Beyond multinationals' insulation and global regulatory gaps: hopes for sustainability in economic ecosystems

William J. Lockhart
Emeritus Professor of Law
University of Utah, S.J. Quinney College of Law
[lockhartb@law.utah.edu]

BIG MONEY = BIG PROJECTS = BIG IMPACTS
SOLUTION = ? (Laissez-Faire?)
THE PROBLEM

* Texaco exploration from 1964. Operator, oil consortium in eastern Ecuador 1966-76
* Petroecuador major owner from 1976 with Texaco as operations manager
* Texaco 1972: report spills only if got media attention. Oil pipeline spills & oiled roads.
* Drilling mud/production water disposed in nearly 1000 unlined pits, draining to waters
* Texaco/Ecuador remediation agreement and liability release 1995
* Chevron buys Texaco (and lawsuit) 2001
• Lawsuits Target Energy Giants: Ecuador

• *Aguinda v. Texaco*, a class-action suit brought in November 1993 in New York by approximately 25,000 Indians from eight tribes . . alleges that from 1972 to 1992 Texaco Petroleum Company in Ecuador dumped an estimated 30 billion gallons of toxic waste — including benzene, mercury and lead, much of it in hundreds of unlined pools throughout the rainforest.

• **OPINION AND ORDER**, United States District Court, S.D. N.Y.: " . . . . because . . . these cases have everything to do with Ecuador and nothing to do with the United States, the Court grants the motion and dismisses the cases . . . . To prevail on . . the ground of *forum non conveniens*, a defendant must demonstrate . . . there exists an adequate alternative forum . . . . Here, *Texaco has now unambiguously agreed in writing to being sued on these claims (or their Ecuadorian equivalents) in Ecuador.*
• **ECUADOR: LAWSUIT FILED AGAINST TEXACO**

A US legal team filed a billion-dollar lawsuit in an Ecuadoran court on May 7 [2003] against US oil giant ChevronTexaco. [P]laintiffs, a group of Ecuadoran Indians, accuse the company of destroying large areas of rain forest in Ecuador . . . contaminating local land and rivers, increasing the incidence of cancer among the local population. ChevronTexaco . . . says the company met all its obligations under Ecuadoran law. [UNM/Lobo Vault]

• **Ecuadorian court rules Chevron must pay $9 billion for oil pollution**

Bogota, Colombia - A judge in a small jungle town in Ecuador on Monday **ordered Chevron to pay more than $9 billion in damages**, finding the energy giant responsible for the oil pollution that has fouled a stretch of land along Ecuador's northern border. [The Washington Post, Feb 15, 2011]
• **Chevron Appeals $18 Billion Judgment in Ecuador**
  Chevron has filed an appeal with Ecuador’s National Court of Justice to review an order that it must pay $18 billion in damages for polluting the Amazon jungle. [NY Times Jan 20, 2012- REUTERS]

• **Chevron Loses Injunction Against Ecuador Judgment Collection**
  [T]he U.S. Circuit Court of Appeals in New York unanimously ruled Thursday that U.S. Federal Judge Lewis Kaplan had erred . . . when he blocked enforcement of an Ecuadorian court’s . . . $18 billion judgment against Chevron for environmental contamination. [Latin America Herald Tribune, Sept. 20, 2012]

• **Arbitrators Order Ecuador To Prevent Enforcement Of Judgment Vs Chevron**
  [A] tribunal, convened under the authority of the U.S.-Ecuador Bilateral Investment Treaty . . . and administered by the Permanent Court of Arbitration at The Hague, is considering Chevron's claims that Ecuador has breached its obligations under the BIT. [4-Traders, Feb. 17, 2912]
* U.S. NATIONAL ENVIRONMENTAL POLICY ACT

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall— . . . .

• (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

  • (i) the environmental impact of the proposed action,
  • (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
  • (iii) alternatives to the proposed action,
  • (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
  • (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
THE PROBLEM

BP Deepwater Horizon
(A) The Outer Continental Shelf Lands Act [43 USC Sec. 1340]  
Geological and Geophysical Explorations

(a) Approved exploration plans:

1. ... any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Shelf, ... which are not unduly harmful to aquatic life in such area.

