of an Australian mining concern. *Id.* at 271. Stating that the court would not “place a palladium in Western Australia,” the court declined jurisdiction under 28 U.S.C. § 1331 (federal question) or 28 U.S.C. § 1332 (diversity jurisdiction). *See id.* at 276, 279, 282. The court also refused to extend jurisdiction under 28 U.S.C. § 1337 (jurisdiction arising under congressional act regulating commerce or protecting trade or commerce). *Alcoa*, 518 F. Supp. at 274. The court cited *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), for the proposition that there must be substantial domestic effects for the Sherman Act to apply. *Id.*

¹²³ *Alcoa*, 518 F. Supp. at 275, 276.

principle or the passive personality principle.¹²⁴ In criminal cases, courts generally infer extraterritorial jurisdiction from the nature of the offense itself.¹²⁵

In *United States v. Felix-Gutierrez*,¹²⁶ for example, the defendant was charged with the kidnapping, torture, and murder of a Special Agent from the Drug Enforcement Agency in violation of 18 U.S.C. § 3.¹²⁷ The murder victim disappeared in Guatelajara, Mexico, and his body appeared one month later in Zamora, Michoacan, Mexico.¹²⁸ The court held that U.S. law applied and affirmed a two-part test: (1) there must be congressional intent, express or implied, for the statute to apply extraterritorially; and (2) the application must be reasonable under international law principles.¹²⁹

c. *Conflict of Laws*

Once a court has determined that Congress intended a statute to apply extraterritorially, and that there was the requisite domestic effect, the court will engage in a conflict of laws analysis.¹³⁰ U.S. courts, in most cases, will not apply U.S. laws extraterritorially if they believe there is a conflict of laws, or if they feel this application will violate international law.¹³¹ It is unclear how much conflict must be involved before the court will decline jurisdiction. In determining whether to accept jurisdiction, a court must weigh several conflicting factors including: the concerns of sovereigns potentially affected by the situation; whether the law applied extraterritorially will conflict with the laws of that sovereign; the goals of the international community; and, whether the extraterritorial assertion of jurisdiction conflicts with international law.¹³²

Courts do not want to take an action that will impinge on the President's ability to conduct foreign affairs by creating friction between the United States and foreign nations.¹³³ For this reason, a

¹²⁴ See *Rocha v. United States*, 288 F.2d 545, 549 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961); see also RESTATEMENT (THIRD), *supra* note 21, § 402 cmts. e, g.

¹²⁵ See *Harvey*, 2 F.3d at 1327 (quoting *United States v. Wright Barker*, 784 F.2d 161, 167 (3d Cir. 1986)).

¹²⁶ 940 F.2d 1200.

¹²⁷ *Id.* at 1203 & n.1.

¹²⁸ *Id.* at 1203.

¹²⁹ *Id.* at 1204.

¹³⁰ *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2921 (1993); *Harvey*, 2 F.3d at 1327.

¹³¹ See generally *Hartford Fire Ins. Co.*, 113 S. Ct. 2891; *Timberlane Lumber Co.*, 549 F.2d 597.

¹³² See *Timberlane Lumber Co.*, 549 F.2d at 614.

¹³³ See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823-27 (D.C. Cir. 1984) (Robb, C.J., concurring).

court may decline to hear a case based on theories of nonjusticiability.¹³⁴ For example, in *Tel-Oren v. Libyan Arab Republic*, a case brought under the Alien Tort Claims Act (ATCA),¹³⁵ Senior Circuit Judge Robb argued that the issue was the international status of terrorism.¹³⁶ Judge Robb stated that the case involved standards that defy judicial application and that it touched on "sensitive matters of diplomacy that uniquely demand a singlevoiced [sic] statement of policy by the Government."¹³⁷ He then determined that the case was nonjusticiable.¹³⁸ He further posited that terrorism, the subject of the lawsuit, is a subject historically "within the exclusive domain of the executive and legislative branches"¹³⁹ and that the "possible consequences of judicial action in this area are injurious to the national interest."¹⁴⁰

A court may also examine whether the U.S. law conflicts with the law of the foreign sovereign in which the action took place.¹⁴¹ A court may analyze a number of factors to determine if there is sufficient conflict to warrant declining jurisdiction. In *Mannington Mills, Inc. v. Congoleum Corp.*, for example, the Third Circuit delineated ten factors to be weighed to determine the propriety of exercising extraterritorial jurisdiction.¹⁴² These factors include: (1) the degree of conflict; (2) the nationality of parties; (3) the relative importance of the alleged violation in the U.S. versus its importance abroad; (4) the availability of a remedy abroad or whether litigation is pending abroad; (5) the existence and extent of harm within the United States; (6) the possible effect the exercise of extraterritorial jurisdiction would have upon foreign relations; (7) if relief is granted, whether the party will be forced to perform an illegal act in either country or be under conflicting requirements; (8) whether the court can effect its order; (9) whether relief would be acceptable here if the foreign nation made similar contention; and (10) whether a treaty has addressed the issue.¹⁴³

¹³⁴ See generally *Baker v. Carr*, 369 U.S. 186 (1962); *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Tel-Oren*, 726 F.2d at 823-27 (Robb, C.J., concurring).

¹³⁵ 28 U.S.C.A. § 1350 (West 1993).

¹³⁶ See *Tel-Oren*, 726 F.2d at 823-27 (Robb, C.J., concurring).

¹³⁷ *Id.* at 824.

¹³⁸ *Id.* at 823.

¹³⁹ *Id.* at 825.

¹⁴⁰ *Id.* at 826.

¹⁴¹ See *Hartford Fire Ins. Co.*, 113 S. Ct. at 2910.

¹⁴² 595 F.2d 1287 (3d Cir. 1979).

¹⁴³ *Id.* at 1297-98.

Even if there is a direct conflict between U.S. and foreign law, courts may still accept extraterritorial jurisdiction. "No tenet of international law prohibits Congress from punishing the wrongful conduct of its citizens, even if some of that conduct occurs abroad."¹⁴⁴ In *Hartford Fire Insurance Co. v. California*,¹⁴⁵ for example, nineteen states and numerous private parties sued several reinsurance companies alleging violations of the Sherman Act.¹⁴⁶ The alleged conspiracy involved a number of London based reinsurance companies, which conceded that the Sherman Act had extraterritorial application where, as in *Hartford*, the conduct was intended to produce, and did in fact produce, a substantial effect in the United States.¹⁴⁷ The defendants argued, however, that since the conduct alleged in the complaint was consistent with British law, U.S. laws should not apply for reasons of comity.¹⁴⁸

The court rejected this argument and stated that the application of U.S. antitrust laws is not barred merely because the conduct is lawful in the other country, unless there is a true conflict of law.¹⁴⁹ The court found that the activity at issue was legal in the foreign sovereign (Great Britain), but that the companies involved could comply with both U.S. and British laws.¹⁵⁰ The court held that there was no real conflict because the insurance companies could have complied with both laws.¹⁵¹

If a court has jurisdiction to hear a case, it must still act with prudence because it is possible a judgment must be carried out in a jurisdiction that will not recognize the authority of the court. This was the case in *United States v. Imperial Chemical Industries (ICI)*,¹⁵² a case in which a U.S. district court found ICI in violation of the Sherman Act and demanded that ICI cancel exclusive patents overseas to rectify the situation.¹⁵³ To comply, however, the company would have had to break a contractual agreement with a foreign company in Great Britain.¹⁵⁴ The foreign company filed suit in its

¹⁴⁴ *Harvey*, 2 F.3d at 1329.

¹⁴⁵ 113 S. Ct. 2891 (1993).

¹⁴⁶ *Id.* at 2895.

¹⁴⁷ *See id.* at 2895, 2909.

¹⁴⁸ *Id.* at 2910.

¹⁴⁹ *Id.*

¹⁵⁰ *Hartford Fire Ins. Co.*, 113 S. Ct. at 2910-11.

¹⁵¹ *Id.* at 2911.

¹⁵² 105 F. Supp. 215 (S.D.N.Y. 1952).

¹⁵³ *See id.* at 231.

