Recent Developments in International Environmental Law[*]

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([*])* This article is the text of an address given at the Egyptian Society of International Law, Cairo, March 15, 1999. It generally does not cover developments subsequent to this date.

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Introduction

It is a great honor to have been invited to address the Egyptian Society of International Law, a respected organization that has contributed to the development and understanding of international for half a century. Egypt itself has played an important role in the field of international law, not least through a succession of outstanding international lawyers, including the former Secretary-General of the United Nations, Boutros Boutros Ghali, with whom I had earlier been privileged to serve on the International Law Commission of the United Nations.

In this paper I would like to share a few thoughts on a relatively new branch of international law, but one that is of increasing and pervasive importance to everything from plant and animal life, human living conditions, and North-South relations, to life on Earth as we know it. I refer, of course, to International Environmental Law. Now, this field is as broad as the problems it attempts to address. One need only recall the subjects of the most recent multilateral negotiations to demonstrate this: we have everything from the Aarhus Convention, concluded within the Economic Commission for Europe, on public participation in environmental decision making,(1) to the negotiations in Cartagena on a Biosafety Protocol to the UN Convention on Biological Diversity (which ultimately failed to produce an agreement), and the round of negotiations held at Buenos Aires in the context of the UN Framework Convention on

(1) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, 38 ILM 517 (1999).

Climate Change and its Kyoto Protocol. It would thus be futile for me to attempt to cover "recent developments" in all aspects of the field - and, of course, I will not attempt to do so. Instead, I will focus on two different developments from the Americas that may not be too well known in this hemisphere, and which I thought might be of interest to members of the Society:

- The citizen submission procedure under the environmental side-agreement to the North American Free Trade Agreement, or NAFTA; and
- Recent attempts to use human rights law to protect the environment and to protect the interests of indigenous peoples and other disenfranchised elements of society.

As unrelated as these two topics may appear to be at first blush, I believe they offer a good illustration of the theme of my remarks, which is "interconnectedness" - Specifically, the phenomenon that is increasingly observable, in a number of ways, that all of us on Earth are interconnected with each other, as well as with far-away areas and spaces.

I will begin, then, with the "citizen submission" procedure in the context of NAFTA.

Citizen Submissions under the NAAEC

When Canada, Mexico and the United States concluded the North American Free Trade Agreement (NAFTA) in the early 1990s,[2] they negotiated two "side agreements", as they have been called, to accompany

(2) Signed at Washington. Ottawa and Mexico Dec. 8, 11, 14 and 17, 1992; entered into force 1 Jan.

it one was on labor standards, and the other was on the environment The latter is called the North American Agreement on Environmental Cooperation, or NAAEC.(3) It is the first environmental treaty specifically intended to accompany a trade agreement. One of the broad purposes of the two side agreements was to ensure that lower labor or environmental standards did not distort competition within the NAFTA region by, in effect, subsidizing production costs.(4) In the case of the environment, of course, lower standards could also result in degradation of the quality of air, water, flora and fauna in border regions, and even in places far removed from the border. I cite only two examples:

- DDT, which has been banned in the United States since the 1 970s, has shown up in the fatty tissue of mammals in the Arctic, such as walruses; and,
- as is now well known, sulphur dioxide from plants in the Midwestern United States has caused widespread damage, through so-called acid deposition (or "acid rain") far away in southeastern Canada -- not to mention in the northeastern states of the United States.

These economic and environmental issues are recognized in Article 1 of the environmental sideagreement, which provides that the objectives of the agreement are, inter aria, to:

(a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations; [and]

(b) promote sustainable development based on cooperation and mutually supportive environmental and economic policies; ....

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(3)Signed at Mexico, Washington and Ottawa Sept. 8, 9. 12 and 14,1993; entered into force 1 Jan.

(4)For the NAAEC, see generally Article 1, Objectives

The North American Environmental Cooperation Agreement contains a number of innovative provisions. First, it establishes the Commission for Environmental Cooperation, or CEC. The Commission has three institutional components: the Council, the Secretariat and the Joint Public Advisory Committee. The Council is composed of the environmental ministers of the three countries. The Secretariat is established as an independent international organization, with corresponding privileges and immunities. The Commission's Executive Director and staff are international civil servants, rather than employees or representatives of any of the three governments. The third organ of the Commission, the Joint Public Advisory Committee, consists of five members from each of the three countries. The purpose of this body is to ensure that the Council and Secretariat receive representative public input from persons in each of the states parties.

