Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in In Re: Union Carbide, Alfaro, Sequihua, and Aguinda

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SUMMARY

I. INTRODUCTION ............................................................................................................... 299

II. RETHINKING THE DOCTRINE: FOUR LANDMARK CASES IN TRANSNATIONAL TORT .................................................................................................................. 302
   A. In re Union Carbide Corporation Gas Plant Disaster ........................................... 302
   B. Dow Chemical Co. v. Alfaro .............................................................................. 303
   C. Sequihua v. Texaco, Inc. ................................................................................ 306
   D. Aguinda v. Texaco, Inc. .................................................................................. 307

III. A JUDICIAL DIALOGUE OVER FORUM NON CONVENIENS AND CORPORATE ACCOUNTABILITY ...................................................................................... 312

IV. CONCLUSION: LAW, GLOBAL ETHICS AND THE TRANSNATIONAL ECONOMY ..................................................................................................................... 314

I. INTRODUCTION

Is it possible for the citizens of developing countries to bring a class action suit in American courts for the negligent actions of a U.S.-based transnational corporation? The experiences of plaintiffs from developing countries show that it is extremely difficult. Almost invariably, in mass transnational tort actions, transnational corporations (TNCs) invoke the common law doctrine of the inconvenient forum—forum non conveniens—as a first line of defense. The doctrine has proven time and again to be a significant obstacle for plaintiffs in developing countries who are seeking to sue a U.S.-based transnational corporation in the United States. However, in recent years there have been some guarded successes for such plaintiffs, and it is apparent that cracks may be beginning to form in the defense of the conveniently inconvenient forum. In this paper I discuss a series of landmark

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tort cases in which plaintiffs from some of the poorest countries of the world have attempted to bring class actions in the United States against some of the largest and wealthiest transnational corporate enterprises. The cases demonstrate clearly that many U.S. courts and legislatures are loathe to open the floodgates by allowing foreign nationals to sue U.S.-based transnational corporations in U.S. courtrooms. Taken as part of an emerging judicial and legislative dialogue, these cases raise serious questions about the ethics of a legal system which permits TNCs to establish operations in developing countries, but at the same time restricts the victims of industrial and environmental hazards from seeking a remedy in the home country of the offending corporation. This paper also provides a glimpse of an emerging and lively debate over the doctrinal, ethical, and economic issues facing the courts in transnational torts in the new global economy.

I shall focus on cases involving plaintiffs from India, Central America, and Ecuador. The first of these is the widely-known lawsuit against the Union Carbide Corporation launched in the wake of the tragedy in Bhopal, India in 1984. Thousands were killed and hundreds of thousands seriously injured when a chemical storage facility owned by the Union Carbide Corporation, and the Union Carbide of India Ltd,¹ leaked deadly methyl isocyanate gas over a Bhopal suburb. Years later, the state district court of New York dismissed a massive consolidated action that had been brought against the Union Carbide Corporation in the United States on the grounds that the U.S. courts were an inconvenient forum.² In Central America, thousands of banana workers became sterile during the 1970s and early 1980s because of exposure to the pesticide containing 1,2 dibromochloropropane (DBCP). DBCP was manufactured in the United States by the Shell Oil and Dow Chemical corporations. U.S.-based transnational enterprises operating in developing countries used DBCP in banana plantations for more than a decade after the chemical was banned in the United States. The chemical was also exported for use by local banana companies. In Dow Chemical Co. v. Alfaro,³ banana workers from Costa Rica met with some limited success in a class action against the Shell Oil and Dow Chemical corporations in Texas courts. The case brought widespread media attention to the plight of Central American banana workers; however, the final settlement was paltry and the legal results were disappointing. In Sequihiua,⁴ the Ecuadorian plaintiffs alleged that widespread contamination of the environment and injury to human health were caused by the use of substandard technology in the disposal of toxic oil wastes. That case was quickly dismissed. Soon afterwards, a new case was launched to address the same issues: Aguinda v. Texaco, Inc.⁵ Aguinda has yet to be disposed. The plaintiffs allege that the decisions to use the substandard technology were made by U.S. nationals at the corporate headquarters in White Plains, New York. In this highly complex case, the wrangling is over forum non conveniens.

United States federal courts may dismiss a civil action on grounds that the court is an inconvenient forum for the resolution of the dispute. In the context of transnational litigation the function of forum non conveniens is often analogous to the function of the corporate veil of separate legal personality—both doctrines are used to insulate the parent company from liability for activities carried out abroad. As the global economy becomes more integrated, the frequent use of the doctrine of forum non conveniens raises important legal, ethical, and political concerns. In many cases, the victims of industrial accidents and

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1. The Union Carbide Corporation owned 50.9% of the Union Carbide of India Ltd at the time of the accident; the remainder was owned by the government of India. See In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 844 (S.D.N.Y. 1986), aff'd, 809 F.2d 195 (2d Cir. 1987).
2. See id.
severe environmental contamination are left totally without a legal remedy in either the home or host country. In such situations the transnational corporation benefits from the “best of both worlds.” The corporation is able to reap financial benefits that indirectly result from operating in a country where citizens are excluded from the political-legal system. At the same time, the corporation is able to insulate itself from any actions that, in the rare instance, may be brought against the company in home-country courts.

The basic principles to be considered in a motion to dismiss for inconvenient forum were laid down by the United States Supreme Court in the 1947 case, *Gulf Oil Corp. v. Gilbert*. Those principles are: (1) the trial court has the discretion to dismiss an action; (2) the choice of forum made by the plaintiff should receive deference; and (3) the trial court should consider a range of private and public interests. Furthermore, a civil action will only be dismissed under the doctrine when it is clear that “an alternative forum is available, because application of the doctrine ‘presupposes at least two forums in which the defendant is amenable to process.” The relevant private interests to be considered include the cost of witnesses attending trial, access to evidence, and the ease of enforcement of the judgement. The relevant public interests include the fairness of imposing compulsory jury service on people who have no obvious relation to the action, administrative difficulties, and the importance to the public in the foreign jurisdiction of having local matters resolved locally. The weighing of broadly-defined public and private factors by U.S. judges has led to a fascinating, and at times bizarre, debate within the judiciary.


One of the main reasons transnational corporations can pursue “accelerated development” in countries like Ecuador is because local communities have little or no access to political or legal representation. It is hardly an exaggeration to state that where local populations do not have political power, adequate legal protection of their lands, or cannot access legal services, oil companies are free to operate much as though the areas were uninhabited. Where the members of local organizations do not have the practical skills or resources needed for effective participation in environmental planning and management, oil companies are spared the “costs” of local-level democracy.