¹⁵⁴ *Id.* at 230.

home forum, seeking a declaration of its rights.¹⁵⁵ The British court issued an injunction, which was upheld on appeal: the court stated that to hold otherwise would violate British law, and, therefore, the court was bound to uphold the injunction despite the U.S. decision.¹⁵⁶

III. U.S. ENVIRONMENTAL STATUTES AND THE ALIEN TORT CLAIMS ACT (ATCA)

To apply U.S. law extraterritorially, there must be a statute applicable to the actions alleged in the complaint.¹⁵⁷ A number of environmental statutes are potentially applicable in circumstances like those alleged in the Aguinda Complaint, had they occurred within the sovereign borders of the United States. Statutes that might apply include: the Resource Conservation Recovery Act (RCRA),¹⁵⁸ the Comprehensive Environmental Response and Liability Act (CERCLA),¹⁵⁹ and the Oil Pollution Liability and Compensation Act (OPLCA).¹⁶⁰

A. *Resource Conservation Recovery Act (RCRA)*

The Resource Conservation Recovery Act (RCRA), is one statute that would apply if the actions alleged in the Aguinda Complaint had occurred within the United States. RCRA is a comprehensive statute that regulates the entire waste cycle to prevent hazardous dumping and to hold persons liable should illegal dumping occur.¹⁶¹ Congress included a statement of purpose in the statute, which states that the problem of hazardous waste dumping has exceeded the function of the state and has become a matter of national concern.¹⁶² The statement of purpose further notes that "open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land"¹⁶³

¹⁵⁵ LOWENFELD, *supra* note 41, at 53.

¹⁵⁶ *Id.* at 55.

¹⁵⁷ RESTATEMENT (THIRD), *supra* note 21, § 402 cmt. i.

¹⁵⁸ 42 U.S.C.A. § 6901 *et seq.* (West 1983 & Supp. 1993).

¹⁵⁹ 42 U.S.C.A. § 9601 *et seq.* (West 1983 & Supp. 1993).

¹⁶⁰ 33 U.S.C.A. § 2701 *et seq.* (West 1993).

¹⁶¹ See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 251-52 (1992).

¹⁶² 42 U.S.C.A. § 6901(a)(4) (West 1983).

¹⁶³ 42 U.S.C.A. § 6901(b)(4) (West 1983).

Individuals are personally liable under RCRA when acting on behalf of a corporation, so there is no need to “pierce the corporate veil” to find liability; a court will find individual liability merely if a private party was in control of waste or its disposal.¹⁶⁴ Parties can be held liable if they are past or present handlers of hazardous materials that endanger health or the environment, regardless of fault.¹⁶⁵ RCRA specifically bans the use of waste oil for dust suppression or road treatment.¹⁶⁶

RCRA contains a citizen suit provision that allows individuals to seek relief for damages for medical monitoring and for other losses, such as damage to property or the environment.¹⁶⁷ The provision is very broad, and allows any person to commence a civil action against any person alleged to be in violation “of any permit, standard, regulation, condition, requirement, prohibition, or order . . .” pursuant to RCRA.¹⁶⁸ The statute also allows for suits against contributors to “past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste”¹⁶⁹ Any suit filed pursuant to RCRA “shall be brought in the district court for the district in which the alleged violation occurred”¹⁷⁰

B. *The Comprehensive Environmental Response Compensation and Liability Act (CERCLA)*

The Comprehensive Environmental Response Compensation and Liability Act (CERCLA or Superfund)¹⁷¹ is a very broad legislative scheme that finances the remediation of toxic waste sites. CERCLA provides for the generation of a fund by Congress, to be supplemented and replenished by private corporations who *may be* responsible for known waste sites.¹⁷² The fund is used to clean up sites that have been identified and prioritized according to a national list.¹⁷³

¹⁶⁴ *United States v. Northeastern Pharm. & Chem. Co., Inc. (NEPACCO)*, 810 F.2d 726, 745 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

¹⁶⁵ 42 U.S.C.A. § 6973 (West Supp. 1993); *see also* NEPACCO, 810 F.2d at 740 (quoting H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 119 (1984)).

¹⁶⁶ 42 U.S.C.A. § 6924 (d) (West Supp. 1993).

¹⁶⁷ 42 U.S.C.A. § 6972 (a) (West Supp. 1993).

¹⁶⁸ 42 U.S.C.A. § 6972(a)(1)(A) (West Supp. 1993).

¹⁶⁹ 42 U.S.C.A. § 6972(a)(1)(B) (West Supp. 1993).

¹⁷⁰ 42 U.S.C.A. § 6972(a) (West Supp. 1993).

¹⁷¹ 26 U.S.C.A. § 9601 *et seq.* (West 1989 & West Supp. 1994).

¹⁷² 26 U.S.C.A. § 9507 (West 1993).

¹⁷³ 42 U.S.C.A. § 9605(a)(8)(B) (West Supp. 1993).

CERCLA provides for broad and expansive definitions to cover virtually all areas where dumping occurs. For example, the statute defines the term "environment" to include all waters, whether within the borders of the United States or in the contiguous zone—a zone defined by international law to be an agreed amount of miles around the shoreline of a sovereign in which the sovereign has jurisdiction and control.¹⁷⁴ The term "environment" includes: "any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States."¹⁷⁵ The statute defines "otherwise subject to the jurisdiction of the United States" to mean by virtue of U.S. citizenship, U.S. vessel documentation, or international agreement.¹⁷⁶

CERCLA also provides for broad categories of liability. For a company or individual to be liable under CERCLA, a court must find that the company or the individual was a past or present owner or operator of a hazardous waste facility, a past or present generator of hazardous substances, or a party that provides for the transportation of hazardous substances.¹⁷⁷ A facility is defined broadly to include virtually any place at which hazardous wastes have been placed.¹⁷⁸ While CERCLA's statutory standards of liability are vague, courts have applied a strict liability standard.¹⁷⁹ Courts have also determined that CERCLA permits, but does not mandate, joint and several liability.¹⁸⁰

CERCLA, like RCRA, also provides for citizen suits.¹⁸¹ Any person may commence a civil suit against an individual or entity who violates the standards of the act.¹⁸² The statute also allows for foreign plaintiffs and gives the United States jurisdiction over "all controversies arising under this chapter, without regard to the citizenship of the parties"¹⁸³

¹⁷⁴ 42 U.S.C.A. § 9601(8)(A) (West Supp. 1993); *see also* Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, art. 24, 15 U.S.T. 1606, 516 U.N.T.S. 205.

¹⁷⁵ 42 U.S.C.A. § 9601(8)(B) (West Supp. 1993).

¹⁷⁶ 42 U.S.C.A. § 9601(19) (West Supp. 1993).

¹⁷⁷ 42 U.S.C.A. § 9607(a) (West Supp. 1993).

¹⁷⁸ 42 U.S.C.A. § 9601(9) (West Supp. 1993).

¹⁷⁹ *See* David A. Rich, *Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA § 107*, 13 B.C. ENVTL. AFF. L. REV. 643, 655 (1986).

¹⁸⁰ *United States v. Northeastern Pharm. & Chem. Co. (NEPACCO)*, 579 F. Supp. 823, 844 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

¹⁸¹ *See generally* 42 U.S.C.A. § 9659 (West Supp. 1993).

¹⁸² 42 U.S.C.A. § 9659(a) (West Supp. 1993).

¹⁸³ 42 U.S.C.A. § 9613(b) (West Supp. 1993).

C. *Oil Pollution Liability and Compensation Act (OPLCA)*

The Oil Pollution Liability and Compensation Act (OPLCA) is a comprehensive statute designed to clean up oil spills.¹⁸⁴ Like CERCLA, a fund is generated by Congress to facilitate the removal of oil from contaminated areas.¹⁸⁵ Persons found liable must pay damages for, among other things: removal costs, damages to natural resources, damages to real or personal property, income lost due to loss of subsistence use of natural resources, loss of revenues or profits due to personal injury, or destruction or loss of property.¹⁸⁶ Liability extends to any party responsible for a vessel or facility from which oil is discharged.¹⁸⁷

Under OPLCA, a party may be liable to a foreign sovereign for natural resources belonging to, managed by, controlled by, or appertaining to the sovereign in any case in which the OPLCA applies.¹⁸⁸ The OPLCA provides for the designation of a foreign trustee to represent a foreign sovereign's interests in the remediation of its natural resources.¹⁸⁹ The trustee must be appointed by a foreign government to act on that foreign government's behalf.¹⁹⁰

The OPLCA defines a claimant as any person or government who presents a claim for compensation under the Act.¹⁹¹ A foreign claimant is specifically identified as: "(1) a person residing in a foreign country; (2) the government of a foreign country; [or] (3) an agency or political subdivision of a foreign country."¹⁹²

The OPLCA permits a foreign claimant to recover removal costs or damages resulting from a discharge within a foreign country under limited circumstances, including, but not limited to: discharges from a facility within the jurisdiction of the United States or within the contiguous zone, discharges from a vessel within the navigable waters within the foreign sovereign's jurisdiction, or discharges from any vessel carrying oil as cargo between two United States ports.¹⁹³ A treaty or executive agreement between the United States and the claimant's country must specifically authorize a for-

¹⁸⁴ 33 U.S.C.A. § 2701 *et seq.* (West 1993).