A second set of innovative provisions of the Environmental Agreement concerns the obligations of the parties. I will not try to do more than give you a brief overview of those obligations, to provide additional background for a discussion of the citizen submission procedure. The obligations established by the agreement fall into four categories. First, "each party must ensure that its laws and regulations provide for high levels of environmental protection and [must] strive to continue to improve those laws and regulations."(5) This is the socalled "anti-rollback" provision, which prevents the parties from reducing their levels of environmental protection. Second, each party must "effectively enforce its environmental laws and regulations."(6) This provision provides the substantive basis for the citizen submission procedure. Third, the parties

(5)NAAEC, Art. S.
(6)Ibid., Art. 3.

are required to publish their laws, regulations, procedures and administrative rulings to enable interested persons and the other parties to become acquainted with them.(7) And fourth, each country is to ensure that persons have appropriate access to administrative and judicial proceedings for the enforcement of the that country's environmental laws and regulations.(8) The parties must ensure that these administrative and judicial proceedings are fair, open, and equitable.(9)

Against this background, let us look at the citizen submission procedure. Under Article 14 of the North American Environmental Agreement, the Secretariat of the Commission may consider a submission from any person or non-governmental organization, asserting that a Party to the Agreement is "failing to effectively enforce its environmental law". It is important to note what this provision does, and does not, permit. It allows private persons or organizations -whom I will refer to collectively as "citizens" -- to monitor the manner in which the parties are enforcing their environmental laws. It does not permit citizens to complain about the laws themselves - for example, that they do not provide a sufficiently high level of environmental protection. That is something that is reserved to the governments of the three countries, who may allege that a party has failed to fulfill one of the obligations I referred to a moment ago, namely, to ensure that its laws and regulations provide for high levels of environmental protection.

Once the Commission's Secretariat has received a submission, it first determines whether the submission meets the criteria set out in Article 14, paragraph 1. These criteria are largely formal, but a number of

(7)Ibid., Art. 4.

(8)Ibid.. Art. 6. See also Art. 5(2), requiring that each party ensure that judicial and administrative enforcement proceedings are available under its law.

(9)Ibid.. Art. 7(1).

submissions, which may have appeared proper at first sight, have not satisfied them.[10] If the submission does meet those criteria, the Secretariat next determines whether it merits requesting a response from the country in question.[11] If a response is requested, Article 14(3) provides that the country involved must advise the Secretariat within specified time limits:

(a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further; and

(b) of any other information that the Party wishes to submit . . [12]

The final stage of the submission proceedings concerns the development of a "factual record." If the Secretariat considers that the submission, including any response provided by the state in question, warrants developing a factual record, it is to so inform the Council. The Council may then instruct the Secretariat, by a two-thirds vote, to prepare a factual record. In developing this record, the Secretariat may draw upon a wide range of information, including that which is publicly available - which is considerable today, given the ease of access provided by the Internet - that which is submitted by "interested non-governmental organizations or persons," and that developed by the Secretariat itself or by independent experts. After the factual record has been developed by the Secretariat and finalized,[13] the Council may, again by a two thirds vote, make it publicly available.[14]

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(10)Infine, four submissions have been dismissed under Article 14(1). This is discussed further below.

(11)NAAEC, Art. 14(2).

(12)Ibid., Art. 14(3).

(13)The procedure for finalizing a factual record is provided for in Art. 15(5) and (6).

(14)Art. 15(7)

The Secretariat has received some twenty submissions since 1995. One of these submissions has gone all the way through the process, including the public release of a final factual recorded[15]. Another submission has reached the stage at which the Secretariat is currently developing a factual record.[16] of the twenty submissions, eight involve Canada, eight concern Mexico and 4 are addressed to the United States. There are currently eleven submissions under review. All submissions but two have been made by non-governmental organizations, or NGOs. Some of these groups are dedicated to the protection of a specific resource, for example, a river, or fish, while others are concerned with protection of the environment in general. The Secretariat has demanded strict compliance with the terms of Article 14 in evaluating whether submissions are admissible. Two examples may help to illustrate this point.

The very first submission received by the Secretariat alleged that a budgetary measure passed by the US Congress resulted in a failure to effectively enforce an environmental law, namely, the Endangered Species Act. The budgetary measure rescinded the portion of the budget of the US Fish and Wildlife Service that was used to list species under the Endangered Species Act, and to determine whether a particular habitat should be designated as "critical habitat" under that Act. Now, this budgetary measure obviously made it impossible to carry out the terms of the Endangered Species Act, a law that is not at all popular with the

(15)This was the Cozumel submission, Cruise Ship Pier Project in Cozumel, Quintana Roo. See the Final Factual Record, published in COMMISSION FOR ENVIRONMENTAL COOPERATION, NORTH AMERICAN ENVIRONMENTAL LAW AND POLICY, at 141 (1998). The documents concerning the ten other submissions considered by August, 1997, are contained in ibid., at 65, et seq.