Id. at 34. See also Malcolm Rogge, *Ecuador’s Oil Region: Developing Community Legal Resources in a National Security Zone*, THIRD WORLD LEGAL STUDIES (1996–97); Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador’s Amazon Oil Fields*, 2 SW. J. L & TRADE AM. 293 (1995) [hereinafter Kimerling, Rights, Responsibilities, and Realities]. Also of interest is *Delgado v. Shell Oil Co.*, in which Judge Lake of the Federal District Court for the Southern District of Texas dismissed a consolidated action for wrongful death and personal injury against Shell, on the grounds, in part, that plaintiffs in Burkino Faso, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Ivory Coast, Nicaragua, Panama, The Philippines, Saint Lucia, and Saint Vincent were able to sue Shell Oil Company in the courts of those countries. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1357–65 (S.D. Tex. 1995).

8. Id. at 507–08.
11. Id. at 508–09.
II. RETHINKING THE DOCTRINE: FOUR LANDMARK CASES IN TRANSNATIONAL TORT

A. In re Union Carbide Corporation Gas Plant Disaster

This infamous case arose out of the tragic Union Carbide chemical plant disaster in Bhopal, India on the third and fourth of December, 1984. The District Court decision, which was upheld on appeal, reaffirmed the use of *forum non conveniens* in cases where foreign plaintiffs attempt to reach the parent company in the United States. The case is also notorious for the fact that the U.S.-based Union Carbide Corporation argued that it should not be held legally responsible for the accident because the Indian subsidiary (the Union Carbide of India Ltd) was a separate legal person with very minimal ties to the United States. In response to that argument, India argued that the Courts should pierce the corporate veil and find the parent company legally responsible for the negligent actions that led to the tragedy in India.

The disaster at Bhopal occurred when a large quantity of methyl isocyanate leaked from a pesticide plant and drifted over a densely populated suburb of the city of Bhopal. Methyl isocyanate is one of the most toxic substances in the world—serious injury or death may result from exposure to minute quantities. Thousands of people were killed and hundreds of thousands of people were injured or permanently disabled. Fifteen years after the tragedy, it is still difficult to comprehend how a corporation could store large quantities of such a dangerous chemical in a substandard facility so close to a densely populated area. Any accident involving the chemical would have been catastrophic. Shortly after the disaster, hundreds of class action suits (comprising approximately half a million claimants in total) were filed against the Union Carbide Corporation in the United States. The multiple actions were consolidated and filed in a state district court of New York in 1985. While these civil actions were underway the Indian government passed the *Bhopal Gas Leak Disaster Act*. Under the Act, only the government of India could represent plaintiffs in any of the cases relating to the Bhopal disaster in Indian or U.S. courts. The government of India represented plaintiffs in the action against the parent company in the United States despite the fact that it was a part owner of the chemical plant. Not surprisingly, the Union Carbide Corporation invoked the defense of *forum non conveniens* and sought to have the case dismissed. India strenuously objected to the motion.

The Union Carbide Corporation also argued that the Union Carbide of India Ltd was legally separate from the Union Carbide Corporation. At the time of the accident, the Union Carbide Corporation—based in New York City—owned 50.9% of the Union Carbide of India Ltd; 22% was owned by the government of India; and the remainder was owned by Indian citizens. India argued that the U.S. Union Carbide Corporation owned and controlled the Indian operation and that the court should pierce the corporate veil to reach the parent company.

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14. Estimates vary from 2000 to 4000 deaths, and up to 200,000 people injured. *See id.*
15. *See Union Carbide*, 809 F.2d at 197.
16. *See id.*
17. *Id.* at 197–98.
18. *Id.* at 198.
19. *Id.*
21. *See id.* at 197.
the assets of the controlling parent company. The government of India argued for the substantive principle that home-country courts should make parent corporations responsible for the acts of their foreign operations or subsidiaries. In the end it was not necessary to consider India's arguments on these points because the case was dismissed on grounds of forum non conveniens. The trial court's decision was upheld on appeal, thereby reaffirming the usefulness of the doctrine to TNCs in cases of transnational toxic torts. Union Carbide eventually agreed to a settlement worth hundreds of millions of dollars, a paltry amount compared to the $250 billion in claims. Even today, many of the victims have not been compensated.

B. Dow Chemical Co. v. Alfaro

The slew of cases relating to the chemical sterilization of banana plantation workers in Central America are almost as notorious as the Bhopal case. In Dow Chemical Co. v. Alfaro, the Costa Rican plaintiffs were almost successful in their bid to sue in the United States, but, ultimately, the case was settled out of court. In Alfaro the plaintiffs piggybacked their action into U.S. courts on the Alien Tort Statute.

There were many cases that involved banana plantation workers in Central America, Africa, and South-East Asia who suffered injuries as a result of being exposed to 1,2 dibromochloropropane (DBCP), a chemical used in Nemagon and Fumazone pesticides. For much of the 1960s and 1970s DBCP was widely used in banana plantations around the world. Occupational safety training for the workers who applied the chemical was inadequate or nonexistent, and workers were ill-equipped for the use of toxic chemicals. The Shell Oil Company knew of the dangers posed by DBCP as early as 1958 when studies showed the effects of the chemical on the reproductive systems of laboratory animals. In 1964 the company sold the chemical without any warnings of the potential harm to

23. Despite the tendency of the courts not to pierce the corporate veil, the common law courts appear to recognize the moral relevance of the inequality of economic power of the victim and the responsible party. The reality of the "inequality of economic power" between the victims of personal injury in industrial accidents and the responsible corporation makes veil piercing a morally charged legal and political issue. The ethics of "veil piercing" in the transnational context are made even more dramatic because of the poor economic and social conditions facing workers in many Third World countries and because of the absence of reliable preventative controls against industrial accidents in many of those countries.
24. Union Carbide, 809 F.2d at 197.
26. See id. at 143. Cassels argues that Judge Keenan's decision resulted in the affirmation of the substantive principle whereby home states are not responsible for supervising the activities of their corporations abroad. Id. at 143-44.
27. Dow Chemical Co. v. Alfaro, 786 S.W.2d 674 (1990).
28. Death or Injury Caused by Act or Omission Out of State (Alien Tort Statute), TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (1986). The Texas Alien Tort Statute states that:

a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country.