¹⁸⁵ 26 U.S.C.A. § 9509 (West 1993).

¹⁸⁶ 33 U.S.C.A. § 2702 (West 1993).

¹⁸⁷ *Id.*

¹⁸⁸ 33 U.S.C.A. § 2706(a)(4) (West 1993).

¹⁸⁹ 33 U.S.C.A. § 2706(b)(5) (West 1993).

¹⁹⁰ *Id.*

¹⁹¹ 33 U.S.C.A. § 2701(4) (West 1993).

¹⁹² 33 U.S.C.A. § 2707(c) (West 1993).

¹⁹³ 33 U.S.C.A. § 2707(b) (West 1993).

eign claimant to recover.¹⁹⁴ If "the Secretary of State, in consultation with the Attorney General and other appropriate officials, . . . certify[s] that the claimant's country provides a comparable remedy for United States claimants," a foreign claimant may recover.¹⁹⁵

The United States and Ecuador enacted the Treaty of Peace, Friendship, Navigation and Commerce in 1839.¹⁹⁶ Article 13 states, in pertinent part: "Both the contracting parties promise and engage, formally, to . . . [leave] open and free to them, the tribunals of justice, for their judicial recourse, on the same terms which are usual and customary with the natives or citizens of the country, in which they may be."¹⁹⁷ The treaty apparently gives equal access, and therefore a comparable remedy, to citizens of each country.

D. *The Alien Tort Claims Act (ATCA)*

The Alien Tort Claims Act (ATCA)¹⁹⁸ was first passed as part of the Judiciary Act of 1789, and applies extraterritorially in a number of cases to extend the jurisdiction of U.S. courts over tort claims.¹⁹⁹ The ATCA states: "The district courts shall have original jurisdiction over 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."²⁰⁰ Thus, the *prima facie* requirements of an action under the statute are: (1) the plaintiff must be an alien; (2) the cause of action must lie in tort; and (3) the tort alleged must be a violation of the law of nations or a treaty of the United States.²⁰¹

In the earliest cases, courts extended jurisdiction under the ATCA over private parties. The first such case was *Bolchos v. Darrel*.²⁰² In that case, the South Carolina District Court, without explanation, stated that it had jurisdiction under the ATCA.²⁰³ Then, in 1961, the

¹⁹⁴ 33 U.S.C.A. § 2707(a)(1)(B) (West 1993).

¹⁹⁵ *Id.*

¹⁹⁶ Treaty of Peace, Friendship, Navigation and Commerce, June 13, 1839, U.S.-Ecuador, 8 Stat. 534 [hereinafter Ecuador Treaty].

¹⁹⁷ *Id.* art. 13.

¹⁹⁸ 28 U.S.C.A. § 1350 (West 1993).

¹⁹⁹ See generally *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993); *Filartiga v. Peña Irala*, 630 F.2d 876 (2d Cir. 1980); *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988); *cf. Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

²⁰⁰ 28 U.S.C.A. § 1350 (West 1993).

²⁰¹ *Id.*

²⁰² 3 F. Cas. 810 (D.S.C. 1795).

²⁰³ *Id.* at 810. The plaintiff, captain of a vessel which brought into port a Spanish prize holding mortgaged slaves, sued the agent of the individual holding the mortgage because the

District Court of Maryland accepted jurisdiction over private parties under the ATCA in *Adra v. Clift*.²⁰⁴ *Adra* involved a child custody dispute in which the court held that it had jurisdiction because an action for child custody is a tort, and the mother of the child had falsified the passport of the child in violation of the law of nations.²⁰⁵ It is significant to note that the activity that violated the law of nations was not the basis for the suit, but only the basis for the court's jurisdiction.²⁰⁶

Over the next two decades, a number of suits were unsuccessful under the ATCA.²⁰⁷ Then, in 1980, the Second Circuit decided the landmark case, *Filartiga v. Peña-Irala*.²⁰⁸ In *Filartiga*, the Paraguayan father and sister of a young man who had been kidnapped and tortured by a Paraguayan general brought suit in the Eastern District of New York.²⁰⁹

The issue in *Filartiga* was whether the acts alleged violated the law of nations.²¹⁰ The plaintiffs submitted several affidavits from distinguished legal scholars stating unanimously that the law of nations prohibits the use of torture under the color of law.²¹¹ The court held that, although there was no universal agreement on the precise extent of human rights guaranteed by the U.N. Charter, this defendant's actions violated universally accepted norms of international law and human rights and, therefore, fell under the ATCA.²¹²

The court asserted a number of propositions regarding the determination of what violations of international law are sufficient to invoke the statute. The court cited *The Paquete Habana*²¹³ for the

agent seized and sold the slaves. *Id.* The court found that the two private parties in the suit were aliens and the action was in tort for an alleged violation of a treaty between the United States and France. *Id.*

²⁰⁴ 195 F. Supp. 857 (D. Md. 1961).

²⁰⁵ See *id.* at 862, 864.

²⁰⁶ *Id.* at 863. The court found jurisdiction because the defendant's act of falsifying her daughter's passport violated the law of nations. *Id.* The lawsuit, however, involved a child custody dispute. *Id.*

²⁰⁷ See generally *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (willful negligence in air disaster not violation of law of nations); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) (fraud, conversion, corporate waste not violations of law of nations); *Khedivial Line, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49 (2d Cir. 1960) (international law does not extend universal right to unimpeded access to ports).

²⁰⁸ 630 F.2d 876 (2d Cir. 1980).

²⁰⁹ *Id.* at 878.

²¹⁰ *Id.*

²¹¹ *Id.* at 879. This tactic was also successful in *Forti*, 694 F. Supp. at 709.

²¹² *Filartiga*, 630 F.2d at 878.

²¹³ 175 U.S. 677 (1900).

proposition that "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."²¹⁴ The court also cited *Romero v. International Terminal Operating Co.*²¹⁵ for the proposition that the law of nations is not stagnant, but should be considered part of an evolutionary process.²¹⁶ The court further determined that a cause of action must allege a violation of the law of nations, not merely a cause of action arising under the law of nations.²¹⁷

A number of cases decided since *Filartiga* have narrowed the application of the ATCA. In *Tel-Oren v. Libyan Arab Republic*,²¹⁸ survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel brought suit against the Palestinian Liberation Organization (PLO) under the ATCA.²¹⁹ The court issued a *per curiam* decision affirming the district court's dismissal of the case.²²⁰ Judge Edwards, Judge Bork, and Senior Judge Robb each submitted concurring opinions.²²¹

Judge Edwards relied on *Filartiga* for the proposition that the ATCA provides a right of action and a forum for any suit alleging a violation of the law of nations.²²² Judge Edwards also determined that after *Filartiga* "persons may be susceptible to civil liability if they commit *either* a crime traditionally warranting universal jurisdiction *or* an offense that comparably violates current norms of international law."²²³ He cited the then-tentative draft of the *Restatement (Third)* for the proposition that certain actions practiced, encouraged, or condoned by a State violate international law.²²⁴ Judge Edwards held that the PLO was not a state actor, that the acts of terrorism did not violate international law, and, therefore, the complaint was not actionable under the ATCA.²²⁵

²¹⁴ *Filartiga*, 630 F.2d at 880.

²¹⁵ 358 U.S. 354 (1959), *reh'g denied*, 359 U.S. 962 (1959).

²¹⁶ *Filartiga*, 630 F.2d at 887.

²¹⁷ *Id.* In other words, human rights violations are of mutual, not several, concern; the fact that several nations consider freedom to contract a right would be of several, not mutual, concern. *Id.* at 888. For a discussion of *jus cogens* by a U.S. court see *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-19 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

²¹⁸ 726 F.2d 774, 775 (D.C. Cir. 1984).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 780 (Edwards, J., concurring).