(16)This is the B.C. Hydro submission, submitted by B.C. Aboriginal Fisheries Commission, et al.. Action on this submission up to August, 1997, is summarized in ibid., at 119-121.

current majority party in Congress. But the Secretariat found that this did not constitute a "failure to effectively enforce" the Act, within the meaning of Article 14, because the alleged failure "results from competing legislative mandates, and not from other action or inaction taken by agencies or officials."(17) In short, the Secretariat said, it could not "characterize the application of a new legal regime as a failure to enforce an old one."(18) The Secretariat noted that the submitters might contend that the budgetary measure amounts to a breach of the obligation to maintain high levels of protection but pointed out that the Secretariat was not competent to address such claims.

A second submission concerned an alleged failure by the government of Canada to enforce its law requiring environmental impact assessment of federal initiatives, policies and programs. In particular, it was alleged that the Canadian government failed to conduct an environmental assessment of a program called The Atlantic Groundfish Strategy. In this case the Secretariat focused upon the tense of the verb used in Article 14(1), namely, "is failing". It found that since the alleged failure occurred more than three years before the submission was received, the submitter did not raise the issue of non-enforcement in a timely manner in light of the temporal requirement of Article 14(1). The submission contained no indication that Canada's failure was continuing or recent, nor did it explain why the submitter had not filed its claims when it became aware of the government's alleged failure to enforce. Finally, the Secretariat noted that the submitters had failed to indicate that they were diligently pursuing local remedies.

This case, then, demonstrates that the Secretariat will require

(17)Biodiversity Legal Foundation, ibid., at 67, at 72.
(18)Ibid ., at 74.

persons and NGOs to file submissions in a timely manner, and will consider whether the submitter diligently pursued local remedies as a factor in making its determination.

I would like now to describe briefly the submission on which the Secretariat is currently developing a factual record. The case is known as "BC Hydro," and involves a claim that Canada is failing to effectively enforce its environmental laws, specifically with regard to the impact of hydroelectric dams in the Canadian Province of British Columbia.

The submitters specifically allege that the Canadian Government is failing to enforce a provision of the Canadian Fisheries Act and to use its powers under legislation relating to the energy sector to protect fish in British Columbia's rivers from environmental damage caused by hydroelectric dams. The submitters further allege that the operations of the British Columbia

Hydroelectric power agency are in effect being exempted from the application of Canada's environmental laws by the failure of the Canadian Federal Government to enforce the Fisheries Act. Moreover, say the submitters, this situation gives the power agency an unfair competitive advantage over US hydro power producers.

The Canadian response stated, inter alia, that Canada was, in fact, fully enforcing the environmental provisions of the Fisheries Act. Canada also took the position that it was unnecessary for the Secretariat to develop a factual record in the case in light of the detailed information provided by the Canadian government in its response. The parties to the treaty, through the Council of the CEC, nevertheless decided that the Secretariat should proceed with the production of a factual record and, as I have already noted, it is in the process of doing so now.

This case indicates that the three governments are not reluctant to

take on difficult issues, such as energy production vs. the protection of fish, through the submission process. They are willing to do so even though they realize that next time they might be the one that is the object of a submission. So, from the perspective of an observer of the process, it does not appear that the three countries engage in "vote-trading" or other similar kinds of behavior designed to protect themselves in future cases.

To sum up, then, with regard to the citizen submission process under the North American Environmental Cooperation Agreement, this procedure illustrates how the three parties to the NAFTA, covering an area from the arctic to the tropics, are interconnected - not only through their economic relations, but also through their shared interest in environmental protection. It also provides an illustration of a clear trend in the field of international environmental law, namely, increased possibilities for citizen participation in the making and enforcement of the law in the field. Public participation was endorsed in Principle 10 of the Rio Declaration, adopted at the United Nations Conference on Environment and Development in 1992,[19] and is the subject of provisions in a number of other recent instruments.[20] The second topic, to which I would like to turn, also supports this trend.

Human Rights, the Environment, and Indigenous Peoples

The nature of the relationship between human rights and efforts to protect

(19)United Nations Conference on Environment and Development, Rio Declaration, print 10, U.N. Doc. A/CONF.151/5Rev.1 (1992), reprinted in 31 L.L.M. 874 (1992).