Id.
29. Are these brand names or types of pesticides?
30. The Legacy 6 (lawyers pamphlet, on file with the Texas International Law Journal).
31. Id.
32. Id. at 10.
reproductive organs. In 1969 the Standard Fruit Company began to use the chemical on plantations in Costa Rica. DBCP was eventually used in a nematicide that was a standard agricultural input for the banana industry throughout Central and South America. In 1977, after 35 workers at a California plant became sterile from exposure to DBCP, the State of California immediately banned the use of DBCP. Despite the ban and the obvious high risks to human health, the American manufacturers continued to produce DBCP for sale to Standard Fruit and Dole for use in Central and South America. In September 1977, the U.S. Environmental Protection Agency suspended the use of DBCP in the United States, but Standard Fruit and Dole continued to use DBCP in banana plantations abroad. Even as late as 1981 Nemagon was still being used in the Ivory Coast. Thousands of banana workers in Central America, Ecuador, Southeast Asia, and Africa became sterile because of exposure to DBCP.

DBCP was banned for use in the home country, but the manufacturers were still able to export the DBCP to countries where environmental and safety standards were less onerous or less rigidly enforced. The poor economic situation of the receiving countries exacerbated this moral hazard—the banana-producing countries depended on export revenue from the sale of bananas to service growing foreign debts.

In Alfaro, eighty-one Costa Rican banana workers and their families sued Standard Fruit and Dow Chemical. The plaintiffs alleged that DBCP had caused serious harm to human health, including cancer and male sterility, and they alleged that the chemical was used with full knowledge of the dangers it posed.

In all the DBCP-related cases, the banana workers were faced with seemingly interminable delays from procedural wrangling by the defendant corporations. As expected, the defendant corporations (Shell Oil, Dow Chemical, Standard Fruit, and Dole) invoked the defense of forum non conveniens. But in 1990, the Texas Supreme Court ruled five to four that the Texas Civil Practice & Remedies Code's wrongful death statute (the Alien Tort Statute) effectively abolished the defense of forum non conveniens in cases of personal injury, even in cases where the injuries occurred in other countries. The Texas Supreme Court refused to dismiss the case on the motion and thereby opened the courts to a slew of other DBCP-related cases.

33. Id. at 24.
34. Id. at 16.
35. Id.
36. Legacy, supra note 30, at 17, 24.
37. Id. at 17.
38. Id. at 24.
39. Id. at 24.
40. Id.
41. Id. at 5.
42. On the economic crisis in Ecuador and the environmental and social impact of export industries, such as banana and oil production, see generally C. Jochnick & Paulina Garzon, A Seat at the Table, 34 NACLA REPORT ON THE AMERICAS 41 (Jan./Feb. 2001); Carlos C. Larrea, The Mirage of Oil Development: Oil, Employment, and Poverty in Ecuador (1972–1990) (1992) (unpublished Ph.D. dissertation, York University (Can.)) (on file with the Library of York University (Can.)).
43. See Dow Chemical Co. v. Alfaro, 786 S.W.2d 674, 675 (1990).
44. Id. at 675.
45. A brief overview of the case prepared by the plaintiffs' lawyers makes the following poignant observation: "Even though one of the defendants' headquarters was three blocks from the courthouse, defendants maintained for six years that litigation in Texas was inconvenient for them, asserting the doctrine of forum non conveniens." See Legacy, supra note 30, at 25.
46. See Death or Injury Caused by Act or Omission Out of State (Alien Tort Statute), TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (1986).
The *Alfaro* decision is a significant contribution to the debate over the role of law in the rapidly expanding transnational economy. In a concurring opinion, Justice Doggett strongly criticized the hazardous and often negligent practices of U.S. corporations operating in developing countries:

Some United States multinational corporations will undoubtedly continue to endanger human life and the environment with such activities until the economic consequences of these actions are such that it becomes unprofitable to operate in this manner. When a court dismisses a case against a United States multinational corporation, it often removes the most effective restraint on corporate misconduct.... In the absence of meaningful tort liability in the United States for their actions, some will continue to operate without adequate regard for the human and environmental costs of their actions. This result cannot be allowed....

Justice Doggett rejected vehemently the view that the citizens of Texas are not interested in the activities of U.S.-based TNCs in other countries. He also rejected the view of the authors of the minority decision that, as a matter of public policy, Texas citizens should not be required to serve compulsory jury duty in transnational tort actions:

The dissenters [judges supporting the minority decision] are insistent that a jury of Texans be denied the opportunity to evaluate the conduct of a Texas corporation concerning decisions it made in Texas because the only ones allegedly hurt are foreigners. Fortunately Texans are not so provincial and narrow-minded as these dissenters presume. Our citizenry recognizes that a wrong does not fade away because its immediate consequences are first felt far away rather than close to home. Never have we been required to forfeit our membership in the human race in order to maintain our proud heritage as citizens of Texas.\(^{48}\)

Justice Doggett's strong criticisms are, legally speaking, *obiter dicta*, and thus only carry moral force. Strictly speaking, the *ratio decidendi* of *Alfaro* was that in wrongful death or personal injury actions for incidents that occurred in a foreign country, the defense of *forum non conveniens* was statutorily abolished in Texas in the Texas Civil Practice and Remedies Code.\(^{49}\) For a brief period following *Alfaro*, it seemed that cases involving DBCP poisoning would be resolved relatively quickly.\(^{50}\) It appeared that TNCs were no longer

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47. *Alfaro*, 786 S.W.2d at 689. In another part of his opinion, Justice Doggett wrote:

> Because its analysis and reasoning are correct I join in the majority opinion without reservation. I write separately, however, to respond to the dissenters who mask their inability to agree among themselves with competing rhetoric. In their zeal to implement their own preferred social policy that Texas corporations not be held responsible at home for harm caused abroad, these dissenters refuse to be restrained by either express statutory language or the compelling precedent, previously approved by this very court, holding that *forum non conveniens* does not apply in Texas. To accomplish the desired social engineering, they must invoke yet another legal fiction with a fancy name to shield alleged wrongdoers, the so-called doctrine of *forum non conveniens*. The refusal of a Texas corporation to confront a Texas judge and jury is to be labeled "inconvenient" when what is really involved is not convenience but connivance to avoid corporate accountability.

Id. at 680.

48. Id. at 680.

49. See *Alfaro*, 786 S.W.2d at 682.

immunized from liability for DBCP damages that took place in foreign jurisdictions. With this Texas Supreme Court decision in place, the doctrine of the inconvenient forum could no longer be used to shield a TNC from its moral responsibilities for activities carried out in foreign jurisdictions. *Alfaro* was allowed to continue; however, it only applied to three individuals, and it was eventually settled.