²²³ *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring).

²²⁴ *Id.*

²²⁵ *Id.* at 791-92. Judge Edwards stated that he was not prepared to extend the definition of violation of the "law of nations" without any direction from the Supreme Court. *Id.* at 792.

Judge Bork concurred with Judge Edwards, but declined jurisdiction for failure to state a claim. He concluded that there must be an allegation of conduct that is somehow "codified" as a violation of international law to find a cause of action under the ATCA.²²⁶ He stated that unless an international agreement is self-executing (provides a private right of action), no cause of action will lie.²²⁷ Senior Judge Robb also concurred, but relied on the political question doctrine.²²⁸

Subsequent caselaw creates uncertainty regarding when, if ever, the ATCA applies. In *Sanchez-Espinoza v. Reagan*,²²⁹ then-Judge Scalia stated that because there is little legislative history surrounding the Act, it may conceivably only cover "private, non governmental acts that are contrary to treaty [sic] or the law of nations."²³⁰ He stated that there was no treaty that covered the acts alleged in the complaint and that the law of nations "does not reach private, non state conduct of *this sort* for the reasons stated by Judge Edwards in *Tel-Oren . . .*."²³¹

The U.S. Supreme Court briefly addressed the ATCA in *Argentine Republic v. Amerada Hess Shipping Corp.*²³² In *Amerada Hess*, the Court held that the Foreign Sovereign Immunities Act (FSIA)²³³ was the only basis for jurisdiction over a foreign state, and that it therefore supplants the ATCA in situations involving official state action.²³⁴ *Amerada Hess* involved the attack of a neutral ship during war. The Court held that the FSIA was the sole basis for jurisdiction over a foreign sovereign in any action in U.S. courts.²³⁵

In 1992, the Ninth Circuit addressed two applications of the ATCA, both involving alleged instances of torture by an individual acting under the color of law.²³⁶ In *Siderman de Blake v. Argentina*, the court gave an extensive analysis of *jus cogens* and the applicability of the FSIA in cases which involve the violation of *jus cogens*.²³⁷ The

²²⁶ *Id.* at 799 (Bork, C.J., concurring).

²²⁷ *Id.* at 801.

²²⁸ *Tel-Oren*, 726 F.2d at 823 (Robb, C.J., concurring). Judge Robb stated that "[f]ederal courts are not in a position to determine the international status of terrorist acts." *Id.*

²²⁹ 770 F.2d 202 (D.C. Cir. 1985).

²³⁰ *Id.* at 206.

²³¹ *Id.* at 206-07 (emphasis added).

²³² 488 U.S. 428 (1989).

²³³ 28 U.S.C.A. §§ 1602-11 (West 1993).

²³⁴ 488 U.S. at 434.

²³⁵ *Id.* at 439.

²³⁶ *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993); *Siderman de Blake v. Republic of Argentina*, 965 F.2d at 714-19.

²³⁷ 965 F.2d at 714-19.

court closely examined the plaintiff's argument that the FSIA should not apply because the FSIA is based on international law, and international law does not recognize acts in violation of *jus cogens* as state actions.²³⁸ The court was convinced by this argument, but stated that Argentina was immune under the FSIA because all FSIA cases must be addressed "through the prism of *Amerada Hess*,"²³⁹ and Congress had not given any indication that violations of *jus cogens* should trump the FSIA.²⁴⁰

In the case of *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, the Ninth Circuit found that the defendant, the daughter of former Philippine President Ferdinand Marcos, had admitted acting on her own authority and, therefore, was not immune under the FSIA.²⁴¹ The court stated that Congress intended § 1350 to provide a federal cause of action for "transitory torts"—tort actions that follow a tortfeasor wherever he or she goes.²⁴² The court held that there was jurisdiction under the ATCA because acts of torture are violations of the law of nations.²⁴³

IV. APPLICATION OF THE PRINCIPLES OF EXTRATERRITORIAL JURISDICTION TO U.S. ENVIRONMENTAL STATUTES AND *AGUINDA* V. *TEXACO*

A. Forum Non Conveniens

In *Aguinda v. Texaco*, Texaco has already filed a motion to dismiss on the basis of *forum non conveniens*. U.S. District Court Judge Vincent Broderick, in an unpublished decision dated April 11, 1994, denied Texaco's motion.²⁴⁴ Judge Broderick reserved decision on Texaco's motions to allow discovery because it was important to differentiate between events that occurred within the United States—such as specific or generalized directions initiating events in the rainforest—and those that occurred outside the United States.²⁴⁵

²³⁸ *Id.* at 718.

²³⁹ *Id.*

²⁴⁰ *Id.* at 719.

²⁴¹ 978 F.2d at 498.

²⁴² *Id.* at 503.

²⁴³ *Id.* at 499.

²⁴⁴ *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7257, (S.D.N.Y. Apr. 11, 1994) [hereinafter April Memo].

²⁴⁵ *Id.* at 2-3.

This inquiry was limited, however, to information that could be secured voluntarily.²⁴⁶

The court was concerned with the possible need for injunctive relief against Texaco, specifically ordering the company to refrain from making decisions in the United States that initiate such activities abroad without proper safeguards.²⁴⁷ The court distinguished a similar case, *Sequihua v. Texaco*, recently dismissed on the grounds of *forum non conveniens*²⁴⁸ and noted that all of the challenged activity alleged in *Sequihua* occurred within Ecuador.²⁴⁹ The court found that unlike *Sequihua*, the Aguinda Complaint alleged that the decisions, in whole or in part, were made within the United States.²⁵⁰

B. Congressional Intent

1. RCRA

In light of the Third Circuit's recent decision in *United States v. Harvey*,²⁵¹ a court may find sufficient congressional intent for RCRA to apply extraterritorially where the responsible party is a U.S. citizen. RCRA's provisions to fight pollution detrimental to human health and the environment are of unprecedented scope and are arguably as broad as the statutory language in *Harvey*.²⁵² RCRA is a statute that regulates the entire waste cycle and thoroughly addresses hazardous waste issues in areas never before regulated.²⁵³ Congress, therefore, may have intended RCRA to apply outside the United States when a U.S. corporation pollutes abroad.

Despite the broad language of RCRA and its apparent far reaching scope, the District Court for the Southern District of New York refused to apply RCRA extraterritorially in *Amlon Metals Inc. v. FMC Corp.*²⁵⁴ The District Court's interpretation of RCRA in *Amlon*, however, seems incongruous with the plain language of the statute. The waste export provision of the statute reflects congressional concern

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 8.

²⁴⁸ No. 93 Civ. 3432 (S.D. Tex. Jan. 27, 1994).

²⁴⁹ April Memo, *supra* note 244, at 9 (quoting *Sequihua v. Texaco*, No. 93 Civ. 3432 (S.D. Tex. Jan 27, 1994)).

²⁵⁰ *Id.*

²⁵¹ 2 F.3d 1318 (3d Cir. 1993).

²⁵² See *id.* at 1327; see also PLATER ET AL., *supra* note 161, at 251-52.

²⁵³ See PLATER ET AL., *supra* note 161, at 251-52.

²⁵⁴ 775 F. Supp. 668, 676 (S.D.N.Y. 1991).

with wastes exported in situations similar to that in *Amlon*.²⁵⁵ This assertion is supported by Senator Mitchell's remarks that "no American ally or trading partner [should be] saddled with U.S. wastes it does not want or does not have the capacity to handle in an environmentally sound manner."²⁵⁶ The court in *Amlon* avoided this application by separating the export provision from the citizen suit provision, thereby disallowing the extraterritorial application in a private suit.²⁵⁷

Citizen suit provisions, however, are often inserted in legislation to ensure that statutory provisions are enforced, not to limit the application of a statute.²⁵⁸ An already burdened agency cannot prosecute every infraction, and citizens, therefore, act as private "Attorneys General" to enforce various provisions of the statute, or to sue for damages if appropriate.²⁵⁹ In a situation where toxins are exported, a court's failure to apply RCRA extraterritorially would eviscerate the statute.

In *Harvey*, however, the court applied the statute extraterritorially precisely to avoid such a result.²⁶⁰ Furthermore, the courts failure to apply RCRA in situations where toxins are exported encourages U.S. companies to ship hazardous wastes overseas. If the shipment is not discovered prior to export, once the wastes are within a foreign sovereign—and, perhaps, once they are on the high seas—the statute no longer applies.