(c) Plan approval ...

1. ... The Secretary shall approve such plan, as submitted or modified, within thirty days of its submission, except that the Secretary shall disapprove such plan if he determines ... [43 USC 1334 (2)(A)(1) .. after a hearing, that—

(i) continued activity ... would probably cause serious harm or damage to life (including fish and other aquatic life), ... or to the marine, coastal, or human environment;
40 CFR Sec. 1500.4 Reducing paperwork.
Agencies shall reduce excessive paperwork by:

(p) Using *categorical exclusions* to define categories of actions *which do not individually or cumulatively have a significant effect* on the human environment and which *are therefore exempt* from requirements to prepare an environmental impact statement.

40 CFR Sec.1508.4 “Categorical exclusion” . . . *means* . . . a category of actions which do not individually or cumulatively have a significant effect on the human environment and [no environmental assessment is required . . . Any procedures under this section *shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.*

Mineral Management Service Manual: [Exclusion permitted for:] Approval of an offshore . . . exploration development/production plan . . . in the central or western Gulf of Mexico *except* (1) In areas of high seismic risk or seismicity, *relatively untested deep water*, or remote areas, . . . or (3) in areas of hazardous natural bottom conditions; or (4) utilizing new or unusual technology.
THE PROBLEM [S]
Bauxite Mining by Vedanta Corporation on ancestral lands of the indigenous Dongria Kondh people

Village, refinery and mining area locations
• Vedanta’s controversial mine gets backing of India’s PM

In a highly unusual move, India’s Prime Minister has intervened directly in the approval process for one of the world’s most controversial mines. The office of Prime Minister Dr. Manmohan Singh has written to the Environment and Forests Ministry urging it to clear Vedanta’s proposed Niyamgiri mine in Odisha. The mine cannot go ahead without official clearance from the Ministry. LondonMining Network, June 30, 2010
Xingu River, Brazil, and . . .

its damned Belo Monte future
• Belo Monte hydro dam plans, Xingu River, Brazil Amazonia
IBAMA President Resigns Over Belo Monte Licensing

The President of Brazil's environmental agency IBAMA, Abelardo Bayma Azevedo, submitted a letter of resignation yesterday after facing heavy pressure to grant a full installation license for the Belo Monte Complex . . . Abelardo refused to grant the definitive license [for Belo Monte] because the project "was still full of pending environmental problems" [the construction consortium] has failed to meet 40 conditions required by the environmental agency.

Zachary Hurwitz- International Rivers, Jan. 13, 2011
According to the data for 2006, there were about **78,000 TNCs** with more than 780,000 branches and 73 million employees, with **assets of over $51 trillion** US dollars & total sales of about 25 trillion US dollars. For **comparison:** **2007 estimated GDP for all countries = $54.395 trillion** US dollars

Globalinc. An Atlas of The Multinational Corporation

From... **three thousand in 1990** the number of multinationals has grown to over **63,000 today**. . . . The **top 1,000 of these multinationals** account for **80 percent of the world's industrial output**. . . ExxonMobil, **number 21** among the world's 100 largest economies, is **just behind Sweden and above Turkey**.

**And This?** – from a candidate for president:

"Our freedom, what it means to be an American, has been defined and sustained by the liberating power of the free enterprise system. “That same system has helped lift more people out of poverty across the globe than any government program or competing economic system."
I would advance the even stronger claim that the theory of natural selection is, in essence, Adam Smith's economics transferred to nature. We must also note the delicious (and almost malicious) irony residing in such an assertion. Human beings are moral agents and cannot abide the hecatomb -- the death through competition of nearly all participants -- incurred by allowing individual competition to work in the untrammelled manner of pure laissez-faire. Thus, Adam Smith's economics doesn't work in economics. But nature need not operate by the norms of human morality. If the adaptation of one requires the deaths of thousands in amoral nature, so be it. . . . The analogue of pure laissez-faire can and does operate in nature -- and Adam Smith's mechanism therefore enjoys its finest, perhaps its only, full application in this analogous realm. Not in the domain that elicited the original theory itself.