For a short period of time, *Alfaro* opened new doors for mass transnational tort litigation, but those doors were soon slammed shut when the Texas legislature repealed the Alien Tort Statute.\(^{51}\) What appeared to be a watershed for transnational corporate accountability in tort was rendered moot by the Texas legislature. Tremendous pressure from Texas businesses was put on the Texas legislature to close access to the courts by plaintiffs from other jurisdictions—it was costing U.S. companies too much in damages! The history of the DBCP litigation and related legislation clearly demonstrates that for U.S.-based TNCs the common law doctrine of *forum non conveniens* provides them with a key advantage in the transnational economy. Without the doctrine in place, billions in earnings would potentially be lost in damages to foreign plaintiffs. While protected by the veil of forum non-conveniens, U.S. corporations are able to “shop” for jurisdictions where wages and standards are lower, and where citizens have limited access to the courts and the political process. As it is used today, forum non-conveniens is a significant legal barrier to transnational corporate accountability.

\[C. \textit{Seguihua v. Texaco, Inc.}^{52}\]

*Seguihua* was the first case in the United States involving Ecuadorian plaintiffs bringing an action against Texaco for alleged contamination of the environment and related injuries to human health. The plaintiffs alleged that thousands of Ecuadorian citizens were affected by oil and waste water contamination caused by Texaco’s negligent and ultra-hazardous activities. The case was a precursor to *Aguinda v. Texaco, Inc.* (discussed below). Both cases involve roughly the same fact situation relating to Texaco’s operations in Ecuador.

In *Seguihua*, plaintiffs alleged that for over twenty years a consortium owned by Texaco and the government of Ecuador used substandard and ultra-hazardous waste-disposal technology in Ecuador’s Amazon region that led to the contamination of rivers, lakes, groundwater, soil, and air.\(^{53}\) Reports on the impact of oil pollution on the health and well-being of Ecuadorian citizens in the Amazon region are abundant.\(^{54}\) The plaintiffs sought an injunction which would have required the defendants to return the land to its

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51. *Death or Injury Caused by Act or Omission Out of State (Alien Tort Statute),* \textit{TEx. CIV. PRAC. & REm. CODE ANN.} § 71.031 (1986) (as amended 1993).
53. \textit{See id.} at 61.
former condition and would have imposed a trust fund to be administered by the courts.\textsuperscript{55} As expected, the defendants invoked \textit{forum non conveniens}, arguing that "the convenience of the parties and the Court and the interests of justice require that the case be tried in Ecuador."\textsuperscript{56} The court accepted the motion to dismiss based on \textit{forum non conveniens} and international comity of nations. In his decision, Judge Black considered the private and public interest factors outlined in \textit{Gulf Oil Corp.} and determined that the interests weighed in favor of dismissal. He concluded that "Ecuador is an adequate and available forum even though it may not provide the same benefits as the American system."\textsuperscript{57} He also stated that "Ecuador clearly has a local interest in having controversies regarding its air, land and water resolved at home" and that "this district [Texas] does not have any direct interest in this case, and its citizens should not bear the burden of jury service in litigation which has no relation to their community."\textsuperscript{58}

The brief decision in \textit{Seguíhwa} demonstrates how easily dismissal for inconvenient forum could be justified on the basis of public policy at the time that the decision was issued. Judge Black's decision reflects the rather odd view that injuries to humans caused by economic activity carried out in foreign countries in the name of a U.S. corporation are somehow irrelevant to U.S. citizens.

D. \textit{Aguinda v. Texaco, Inc.}\textsuperscript{59}

Like \textit{Seguíhwa}, this case involves indigenous and peasant settlers in Ecuador who allege that the environment was severely contaminated by the activities of Texaco and that this resulted in serious harm to human health. Over time, \textit{Aguinda} and its counterpart \textit{Jota}\textsuperscript{60} may become as legendary as the \textit{Union Carbide} case. The action was filed in the same U.S. District Court that dismissed the consolidated actions against the Union Carbide Corporation in the Bhopal case. \textit{Aguinda} is of special importance to this discussion because of a surprise preliminary ruling on \textit{forum non conveniens} that appeared to lean in favor of the Ecuadorian plaintiffs and because the case is yet to be resolved. The proceedings in \textit{Aguinda} have become a focus of public debate in Ecuador, where the public is divided over whether the action by Ecuadorian citizens ought to be brought in the U.S. courts.

In \textit{Aguinda}, approximately 13,000 plaintiffs are seeking compensation, punitive damages, and equitable relief for contamination of the Ecuadorian Amazon region and for personal injuries.\textsuperscript{61} Plaintiffs allege that for a period of twenty years Texaco was the sole operator of the TexPet consortium, which had over 400 wells in the Amazon region.\textsuperscript{62} The

\textsuperscript{55} See \textit{Seguíhwa}, 847 F. Supp. at 62; Rogge, supra note 6.
\textsuperscript{56} See id. at 63.
\textsuperscript{57} \textit{Seguíhwa}, 847 F. Supp. at 64.
\textsuperscript{58} See id. at 64.
\textsuperscript{60} In \textit{Jota v. Texaco, Inc.}, plaintiffs from Peru living downstream from Ecuador allege that they were injured by the oil activities carried out by Texaco. \textit{Jota v. Texaco, Inc.}, 157 F.3d 153 (2d Cir. 1998). \textit{Jota} and \textit{Aguinda} were consolidated in a single proceeding before Judge Rakoff. Issues arising in both \textit{Aguinda} and \textit{Jota} were addressed together in a decision of the United States Second Circuit Court of Appeals. \textit{Id.}
\textsuperscript{61} See \textit{Aguinda 1}, 1994 WL 142006, at *1.
\textsuperscript{62} Texaco operated in Ecuador through its fourth-level subsidiary, the Texaco Petroleum Company (TexPet). The TexPet consortium was owned by TexPet and Gulf Oil in equal shares. In 1974, Ecuador purchased a 25% share of the consortium, and in 1976, Ecuador purchased all of Gulf Oil's interest, thereby becoming the majority owner. TexPet operated the Trans-Ecuadorian Pipeline until 1989, and operated the oil drilling activities until 1990. By 1992 the consortium was wholly owned by PetroEcuador, the state oil company. See \textit{id.} at 156.
plaintiffs allege that Texaco failed to “use reasonable industry standards of oil extraction... or comply with accepted American, local or international standards of environmental safety and protection.”63 Plaintiffs also contend that “purely for its own economic gain, Texaco deliberately ignored reasonable and safe practices and treated the pristine Amazon rain forests of the Oriente [Ecuadorian Amazon region] and its people as a toxic waste dump.”64 The case was filed in the District Court of New York two months prior to the dismissal of 

Sequihuia in Texas. Just as in the preceding cases, the defendant company brought a motion to dismiss for forum non conveniens as a first line of defense.