Even if a court applies the more restrictive "affirmative intent" standard articulated by Justice Rehnquist in *E.E.O.C. v. Arabian American Oil Co. (Aramco)*, the statute most likely shows sufficient congressional intent for RCRA to apply extraterritorially.²⁶¹ The specific inclusion of the export provisions and Senator Mitchell's remarks indicate such an affirmative intent by Congress.²⁶² Contrary to the decision in *Amlon*, therefore, RCRA may have an extraterritorial application in some instances.

Even if there is congressional intent for RCRA to apply extraterritorially, it is not likely a court would find congressional intent to apply RCRA extraterritorially in a situation like that alleged in the

²⁵⁵ See 42 U.S.C.A. § 6928(d)(6) (West 1993).

²⁵⁶ *Amlon*, 775 F. Supp. at 674 (citing 130 Cong. Rec. 20816 (1984)).

²⁵⁷ *Id.*

²⁵⁸ See PLATER ET AL., *supra* note 161, at 303–04.

²⁵⁹ See *id.* at 303.

²⁶⁰ 2 F.3d at 1327.

²⁶¹ See 499 U.S. 244, 249 (1991).

²⁶² See *Amlon*, 775 F. Supp. at 674.

Aguinda Complaint.²⁶³ Congress most likely did not intend a subsidiary of a U.S. corporation, or a U.S. corporation itself operating abroad, to be liable under RCRA. The definition of persons liable is broad, but much of the statutory language seemingly limits RCRA to the United States.²⁶⁴ For example, while the provisions expressly apply broadly to a case commenced against past or present owners or operators of, or any person contributing to, a dump site, its provisions asserting that venue is the district court for the district in which the alleged violations occurred strongly suggests that Congress did not intend to include extraterritorial dumping within the scope of the statute.²⁶⁵ If the wastes are generated overseas, RCRA most likely does not apply extraterritorially.

2. CERCLA

The unprecedented scope of CERCLA may evidence sufficient congressional intent for the statute to apply extraterritorially. The Superfund Amendments and Reauthorization Act (SARA), which amended CERCLA in 1984, is so pro-liability that some suggest its acronym ought to be changed to RACHEL because the Reauthorization Act Confirms How Everyone's Liable.²⁶⁶ The broadness of the statute is reflected in its definition of the environment, which includes areas within the United States and areas otherwise subject to the jurisdiction of the United States.²⁶⁷ Thus a court may, like in *Harvey*, find sufficient intent to apply CERCLA extraterritorially.²⁶⁸

It is unlikely, however, that its scope alone is sufficient to show congressional intent for the statute to apply extraterritorially. Failure to apply CERCLA in an extraterritorial setting would not greatly curtail the scope and usefulness of the statute.²⁶⁹ Likewise, if a court applies the restrictive "affirmative intent" test from *Aramco*, it is even less likely that it would find the statute to have an extraterritorial application.²⁷⁰ Other factors suggest that CERCLA has only domestic effect, including: the fact that there is a *federal* fund for cleanups, the fact that sites are listed in a *national* database (CERCLIS), and

²⁶³ See Aguinda Complaint, *supra* note 8, at 4–5; see also *supra* notes 10–18 and accompanying text.

²⁶⁴ See, e.g., 42 U.S.C.A. § 6903(15) (West Supp. 1993).

²⁶⁵ See 42 U.S.C.A. § 6928(a)(1) (West Supp. 1993).

²⁶⁶ See PLATER ET AL., *supra* note 161, at 279.

²⁶⁷ See 42 U.S.C.A. § 9601(8)(B) (West Supp. 1993).

²⁶⁸ 2 F.3d at 1327.

²⁶⁹ See *id.*

²⁷⁰ See *Aramco*, 499 U.S. at 259.

the fact that sites are prioritized according to a *national* priority list (NPL).²⁷¹

3. The Oil Pollution Liability and Compensation Act (OPLCA)

The Oil Pollution Liability and Compensation Act (OPLCA),²⁷² like CERCLA and RCRA, is a broad statute that addresses a serious problem. The scope of the Act is not sufficiently broad to cover the acts alleged in the Aguinda Complaint. The Act does specifically allow for foreign claimants, but it limits the situations in which a foreign claimant may have a cause of action.²⁷³ The actions alleged in the Aguinda Complaint do not fit these situations.

The OPLCA allows for recovery if a discharge is made within the navigable waters of a foreign sovereign;²⁷⁴ this type of discharge is not alleged in the Aguinda Complaint. Under the OPLCA, foreign claimants must be authorized to recover pursuant to a treaty or executive agreement between the United States and the claimant's country, or the Secretary of State must certify that the claimant's country provides a comparable remedy in the United States.²⁷⁵ It is not clear, however, what is meant by comparable remedy. There is a treaty between the United States and Ecuador which gives reciprocal access to tribunals of justice, but it is not clear whether access alone is a comparable remedy.²⁷⁶

C. *The Effects Doctrine*

Even if a court found congressional intent for RCRA, CERCLA, or the OPLCA to apply extraterritorially, the court will still examine if the actions fall under the effects doctrine. The court will analyze the actions alleged to determine if there is a domestic effect caused by the overseas conduct.²⁷⁷ Thus, if the examining court finds that Texaco's actions do not produce such an effect, and there is no other basis for jurisdiction, the court will dismiss the case.²⁷⁸

²⁷¹ See PLATER ET AL., *supra* note 161 at 882, 886.

²⁷² 33 U.S.C.A. § 2701 *et seq.* (West 1993).

²⁷³ See *id.*

²⁷⁴ See Aguinda Complaint, *supra* note 8, at 22–27; see also *supra* notes 10–18 and accompanying text.

²⁷⁵ 33 U.S.C.A. § 2707(a)(1)(B) (West 1993).

²⁷⁶ See Ecuador Treaty, *supra* note 196, art. 13.

²⁷⁷ See, e.g., *Hartford Fire Ins. Co.*, 113 S. Ct. at 2909.

²⁷⁸ See RESTATEMENT (THIRD), *supra* note 21, § 402 and comments.

The impact of the acts alleged in the Aguinda Complaint is widespread water pollution and deforestation in Ecuador, and the likely death of hundreds of indigenous peoples from cancer and other toxic-related illnesses.²⁷⁹ These effects are only found within the sovereign borders of Ecuador,²⁸⁰ and are unlikely to be felt within the United States. Any effects within the United States would be minimal at best, and there is a strong argument that there would be no domestic effects.

Environmental damage and degradation, however, are global issues, with long and short term implications that effect every nation, including the United States. Widespread deforestation, desertification, global warming, and holes in the Ozone Layer are all issues that concern the international community.²⁸¹ This is because these issues know no boundaries and impact on all nations, albeit on some more directly than on others.

U.S. courts are unlikely to declare the amorphous effects of "loss of biodiversity" or "global warming" as domestic effects without more direction from Congress. Despite the global consequences of corporate actions overseas that cause such global environmental problems, it is unlikely that a U.S. court will find them sufficiently compelling to warrant the exercise of extraterritorial jurisdiction. Courts that find sufficient domestic effects point to more specific, easily defined effects, such as social problems caused by drugs,²⁸² child pornography,²⁸³ or unfair trade practices.²⁸⁴

It is even less likely a court will find that Texaco intended to produce these effects on the environment—either globally or in Ecuador. Some courts have held that they will only assert extraterritorial jurisdiction if there is an *intended* effect.²⁸⁵ Environmental degradation was not likely the intent of Texaco. The most probable domestic effect intended by Texaco was increased values for shareholders.

²⁷⁹ See James Brook, *Pollution Of Water Tied to Oil In Ecuador*, N.Y. TIMES, Mar. 22, 1994, at C11.

²⁸⁰ See *id.*

²⁸¹ See generally, e.g., Convention on Biological Diversity, June 1992, 31 I.L.M. 818; Framework Convention on Climate Change, June 1992, 31 I.L.M. 849.

²⁸² See *Rivard v. United States*, 375 F.2d 882, 887 (5th Cir. 1967).

²⁸³ See *Harvey*, 2 F.3d at 1328.

²⁸⁴ See *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 615 (9th Cir. 1977).