In the pleadings, the plaintiffs focus on activities carried out by Texaco officials in their New York headquarters. Specifically, they allege that operational decisions which led to the injuries in Ecuador were made in the board rooms of Texaco’s corporate headquarters in White Plains, New York.65 In a decision of April 11, 1994, Judge Vincent Broderick refused to dismiss the case until he had seen more evidence on the issue as to whether decisions made in the United States had led to the use of ultra-hazardous activities in Ecuador.66 In order to obtain that information he ordered discovery:

[My] decision is reserved on each of Texaco’s motions. Pending further order, discovery is limited to the following:

a) events relating to the harm alleged by plaintiffs occurring in the United States, including specific or generalized directions initiating events to be implemented elsewhere, communications to and from the United States and discussions in the United States concerning, or assistance to or guidance for events occurring elsewhere; and

b) events occurring outside the United States to the extent the information can be furnished or secured voluntarily or through directives to parties in the United States to secure information. No involuntary discovery requiring enforcement action to be taken outside the United States is authorized by this memorandum order . . . .

This does not preclude any party from moving for summary judgment or for preliminary relief of any kind if appropriate.67

Judge Broderick noted that in a motion to dismiss on forum non conveniens, the U.S. case law permits the courts to “tailor relief to the needs of the case and in the interest of

63. Plaintiffs also alleged that:

6. Texaco failed to pump unprocessable crude oil and toxic residues back into wells as is the reasonable and prudent industry practice. Instead, Texaco disposed of these toxic substances by dumping them in open pits, into streams, rivers and wetlands, burning them in open pits without any temperature or air pollution controls, and spreading oil on the roads . . . .

7. Texaco’s practice of disposing untreated crude and waste by-products into the environment has contaminated the drinking water, rivers, streams, ground water and air with dangerously high levels of such known toxins as benzene, toluene, xylene, mercury, lead and hydrocarbons, among others. Texaco’s acts and omissions have resulted in the discharge of oil into the plaintiffs’ environment at a rate in excess of 3,000 gallons per day for 20 years. Many times more oil has been spilled in the Oriente than was spilled in the Exxon Valdez disaster in Alaska.

64. Id. at 4.
65. Id. at 18.
67. Id.
justice.\textsuperscript{58} Based on the criteria established in \textit{Gulf Oil Corp.} and in \textit{Piper Aircraft Co. v. Reyno},\textsuperscript{59} he decided that the case law appears to “favor resolution of damage claims in Ecuador.”\textsuperscript{60} However, he also suggested that, in balancing public and private interests, it was possible that the issue of liability might be separated from the issue of damages and might be tried in the U.S. courts.\textsuperscript{71}

Judge Broderick also indicated that, prior to any dismissal, Texaco would be required to submit to jurisdiction in Ecuador. He required that Texaco do the following:

a) Execute a binding acceptance of personal jurisdiction over it in Ecuador [sic] courts and

b) Provide binding acceptance of such jurisdiction by any Texaco subsidiaries having assets derived from the operations in Ecuador at issue, or waiver of the corporate veil by Texaco, or

c) Post an adequate bond to cover any liability imposed by the Ecuadoran [sic] courts.

If these requisites are met, consideration may be given to (a) absolute dismissal of plaintiffs’ individualized monetary and class action claims or (b) stay of litigation of such claims in this court to permit their pursuit in Ecuador.\textsuperscript{72}

Needless to say, Judge Broderick’s decision sent shock waves through the transnational corporate elite.\textsuperscript{73}

Almost two years after Judge Broderick’s decision, the District Court swung radically in the opposite direction. Judge Rakoff, who had replaced Judge Broderick,\textsuperscript{74} issued a terse judgment\textsuperscript{75} in which he discredited Judge Broderick’s decision and lashed out against the plaintiffs:

[W]hen the instant action was filed… the late Judge Broderick accorded plaintiffs unusual leeway, through discovery and otherwise, to try to prove that this seemingly Ecuadoran-centered lawsuit properly belonged here…. In hindsight, such solicitude may have been improvident, for the overwhelming obstacles to the Court’s jurisdiction that were already apparent to the court in \textit{Seqiuhua} have become increasingly obvious to this court as well.

While it is true that… defendant Texaco is headquartered in this judicial district and the Complaint alleges that decisions made by its executives in New York were important to the allegedly unlawful activities undertaken by the consortium in Ecuador, these differences are, in the Court’s view, insufficient to overcome the balance of other factors that weigh so heavily against retaining jurisdiction…. 

\textsuperscript{58} Id. (citing \textit{In re Pan Am}, 16 F.3d 513 (2d Cir. 1994); Blanco v. Banco Industrial de Venezuela S.A., 997 F.2d 974 (2d Cir. 1993)).


\textsuperscript{60} \textit{Aguinda I}, 1994 WL 142006, at *2.

\textsuperscript{61} Id. at *2–3.

\textsuperscript{62} See id. at *2.


\textsuperscript{64} See \textit{Aguinda v. Texaco, Inc.}, 945 F. Supp. 625, 627 (S.D.N.Y. 1996). Judge Broderick, who was very ill when he wrote the decision, passed away shortly afterwards.

\textsuperscript{65} See generally id. Judge Rakoff’s decision is barely three pages long.
In short, plaintiffs’ imaginative view of this Court’s power must face the reality that the United States district courts are courts of limited jurisdiction. While their power within those limits is substantial, it does not include a general writ to right the world’s wrongs.  

Judge Rakoff dismissed the case on the grounds of forum non conveniens and comity of nations, citing the reasons provided in Judge Black’s earlier decision in Sequiha. He also dismissed Aguinda for failure to join the government of Ecuador as a necessary party.  

Interestingly enough, Judge Rakoff noted in his decision how politicized the Aguinda case had become in Ecuador. At the initial stages of the proceedings, the position of the Government of the Republic of Ecuador was unclear, as the Ambassador to the United States took a position that was apparently in conflict with the view of the Ecuadorian National Congress. A frustrated Judge Rakoff requested that Ecuador confirm its position on the case. On June 10, 1996, Edgar Terán, Ecuador’s Ambassador to the United States, issued a diplomatic note, stating that:  

As the current duly appointed Ambassador of the Republic of Ecuador, I hereby reiterate unequivocally that Ecuador respectfully objects to the acceptance of jurisdiction over this dispute in the United States . . . . Any assertion to the contrary by any other party is categorically false and could only act to the detriment of the interests of the Republic.  

In point of fact, the plaintiffs’ attorneys in this matter are attempting to usurp the rights that belong to the government of the Republic of Ecuador under the Constitution and laws of Ecuador and under international law.  

But the Ecuadorian National Congress wrote letters to demand that Judge Rakoff ignore Ambassador Terán’s statements. Apparently growing impatient, Judge Rakoff considered it especially relevant that the U.S. court was unable to determine the definitive position of the Government of Ecuador. His response was to decide that it was against public policy to let the case continue in the United States:  

As for the submissions offered here by the Congress of Ecuador asking this Court to disregard the submissions of the Government of Ecuador objecting to this Court’s retention of jurisdiction, the litany of conflicting submissions from these representatives and officials further evidences the need for this Court to resist intruding on matters that are already the subject of intense political debate in the affected foreign country.  

76. Id. at 627–28.
77. Id. at 627.
78. Id.
79. Id.
80. Interview with Dr. Isaro Puente, President of the Congressional Commission on the Environment and Former Deputy of the National Congress of the National Congress of Ecuador, in Quito, Ecuador (July 1996).
81. Id.
82. Prior to his post as Ambassador to the United States, Edgar Terán was an officer in the TexPet consortium.
84. Interview with Dr. Isaro Puente, supra note 80.
The "conflicting litany" coming from Ecuador did not end with Judge Rakoff's decision. In fact, his decision to dismiss the case led to a public outcry in Ecuador. In Ecuador's capital city Quito, a mass of demonstrators occupied the Attorney General's offices for several days. Just six days after Rakoff's decision, the recently appointed Attorney General Leonidas Plaza Verduga announced that Ecuador would intervene in the case in favor of the plaintiffs and would request the judge to reconsider his decision. However, Judge Rackoff refused to reconsider his decision and reportedly refused even to open the papers sent by the Attorney General on the grounds that the position of the Government of Ecuador could not be relied upon.

The proceedings appear today to be far from reaching a conclusion. The plaintiffs appealed Judge Rakoff's refusal to reconsider his decision. In a lengthy judgment, Judge Jon O. Newman of the Second Circuit Court of Appeals rejected Judge Rakoff's decision on all points. He held that "dismissal for forum non conveniens is not appropriate, at least absent a commitment by Texaco to submit to the jurisdiction of the Ecuadorian courts" and that the "District Court should independently re-weigh the factors relevant to a forum non conveniens dismissal, rather than simply rely on Sequihtua. Notably, Judge Newman held that the Aguinda case was distinguishable from the Sequihtua case in that the plaintiffs in Aguinda "are challenging only decisions made by Texaco within the United States, and that the necessary documents and witnesses are thus much more readily accessible in a United States forum."

Judge Newman also made it clear that the Government of Ecuador now support the litigation in the U.S. forum. He remanded the comity of nations issue, in part because of the "lack of conditioning dismissal on Texaco's consent to jurisdiction in Ecuador." Furthermore, Judge Newman ordered the District Court to reconsider the comity issue "in light of Ecuador's changed litigating position." He also remanded the issues of the failure to join Ecuador as a necessary party and ordered the District Court to "reassess Ecuador's motion to intervene in the light of all the current circumstances.

On January 31, 2000, Judge Rakoff issued a memorandum order in which he stated that the Court is "obliged" to reopen the record and receive additional submissions on "whether the courts of Ecuador and/or Peru might reasonably be expected to exercise a modicum of independence and impartiality if these cases were dismissed in contemplation of being relitigated in one or both of those forums." Judge Rakoff was guided by a very recent Second Circuit decision, Bridgeway Corp. v. Citibank. In that decision, the Second Circuit confirmed District Court Judge Chin's view that a judgment of the Supreme Court of Liberia ought not to be enforceable in the United States because the Liberian judicial system did not "provide impartial tribunals or procedures compatible with the requirements of due process" at the relevant time. The Second Circuit approved Judge Chin's heavy reliance on the annual U.S. State Department Country Reports which attempt to assess the fairness of

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86. Interview with Paulina Garzon, Executive Director of the Centre for Economic and Social Rights, in Quito, Ecuador (June 1998).
88. Id.
90. Id. (emphasis in original).
91. Id. at 160.
92. Id.
93. Id. at 163.
95. Bridgeway Corp. v. Citibank, 201 F.3d 134 (2d Cir. 2000).
96. Id. at 137.
judicial institutions abroad. Judge Rakoff appears to have consulted the report for Ecuador and noted that the main conclusion of the latest available Country Report for Ecuador, dated February 26, 1999, was that "[t]he most fundamental human rights abuse [in Ecuador] stems from shortcomings in the politicized, inefficient, and corrupt legal and judicial system." In light of such conclusions, Judge Rakoff held that:

While the evidence set forth in the report in support of this strong statement largely relates to criminal cases, the Court does not believe that, even in the very different context of the instant lawsuits, it can ignore without further inquiry a statement from a department of the U.S. Government that so fully casts doubt on the independence and impartiality of the principal courts to which the defendant seeks to remit these cases.

Judge Rakoff also noted that on January 21, 2000 a military coup deposed President Jamil Mahuad, and that one of the leaders of the coup was a former justice of the Supreme Court of Ecuador. Given the precariousness of the current political situation in Ecuador and the unequivocal conclusions of the U.S. State Department Country Report for Ecuador, Judge Rakoff had no alternative but to invite further submissions on the fairness of the Ecuadorian judicial system today. Those submissions are currently being considered; meanwhile the Ecuadorian plaintiffs and the international business community are anxiously awaiting Judge Rakoff's decision.

III. A JUDICIAL DIALOGUE OVER FORUM NON CONVENIENS AND CORPORATE ACCOUNTABILITY

The debate about the suitability of forum non conveniens has frequently turned to the much broader issue of how the courts and legislatures can make the law meet our ethical expectations in the context of the increasingly integrated global economy. It is no secret that TNCs are very busy seeking ways to ensure that cases like Aguinda and Alfaro do not negatively impact the financial interests of TNCs. However, the persistence of the plaintiffs in such cases has led to a lively judicial dialogue and academic debate about the use of forum non conveniens and other common law doctrines (such as separate legal personality) in transnational tort cases.