²⁸⁵ See *United States v. Aluminum Corp. of America (ALCOA)*, 148 F.2d 416, 443-44 (2d Cir. 1945).

If the allegations against Texaco are true, however, one intended domestic effect may be unfair competition. Companies that drill oil within the borders of the United States must do so at a significantly higher cost because they must carefully dispose of the wastes in accordance with U.S. laws. Domestic companies are at an extreme disadvantage to companies that improperly dispose of wastes. The potential effect is that companies who have the benefit of concession agreements with developing countries make windfall profits at the expense of the local indigenous peoples, while domestic drilling companies operate at a lower profit margin, because they must meet higher environmental standards and still compete with the price of imported oil.

Unfair competition is probably not, however, a sufficient domestic effect for a U.S. court to assert extraterritorial jurisdiction. The activities alleged in the Aguinda Complaint are not such that they result in the manipulation of business practices in the United States, as did the British insurance companies in *Hartford Fire Insurance Co. v. California*.²⁸⁶ The actions probably have minimal effect on U.S. foreign commerce, unlike the actions in *United States v. Aluminum Co. of America (ALCOA)*.²⁸⁷ The dumping alleged in the Aguinda Complaint will not be adding to the already pressing problem of pollution within the United States, as was the case with the child pornography issue in *United States v. Harvey*.²⁸⁸ It is therefore unlikely that a court will find a domestic effect sufficient to warrant extraterritorial jurisdiction under U.S. environmental laws.

D. *The Principle of Universal Jurisdiction and the Alien Tort Claims Act (ATCA)*

There is a strong case for a court to apply the ATCA extraterritorially and assert jurisdiction in *Aguinda v. Texaco*. Two of the three requirements for a cause of action to stand under the ATCA are met: the plaintiffs are aliens, specifically Ecuadoran indigenous peoples suffering from the effects of widespread environmental degradation,²⁸⁹ and, the complaint requests relief under various tort theories, including negligence and strict liability for the toxic tort of widespread oil pollution and dumping.²⁹⁰

²⁸⁶ See 113 S.Ct. at 2898; see also *supra* notes 118–129 and accompanying text.

²⁸⁷ See 148 F.2d at 444.

²⁸⁸ See 2 F.3d at 1328 (quoting *United States v. Thomas*, 893 F.2d 1066, 1068–69 (9th Cir.), cert. denied, 498 U.S. 826 (1990)).

²⁸⁹ Aguinda Complaint, *supra* note 8, at 3–4.

²⁹⁰ *Id.* at 27–33.

It is unclear, however, whether the third requirement is met, because the actions alleged may not violate the law of nations or a treaty.²⁹¹ As previously noted, a court examines international law documents, including specific treaties and conventions, and affidavits submitted by international legal scholars, to determine if an action violates the law of nations.²⁹²

1. Violations of Treaties or International Contract Law

Treaties, by definition, are between sovereign states.²⁹³ It is difficult to find a treaty that these actions by a private party within a foreign sovereign violate. They may, however, violate the Rio Declaration on Environment and Development (Rio Declaration).²⁹⁴

Principle 2 of the Rio Declaration bestows on States the “responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limit of national jurisdiction.”²⁹⁵ Principle 6 of the Rio Declaration recognizes the “special situation and needs of developing countries [T]hose most environmentally vulnerable, shall be given special priority.”²⁹⁶ Principle 7 states that “developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development”²⁹⁷ Principle 13 specifically mandates States to use their national law to provide compensation for victims of pollution and environmental damage:

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate . . . to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their control.²⁹⁸

²⁹¹ See *Filartiga*, 630 F.2d at 880.

²⁹² See *id.* at 879; *Forti*, 694 F. Supp. at 709.

²⁹³ See WESTON ET AL., *supra* note 3, at 44; see also Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(a), UN Doc. A/Conf.39/27, at 289(1969), 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

²⁹⁴ *Report of the U.N. Conference on Environment and Development*, Rio Declaration of the United Nations Conference on Environment and Development, U.N. Doc. A/Conf. 151/5/Rev.1 (1992), *reprinted in*, 31 I.L.M. 876, [hereinafter Rio Declaration].

²⁹⁵ *Id.* principle 2, 31 I.L.M. at 876.

²⁹⁶ *Id.* principle 6, 31 I.L.M. at 877.

²⁹⁷ *Id.* principle 7, 31 I.L.M. at 877.

²⁹⁸ *Id.* principle 13, 31 I.L.M. at 878.

The United States has signed this agreement, but has not yet ratified the document. Nor has the treaty come into force. When a country signs an international agreement, however, it must try to effectuate the agreement's goals until ratification.²⁹⁹ Article 18 of the Vienna Convention on Treaties states that "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval"³⁰⁰ A country that does not do so shows bad faith and is in violation of customary international law.³⁰¹ The United States, therefore, must not act in such a way to defeat the object and purpose of the Rio Declaration.

Failure to take jurisdiction is a failure to comply with principle 13 of the Rio Declaration, which requires States to "develop national law regarding liability and compensation for the victims of pollution and other environmental damage."³⁰² The United States, by declining jurisdiction, would indicate a failure to "develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their control."³⁰³

The United States has jurisdiction over Texaco, Inc. because Texaco is a U.S. corporation. The court may therefore assert jurisdiction over Texaco under the nationality principle.³⁰⁴ If the court asserted jurisdiction over Texaco in this case, it would be further developing the law "regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction"³⁰⁵ The failure to assert extraterritorial jurisdiction is a lost opportunity to further develop the law. Failure to assert extraterritorial jurisdiction in this case is, therefore, contrary to principle 13 of the Rio Declaration.

Failure to take jurisdiction in this case may be a failure to take responsibility in the international pursuit of sustainable development.³⁰⁶ By asserting jurisdiction, the United States would discour-

²⁹⁹ See Vienna Convention, *supra* note 293, art. 18.

³⁰⁰ *Id.*

³⁰¹ See WESTON ET AL., *supra* note 3, at 73-74.

³⁰² See Rio Declaration, *supra* note 294, art. 13.

³⁰³ See *id.*

³⁰⁴ See RESTATEMENT (THIRD), *supra* note 21, § 402(e); see also text accompanying notes 26-28.

³⁰⁵ See Rio Declaration, *supra* note 294, art. 13.

³⁰⁶ See *id.* art. 7.

age activities by its nationals that would cause environmental damage overseas. If the United States does not take any action, there is no incentive for U.S. multinational corporations to take responsibility and operate in an environmentally sound manner overseas. In developing countries with unequal bargaining power and a strong need for technological advancement, this often can result in damaging environmental consequences. Therefore, failure to take jurisdiction in this case may be a failure to take responsibility in the international pursuit of sustainable development.

It also is possible for the court to interpret the concession agreement between Texaco and Ecuador as a quasi-treaty under the ATCA. A contract between a sovereign nation and a private party, also known as a concession agreement, usually allows a private party to operate within the sovereign in a mutually beneficial economic arrangement.³⁰⁷ Such agreements allow private parties with advanced technology to develop natural resources and pay royalties to the sovereign state. Jurisdictional issues often arise when a party breaches the agreement.³⁰⁸

The agreement between Texaco and Ecuador was such a concession agreement. Texaco allegedly supplied its equipment, technology, expertise, and management to drill for and extract oil in Ecuador.³⁰⁹ In exchange, the Ecuadoran government presumably received royalties from the extraction and sale of the crude oil. If the court interpreted a concession agreement as a quasi-treaty under the ATCA, and that agreement guaranteed that development would proceed in an environmentally sound manner, a cause of action would lie.

There is no precedent, however, for a U.S. court to interpret such an agreement as a quasi-treaty. The court may consider a violation of a concession agreement a breach of contract and give Ecuador a cause of action under contract theories. This would not, however, give rise to a cause of action under the ATCA for the plaintiffs in *Aguinda*.

The international community usually considers concession agreements as contracts, and not as treaties of any sort.³¹⁰ In fact, such concession agreements present peculiar problems under interna-

³⁰⁷ For a discussion of the treatment of concession agreements in international law, see generally WESTON ET AL., *supra* note 3, at 418-512.

³⁰⁸ *Id.* at 418-19.

³⁰⁹ See *Aguinda* Complaint, *supra* note 8, at 22-24.