The cases discussed above show that the debate over the use of the legal doctrine of forum non conveniens in the transnational context frequently leads to a discussion of the moral accountability of corporations. Opinions of judges and of academics about forum non conveniens vary immensly—some argue that the doctrine serves U.S. interests, and others state that its use in many cases is morally indefensible. In 1987, A.C. Seward argued vehemently against expanding the scope of transnational corporate accountability. He believed that the United States does an outright disservice to U.S. multinational corporations by placing conditions on the defendant in dismissals of forum non conveniens. Just three years after the tragedy at Bhopal, Seward was convinced that the doctrine of forum non conveniens remained "alive and well in U.S. courts," and he believed that "American parent

97. Id. at 142–44.
100. See id.
corporations with subsidiaries abroad have little to fear in the way of the demise or erosion of this doctrine." In his article *After Bhopal: Implications for Parent Company Liability*, he outlined a liability avoidance strategy for TNCs based on the outcome of *Union Carbide*. He believed that it was necessary for TNCs to restructure their operations to avoid the vicarious liability of parent corporations for their subsidiaries. Based on the Bhopal experience, he advised that there was "a need for a clear delineation of responsibility between headquarters management and subsidiary personnel, with delegation to subsidiary management of as much autonomy as possible concerning operating matters and restricting of headquarters management to strategy and policy issues." But, despite his bold assurances, Seward also believed there was at least one potential line of argument that foreign plaintiffs would use in future transnational tort cases: plaintiffs would emphasize the "role of the American corporate parent in setting policy and supervising operations of its subsidiaries." He was correct. In *Aguinda*, plaintiffs argued that the New York court was the proper district because Texaco had its principal place of business in the judicial district, and because a "substantial part of the tortious acts and omissions giving rise to this Complaint took place in this judicial district." Most importantly, the plaintiffs argued that the case should be heard in the New York court because Texaco's "policies, procedures and decisions relating to oil exploration and drilling in Ecuador were set and made in New York." It is clear that counsel for the plaintiffs were conscious that in order to jump over the procedural hurdle of *forum non conveniens*, the plaintiffs would have to focus on the nature of the corporate decisions made in the United States.

The arguments made in *Aguinda* are evocative of the dissenting opinion of Judge Swygert in *De Melo v. Lederle Laboratories*, a 1986 decision regarding the transnational tort action. In that decision, Judge Swygert wrote:

> I cannot help observing that Lederle is a multinational corporation. It has chosen to do business in Brazil. When such companies do business in foreign countries they should not, by that fact, manage to evade the force of American law. De Melo ingested the drug in Brazil. But the decision to warn of only temporary blindness occurred in the United States, and was made by United States citizens in the employ of a United States corporation. These facts suggest that the United States is the most appropriate forum to hear Ms. De Melo's complaint.

Judge Swygert argued that in the context of multinational enterprises, U.S. courts ought to consider where the operational decisions were made. He suggested that if decisions to use substandard or ultra-hazardous technologies were made in the United States, then the U.S. courts would be the proper forum. Interestingly, Seward later dismissed Judge Swygert's comments as a "straw in the wind." In *Sequihua* the impugned activities "occurred entirely in Ecuador;" but in *Aguinda*, the decision making was alleged to have occurred in the United States headquarters in

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102. *Id.* at 705–06.
103. *Id.*
104. *Id.* at 706–07.
105. *Id.* at 705.
107. *Id.*
108. *De Melo v. Lederle Laboratories*, 801 F.2d 1058 (8th Cir. 1986).
109. *Id.* at 1065.
110. *Id.*
111. Seward, supra note 101, at 705.
White Plains, New York. In the first decision issued in the Aguinda proceedings, Judge Broderick ordered discovery to determine where the decisions to use ultra-hazardous technology were made:

[D]ecision-making on the part of the defendant in the United States may or may not turn out to support some or all of plaintiffs’ claims in the present case; if activities in the United States supported an equitable judgment in favor of the plaintiffs it could presumably be enforced here. The factors relevant to forum non conveniens or comity of nations cannot adequately be evaluated in the context of possible equitable relief until discovery concerning any actionable conduct in the United States has been pursued.\(^{113}\)

Judge Broderick’s decision very much reflected the spirit of Judge Swygert’s dissent in De Melo. Judge Swygert was concerned with the fact that the actionable conduct in developing countries stemmed from decisions which were actually made in the United States by U.S. citizens who were working for a U.S. corporation. The question arises as to whether future cases involving foreign plaintiffs who are bringing a legal action in the home country of a parent corporation will emphasize the location of the key decision makers.

IV. CONCLUSION: LAW, GLOBAL ETHICS AND THE TRANSNATIONAL ECONOMY

The momentum towards globalization appears to be unabated. In the global economy, TNCs gain substantially in real economic terms from using common law doctrines such as forum non conveniens as a bar to transnational tort actions. Any effort to make TNCs more accountable in domestic law for harms caused by their operations abroad will benefit from an understanding of how elements of the common law do precisely the opposite.

Through the strategic coordination of economic activity across borders, corporate strategists take advantage of global disparities in income, of vast differences in workplace health and safety standards,\(^{114}\) of lower environmental standards,\(^{115}\) and of differences in the degree of respect for human rights and democratic rights. Jurisdiction shopping by TNCs ensures that governments in both rich and poor nations compete in a “race to the bottom” to attract needed foreign investment. Many TNCs and their shareholders derive direct and substantial financial benefits from operating in countries where democratic rights are

\(^{114}\) On how TNCs take advantage of lower environmental and employment standards in developing countries, see Barry I. Castileman & Prabir Purkavastha, The Bhopal Disaster as a Case Study in Double Standards, in THE EXPORT OF HAZARD: TRANSNATIONAL CORPORATIONS AND ENVIRONMENTAL CONTROL ISSUES 213 (Jane H. Ives ed., 1985). In another paper, Altamirano Pérez describes some of the institutional barriers to the enforcement of environmental laws and standards in Mexico:

Enforcement of federal regulations in these matters is not easy. There are strong interests that seek non-observance of the law. The possibility of obtaining quick and easy benefits frequently is an enemy for the correct application of the rules. Another problem is the lack of sufficient funds to face the enormous challenges in this area.


repressed and where human rights are not respected. Where this is true, it is because citizens are prevented from pushing for legal and institutional protections from industrial hazards; and because they are prevented from organizing trade unions and other political associations towards the improvement of social and industrial conditions. In a global economy characterized by vast disparity between the “haves” and the “have-nots,” it appears to be difficult for TNCs to resist flexing their economic muscle to gain concessions from ordinary citizens. For example, a company will use its economic power to gain access to peasant lands or ancestral indigenous territories for carrying on lucrative but environmentally destructive resource development or industrial activities. In our current legal system, the common law provides little, if any, remedy for the “have nots” who are subjected to this form of economic coercion.

The common law provides incentives to companies operating in the United States to meet a minimum standard of care; however, these incentives do not necessarily exist in the developing countries in which many TNCs operate. At the same time, common law doctrines such as forum non conveniens and separate legal personality are used so that the legal incentives which apply in the United States are not easily transferable to a TNC’s operations in a developing country. Varying degrees of risk to human health and the environment inevitably come with industrial development. In stable democratic countries governed by the rule of law, negligence law and statutory controls have evolved over the past one hundred years to provide strong incentives for businesses to improve the safety of their operations and their products and to improve environmental management. But in many of the countries where TNCs operate, the legal incentives for corporate responsibility are almost non-existent. This is especially true in those countries where a market economy and industrialization are very recent phenomena, and in countries where non-democratic power structures have repressed the actions of citizens working towards greater corporate and state responsibility. In those countries, citizens who suffer the adverse effects of economic development are left holding an empty bag. At the same time, common law doctrines keep the victims out of the TNC’s home country courts, where a meaningful legal remedy may be a more realistic prospect than in the victim’s own country.

Prior to the Second World War, the doctrine of forum non conveniens was used primarily to prevent “serious injustice or oppression to United States defendants”; but in today’s global economy, the doctrine is used by transnational corporations to block developing-country plaintiffs from seeking a fair remedy in U.S. courts. Similarly, for over one hundred years the common law doctrine of separate legal personality of the corporation functioned like a veil to protect shareholders and directors from being held


117. CASSELS, supra note 25, at 144.

118. Cassels observes:

[The doctrine of forum non conveniens emerged with full vigour [sic] only after the Second World War, coinciding with the rise of multinational business. Originally, its scope was quite narrow, aimed only at preventing serious injustice or oppression to U.S. defendants, but since that time the doctrine has expanded in scope and changed in rationale.

Id. at 144.
liable in tort.\textsuperscript{119} Today, the scope of this doctrine has expanded so much that the corporate veil is used to shield the parent companies of large transnational corporations (TNCs). Even if, in theory, a foreign plaintiff were able to persuade a court to pierce the veil to realize the assets of the parent corporation, the doctrine of \textit{forum non conveniens} may still shield the parent company from being held liable. Like the corporate veil, \textit{forum non conveniens} functions as a non-legislated, common law barrier to moral accountability in the transnational economy.

Most of this article has focused on the technical law; however, the motive for preparing this article is based in normative ethics. While legal rules may protect the corporation from legal sanction, such rules cannot protect against the sense of moral indignation that arises when a wealthy transnational corporation has made deliberate operational decisions that adversely affect the well-being of poverty-stricken citizens in developing countries. The existence of profound economic inequalities between rich industrialized home countries and poor host countries exacerbates the already disturbing divide in law and ethics. It is well-established that human rights are intended to serve as universal ethical standards, that is to say they exist to protect all humans from indignity regardless of nationality. Similarly, the ethical responsibilities of transnational businesses do not end at national borders, even if some corporate strategists would like it to be that way. Ethics and economics are utterly inseparable.\textsuperscript{120} As the global economy evolves, so too must our ethical expectations, and hence our laws and legal traditions.

The apportionment of legal and moral responsibility in the context of transnational capitalism is no simple matter. The business and operational decisions of all components of a TNC are moral decisions; that is to say, they are not neutral from an ethical perspective. When a TNC harms citizens in a host country, the corporation ought to be subjected to public, judicial, and political scrutiny in both the home and the host country.

TNCs often consist of vast networks of legally separate corporations linked by shifting ownership and contractual relations. It is often the case that no sole human individual or corporate personality can be held responsible for all the wrongful acts of a corporate network. Nevertheless, it is still true that TNCs are wholly controlled by their decision makers—by the people who occupy positions of authority and power within the corporate hierarchy. Corporate directors and managers make ethical decisions when they set policy and establish strategic direction for the company. They make ethical decisions when they site industrial facilities which carry high environmental or health risks; they make ethical decisions when they choose to take advantage of lower employment and environmental standards in poorer countries.\textsuperscript{121} The corporate decision maker is not merely a technician who applies his or her skills towards the aim of increasing profits; he or she is also a moral agent who allocates resources and risks in society—within and across national borders.

\textsuperscript{119} In an 1897 decision, the British House of Lords ruled that the legal personality of the corporation is separate from the personality of the directors, shareholders, and other members of the corporation. See Salomon v. Salomon & Co., 66 L.J.R. 35, 49 (H.L. 1897). Lord Macnaghten wrote:

\textit{The company attains maturity on its birth .... The company is at law a different person altogether from the subscribers to the memorandum [of association]; and, though it may be that after incorporation, the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them.}

\textit{Id. at 49.}

\textsuperscript{120} See generally AMARTYA SEN, ON ETHICS AND ECONOMICS (The Royer Lectures Series, John M. Letcher, series ed., 1987) (addressing the interrelationship of ethics and economics).

\textsuperscript{121} The issues of director and shareholder liability are highly relevant to this discussion; however, this paper focuses specifically on corporate liability.
If a corporation’s economic activity moves across national borders, then so must its sense of moral responsibility, and so must the personal ethics of those involved in the decision-making process. The common law loses credibility among ethical observers when it permits a corporation to make huge profits from operations in poorer countries, but at the same time, allows the corporation to resort to legal fictions or convenient inconvenience to avoid legal accountability. Standard procedural barriers to corporate accountability are sometimes inappropriate (and ethically unjustifiable) in the context of the rapidly integrating global economy and should be changed.

It is abundantly clear that transnational corporations are quickly becoming extremely powerful, both economically and politically. Members of the international business community continue to push states and multilateral institutions towards the liberalization of trade and investment regimes. They want freer trade for capital and goods, and freer movement for high-level human resources (managers and professionals); but, they resist strongly the notion that employment standards, environmental standards, and other rules which protect workers and citizens from the hazards of industrial development ought to be transferable across jurisdictions. Moreover, they continue to downplay the relationship between trade and human rights issues.

What do the victims of Bhopal and individuals like Castro Alfaro and María Aguinda represent for law and ethics in the emerging global economy? In all of the cases described above, the corporate headquarters were in the United States and the victims were from developing countries. Without exception, the people who were injured came from the most socially and economically marginalized sectors of those countries. The corporations involved are some of the largest and most profitable in the world. Under the present legal system, thousands of people in developing countries continue to suffer from industrial accidents and other forms of corporate negligence, and they are usually left without a legal remedy. Meanwhile, the parent corporations post billions of dollars in profits and shareholders pocket hefty dividends. This inequity is an undisputed fact of the transnational economy. Economic freedom, broadly defined, is viewed by liberal economists as a necessary precondition for economic growth, and hence, global prosperity. It is a great irony then, that the most wealthy and mobile TNCs hold on to age-old doctrines to block the rare cases where a foreign plaintiff gains the mobility to seek a fair judicial remedy in the corporation’s home country. While the global economy has evolved very rapidly to support business investment in developing countries, it remains virtually impossible to trace moral and legal accountability for industrial harms back to home-country courts. A perplexing, and at times alarming, divide is evolving in law and ethics in the new economy. Plaintiffs like the victims of the Bhopal disaster, like Castro Alfaro, Ignacio Sequihu, and María Aguinda have succeeded in forcing a dialogue to occur about this disturbing chasm between law and ethics.