³¹⁰ See WESTON ET AL., *supra* note 3, at 418.

tional law, as only States are considered subject to international law.³¹¹ Nonetheless, these agreements are recognized as international agreements by the international community, and it is possible that a U.S. court could interpret Texaco's concession agreement as a quasi-treaty for purposes of jurisdiction under the ATCA.

2. General International Human Rights Law

The large scale degradation of the local environment to the point of possible extinction of the local population may violate basic human rights under international conventions and the U.N. Charter. The U.N. Charter calls on all Member States to respect human rights.³¹² The international community has codified various conventions and treaties that nations universally consider human rights violations.³¹³

Examples of human rights violations are found in a number of U.N. documents and other multilateral treaties. For example, international agreements recognize the right to the preservation of health and an adequate standard of living.³¹⁴ A number of international agreements also recognize the right of the individual to be free from cruel, inhuman, or degrading treatment.³¹⁵

Violations of basic human rights may be violations of customary international law because they are recognized in many international agreements. U.S. courts have already recognized the violation of basic human rights as a violation of universal international law.³¹⁶ If the international community considers severe environmental degra-

³¹¹ See *id.* at 419.

³¹² U.N. CHARTER art. 1, ¶ 3.

³¹³ Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., 1496th plen. mtg. Supp. No. 16, at 62, U.N. Doc. A/6316 (1966); The European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention for the Protection of Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/ser L/V/II.23, doc. 21, rev. 6 (English 1979), reprinted in 9 I.L.M. 673 (1978); see also Case 9647, Inter-Am. C.H.R. 147, 166, OEA/Ser. L/V/II.71, doc. 9 rev. 1 (1987).

³¹⁴ See, e.g., American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (March 30–May 2, 1948), art. XI, Bogota, O.A.S. Off. Rec. OEA/Ser. L/V/I.4 rev. (1965); Universal Declaration of Human Rights, *supra* note 313, art. 25.

³¹⁵ See, e.g., Universal Declaration of Human Rights, *supra* note 313, art. 5.

³¹⁶ See *Filartiga*, 630 F.2d at 878. Universal International Law, also called *jus cogens*, is a body of law which recognizes certain acts by definition violate international law. See *supra* notes 36–39 and accompanying text. For a discussion by a U.S. court of the difference in magnitude between customary international law and *jus cogens* see *Siderman de Blake*, 965 F.2d at 715–716.

dation to be a violation of these fundamental human rights, the court might find a valid cause of action under the ATCA.

This conclusion is consistent with previous holdings in U.S. courts. For example, in both *Forti v. Suarez-Mason* and *Filartiga v. Peña-Irala*, the plaintiffs submitted affidavits by prominent legal scholars that indicated the crime alleged in both complaints was a violation of internationally recognized human rights.³¹⁷ In *Siderman de Blake v. Republic of Argentina*, the court recognized that violations of basic human rights were violations of *jus cogens*—values considered fundamental by the international community—and not simply violations of customary international law.³¹⁸

This conclusion is also consistent with *Sanchez-Espinoza v. Reagan*,³¹⁹ which held that the ATCA did not apply to private parties under the circumstances alleged.³²⁰ Then-Judge Scalia specifically stated that the ATCA “may conceivably . . . cover only private, non-governmental acts that are contrary to [a] treaty or the law of nations.”³²¹ If the environmental degradation alleged in the Aguinda Complaint violates these internationally recognized legal rights, Texaco may be in violation of the law of nations and the court should find a colorable claim under the ATCA.

3. The Genocide Convention

The actions alleged in the Aguinda Complaint arguably violate the Convention on the Prevention and Punishment of Genocide (Genocide Convention).³²² The Genocide Convention defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group”³²³ The Convention makes it a crime not only to commit genocide, but also to conspire, incite, or attempt to commit genocide.³²⁴ The Genocide Convention

³¹⁷ See *Filartiga*, 630 F.2d at 879 (holding that torture under color of authority is violation of internationally recognized human rights); *Forti*, 694 F. Supp. at 709 (holding that “disappearance” is violation of internationally recognized human rights).

³¹⁸ 965 F.2d at 715.

³¹⁹ 770 F.2d 202 (D.C. Cir. 1985).

³²⁰ *Id.* at 206–07.

³²¹ *Id.* at 206.

³²² Convention on the Prevention and Punishment of Genocide, Jan. 12, 1951, art. 2, ____ U.S.T. ____, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

³²³ *Id.* The acts specifically enumerated include: killing or causing serious bodily or mental harm to the group, the infliction of conditions calculated to destroy the group, imposing measures to prevent births within the group, or the forcible transfer of children to another group. *Id.*

³²⁴ *Id.* art. 3.

specifically provides that both governments and private parties who commit genocide are liable.³²⁵

Texaco's drilling operations have allegedly caused the deprivation of clean drinking water to the Indians in the Oriente, the Ecuadoran rainforest.³²⁶ The widespread dumping has caused the total destruction and environmental degradation of large areas of the rainforest.³²⁷ This, in turn, will probably result in the extinction of several Indian tribes because the natives depend on the rainforest for their survival.³²⁸

There are several reasons why it might be inappropriate to apply the Genocide Convention to the situation in which natives are harmed, possibly to the point of extinction. The first reason is lack of intent: Article 2 of the Genocide Convention requires intent to destroy the group.³²⁹ It is unlikely that a court will find that Texaco had the requisite intent to destroy the native tribes.

Another reason is that applying the Genocide Convention in this instance might serve to demystify and dilute the Convention by broadening its scope. The international community would probably not consider extreme environmental degradation genocide, and it is probably not advisable to do so. The international community regards genocide as a truly heinous crime, one which is strictly forbidden.³³⁰ If the international community recognizes activities that many would find acceptable within the meaning of genocide, it may somewhat discredit the Convention and limit its impact as a universal crime.

E. *The International Community: Potential Reactions to the Extraterritorial Application of Jurisdiction Over Environmental Issues*

As already noted, U.S. courts will not assert extraterritorial jurisdiction in the face of a severe conflict of laws either with the foreign

³²⁵ *Id.* art. 4.

³²⁶ See Aguinda Complaint, *supra* note 8, at 25-27.

³²⁷ *Id.*

³²⁸ William Andrew Shutkin, Note, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, 31 VA. J. INT'L L. 479, 490 (1991). The indigenous peoples are interdependent on their environment and they farm the rainforest to survive. *Id.* at 494. The Huoarani once numbered between twenty and thirty thousand; it is estimated that there are only approximately 1500 alive today. CLIVE GRYLLIS, ENVIRONMENTAL HOOLIGANISM IN ECUADOR: A STUDY OF THE ENVIRONMENTAL, SOCIAL AND CULTURAL EFFECTS OF OIL OPERATIONS IN THE ECUADORIAN ORIENTE 40 (1992).

³²⁹ Genocide Convention, *supra* note 322, art. 2.

³³⁰ *Id.*

sovereign or the international community as a whole.³³¹ Recent U.S. cases indicate, however, that there will be no such conflict in the *Aguinda* case.³³² Furthermore, the international community may encourage or perhaps require the assertion of jurisdiction in this case.

1. Conflict with Laws in Ecuador

One of the factors a court will weigh in a conflict of laws analysis is the degree of conflict between U.S. and foreign law.³³³ There does not seem to be any conflict between the laws of Ecuador and those domestic laws a U.S. court would apply to the *Aguinda* Complaint. The Ecuadoran Constitution guarantees the right to a clean environment.³³⁴ Furthermore, there are many laws in Ecuador which address environmental issues and offer protection against environmental degradation.³³⁵ Finding environmental liability would not, therefore, be in conflict with the laws of Ecuador.

2. Foreign Relations

There may, however, be a foreign relations issue if a court accepts jurisdiction. The Ecuadoran government was a partner in Petroecuador, the foreign corporation through which Texaco operated and which the Ecuadoran government still operates.³³⁶ The Ecuadoran government may be uncomfortable with a U.S. court ordering Texaco to pay damages or to engage in a cleanup in Ecuador because the court's order may impinge on Petroecuador's ability to continue operations without regard to the environment.

Furthermore, Texaco has sued the government of Ecuador for contribution in Ecuadoran courts.³³⁷ The Ecuadoran government is

³³¹ See *supra* text accompanying notes 130–156.

³³² See *id.*; see also *Hartford Fire Ins. Co.*, 113 S. Ct. at 2921; *Harvey*, 2 F.3d at 1327.

³³³ See *Hartford Fire Ins. Co.*, 113 S.Ct. at 2910; *Mannington Mills, Inc.*, 595 F.2d at 1297; *Timberlane Lumber Co.*, 549 F.2d at 614.

³³⁴ ECUADOR CONST. art. 19 ¶ 2. The Constitution specifically establishes "the right to live in an environment free of contamination." *Id.* The constitution further states that "[i]t is the duty of the State to be vigilant so that this right should not be affected and to guard nature's preservation. *Id.* The law will establish the restrictions to exercise certain rights or liberties so as to protect the environment[.]" *Id.*

³³⁵ Decree #374, *supra* note 9. The statute is very broad and covers the prevention and control of air pollution (Chapter V), water pollution (Chapter VI), and soil pollution (Chapter VII). *Id.*

³³⁶ See *Indians Sue*, *supra* note 11; see also *Aguinda Complaint*, *supra* note 8, at 4.

³³⁷ *Ecuador: Problems with Texaco Will Not Affect Oil Auction*, Inter-Press Serv., Jan. 17, 1994, available in LEXIS, World Library, Curnws file. In December 1993, Texaco filed a \$300 million

likely to be against any exercise of jurisdiction which may adversely affect it.³³⁸ In fact, the government of Ecuador sent a communication to the U.S. government in December 1993 stating that Ecuador does not support the assertion of U.S. jurisdiction.³³⁹ This is not the unanimous position of the government, however, and there has been much criticism of the action.³⁴⁰

It is unlikely that foreign relations alone is sufficient to prevent the extraterritorial application of the ATCA in the *Aguinda* case. The Ninth Circuit, for example, does not examine foreign relations in a conflict of laws analysis.³⁴¹ Furthermore, the Supreme Court has recently stated that there is only one issue to analyze when a U.S. court determines whether to assert extraterritorial jurisdiction: Is there "a true conflict between domestic and foreign law?"³⁴²

3. Enforceability of Judgment

As previously discussed, a court must consider the enforceability of a judgment over the defendant.³⁴³ If the court orders Texaco to clean up contaminated areas, enforcement would be difficult. If the court, however, orders a fund, either for restoration, medical monitoring, or both, there would be no enforcement problem. The funds would come from assets in the United States and could be set up and administered from the United States.

This factor weighs heavily in favor of jurisdiction in the United States. The Ecuadoran courts could not enforce a judgment against the corporation because Texaco no longer has assets there. Furthermore, the fact that the plaintiffs in the *Aguinda* Complaint are unable to get relief in their own country weighs heavily in favor of entertaining the suit in the United States.

lawsuit in Ecuador against the government. *Id.* The lawsuit alleges that the Ecuadoran petroleum authorities failed to comply with contractual obligations. *Id.*

³³⁸ See *Ecuador: Congress Accuses Duran-Ballen of Favoring Texaco*, Inter Press Serv., Jan. 20, 1994, available in LEXIS, World Library, Curnws File.

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ See *Timberlane Lumber Co.*, 549 F.2d at 614.

³⁴² *Hartford Fire Ins. Co.*, 113 S.Ct. at 2910 (quoting *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part, dissenting in part)).

³⁴³ See *Mannington Mills, Inc.*, 595 F.2d at 1298; *Timberlane Lumber Co.*, 549 F.2d at 614.

4. The International Community

The importance of the alleged violation in the United States versus its importance abroad may weigh in favor of declining jurisdiction.³⁴⁴ Environmental damages are a local problem, and the damages occurred in Ecuador. The United States, however, is concerned with preventing its nationals from breaching international law. These actions may violate international law because conventions signed by the United States include a prohibition on such activities.³⁴⁵

Courts do not like to make judgments which conflict with international law, but the court would not have to do so in the *Aguinda* case. The international community is concerned with the environment and is, therefore, unlikely to object to the United States asserting control over its nationals to preserve and protect the environment. There are several indicia of this concern.

In *Our Common Future*,³⁴⁶ for example, the World Commission on Environment and Development (Brundtland Commission) argued that if something is not done soon, humankind may entirely destroy the environment.³⁴⁷ Over the past twenty years, the international community had signed and ratified a number of conventions.³⁴⁸ The Brundtland Commission argued that this was not enough and for the first time spoke in terms of sustainable development.³⁴⁹ In response, world leaders began to discuss what this meant and began to formulate a unified and more holistic approach to environmental protection. This effort culminated in the United Nations Conference on Environment and Development in Rio de Janeiro in June of 1992, where the international community signed several such conventions.³⁵⁰

International law, therefore, reflects a heightened concern for the environment. Likewise, the international community is clearly con-

³⁴⁴ See *Mannington Mills, Inc.*, 595 F.2d at 1297; *Timberlane Lumber Co.*, 595 F.2d at 614.

³⁴⁵ See *supra* notes 295-298 and accompanying text.

³⁴⁶ WORLD COMMISSION ON ENVIRONMENT & DEVELOPMENT, *OUR COMMON FUTURE* (1987). The Secretary General of the United Nations approached Gro Harlem Brundtland of Norway in 1983 to formulate a global agenda for change. *Id.* at ix. The results of that commission were published in the book *Our Common Future*.

³⁴⁷ *Id.*

³⁴⁸ See ENVIRONMENTAL CHANGE, *supra* note 2, at 482-490.

³⁴⁹ *OUR COMMON FUTURE*, *supra* note 346, at 43-65.

³⁵⁰ See Edith Brown Weiss, *Introductory Note to the United Nations Conference on Environment and Development*, 31 I.L.M. 814, 814 (1992).

cerned with discovering new ways to address environmental issues that take into account the changing demands of a developing world.³⁵¹ Furthermore, "[n]o tenet of international law prohibits Congress from punishing the wrongful conduct of its citizens, even if some of that conduct occurs abroad."³⁵²

The court should assert extraterritorial jurisdiction in this case. Texaco is a U.S. citizen. The international community considers these types of activities wrongful. The court should recognize that the international community will not condemn, but, rather, will encourage the assertion of jurisdiction. Therefore, in a situation such as that alleged in the Aguinda Complaint, where a U.S. national is alleged to be responsible for environmental degradation overseas, a remedy should be found in U.S. courts.

CONCLUSION

The foreign plaintiffs in the Aguinda Complaint correctly chose not to include a cause of action under either RCRA, CERCLA, or the OPCLA, because such a claim would not succeed. Congress may have intended these statutes to apply extraterritorially in some circumstances. It is not likely, however, that they apply to wastes generated overseas and subsequently dumped there.

There is a cause of action, however, under the ATCA. The first two criteria are clearly met: (1) this is a tort action, and (2) it is brought by an alien. The third criterion, that the actions violate the law of nations or a treaty, is also met.

The court should find that the massive dumping and polluting activities violate the law of nations. The international community is concerned with the environment and has enacted various conventions to address this issue. This suggests that environmental degradation has become a violation of customary international law, as reflected in the numerous conventions recently signed and ratified by the international community.

It is also possible that a concession agreement is a quasi-treaty under the ATCA. If the concession agreement included guarantees regarding the environment, the court might then find a cause of action under the ATCA. Any U.S. corporation that caused damage in violation of a concession agreement would violate a "treaty" under the ATCA, and a cause of action would lie.

³⁵¹ See discussion of the Rio Declaration, *supra* text accompanying notes 295-298.

³⁵² *Harvey*, 2 F.3d at 1329.

The actions also violate human rights and, therefore, violate either customary international law or *jus cogens*. The severe environmental degradation may result in ethnocide, which would violate either *jus cogens* or customary international law. If there is sufficient evidence of human rights violations, the court will find that the alleged private actions of Texaco fall within the meaning of the law of nations under the ATCA.

The exercise of extraterritorial jurisdiction in this case will not violate international law. The international community would welcome the assertion of jurisdiction in this case. The international community would encourage the United States to hold its citizens to a high standard of environmental safety. The global community would welcome independent action against Texaco to ensure a safe and healthy environment for subsequent generations.

The United States should hold its corporations to a uniform standard abroad because the international community is unable to agree to a unified solution to environmental problems. Developing countries, faced with unequal bargaining power, are often unable to ensure that their home environment will remain safe, regardless of domestic law to the contrary. The United States would aid these developing countries by ensuring that U.S. nationals will not inflict environmental damage, and that if such damage does occur, by requiring that it will be remediated.

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