(20)See, e.g., the draft articles on Prevention of Transboundary Damage adopted on first reading by the International Law Commission in 1998, Art. 9, 1998 ILC Rep. p. 18, at p. 20; 1992 Convention on Biological Diversity, Art. 14(1)(a), 31 ILM 818 (1992); the Aarhus Convention, supra note 1; and, of course, the 1993 North American Agreement on Environmental Cooperation, Art. 1(h).

the environment is controversial[21] Is there a right to an environment of quality, a "healthy" environment, or even simply a "right to environment," as it has sometimes been called?[22] Should international human rights law be used as an instrument in the effort to protect the environment? Is such an approach too "anthropocentric," in that it seems to assume that the only elements of the environment that are worth protecting are those that serve humans? Or, on the contrary, does it diminish international human rights law by focusing unduly on nature, to the exclusion of the needs of humans, per se, that are in need of protection? I will not attempt to answer these questions, or even to shed much light on them. Instead, I would simply like to touch briefly upon a few recent cases in this area, allowing the reader to form his or her own conclusions as to whether international human rights law is good for the environment, and vice versa.

Some of the cases that I would like to discuss involve attempts, not simply to protect human rights broadly speaking, but specifically, to protect the rights and interests of indigenous peoples. What I find particularly striking about these cases is that they typically represent attempts to provide access to justice and remedies by individuals and groups who have been unsuccessful in gaining such access, or in obtaining satisfaction, in their home countries. So in these cases, the persons involved have sought redress in United States courts for alleged deprivations that have been inflicted with the full knowledge, and sometimes the active involvement, of their own governments.

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(21)See, e.g., Gunther Handl, Human Rights and Protection of the Environment: A Mildly "Revisionist" View, in HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENT 117 (A.A. Cancado Trindade ed. 1992); Dinah Shelton, Human Rights, Environmental Rights, and the Right to Environment, 28 STAN. J. INT'L L. 103 (1991); and Philip Alston, Conjuring up New Human Rights: A Proposalfor Quality Control, 78 AM. J. INT L L. 607 (1984).

(22)See Shelton, supra note 21.

A very real problem for these individuals, of course, is that it is not always easy to gain redress from governments. They are often immune from suit, wholly or partially, under domestic legal systems, and if they are sued in other countries they may invoke the doctrine of foreign sovereign immunity. Now, I certainly do not need to tell this audience about the exceptions that have been developed to the doctrine of foreign sovereign immunity, because the mixed courts of Egypt were among the leaders in developing the so-called "restrictive" theory of sovereign immunity According to this approach, which is followed in an increasing number of countries, a state's immunity from the jurisdiction of the courts of another state is "restricted" to cases in which the state acts § re imperil as opposed to those in which it acts lure gestionis". In the latter category of cases, the state acts in the same way as a private individual and, so the theory goes, should be similarly subject to judicial jurisdictional

Now, one of the exceptions to foreign sovereign immunity recognized under the restrictive theory concerns personal injuries or damage to property inflicted unjustifiably at the hands of the state (in the common law, we call these "torts"). so, one might think, even if a government could not be sued in its own courts, it could possibly be sued in another country under the tort exception to foreign sovereign immunity. The problem with this approach is that even if the "defendant" state otherwise had a sufficient relationship with the state in which suit was brought (the "forum" state) to justify the latter's assertion of jurisdiction over it, and even if the forum state followed the restrictive theory of sovereign immunity, virtually all states following this theory only allow foreign states to be sued for torts that were committed in the state of the forum. In the kinds of cases we are considering however, neither the allegedly tortious act nor the plaintiffs injury would have occurred in the

forum state - and thus, the exception would not apply, and the defendant state would be immune from the jurisdiction of the forum state.

But, as we know, for a good lawyer, this is only a small, temporary Setback There must be other ways of gaining redress for the injured parties. And so, it has proved there may be: members of indigenous groups and others have brought suit outside their own countries, not against their governments but against companies that have been licensed by their governments to conduct activities in the individual's country - activities that have resulted in harm to the indigenous peoples or to their environment. A number of such suits have been brought in United States federal courts. Some of them have been more successful than others, but the final results are far from being tallied, because most of these actions are still ongoing. I would like to focus on two of them.

The first case, Jota v. Texaco,[23] is really two cases: It is a consolidated appeal of separate cases that had been dismissed by the trial court. In the first of these cases, Aguinda v. Texaco,[24] residents of the Oriente region of Ecuador, primarily members of indigenous tribes, sued an American oil company for personal injuries and environmental harm allegedly resulting from Texaco's exploitation of the regionts oil Hlelds. The Oriente region is a heavily forested area containing the headwaters of the Amazon River. In the second cases Ashanga v. Texaco,[25] residents of Peru living downstream from the Oriente region of Ecuador made claims that were similar to those in Aguinda. In both cases plaintiffs alleged that Texaco dumped large quantities of toxic by-products of the drilling

(23)Jota Via Texaco, 157 F.3d 153 (2d Cir. 1998).
(24)Aguinda v. Texaco, Inc., 850 F. Supp. 282 (S.D.N.Y. 1994).
(25)S.D.N.Y. Dkt. No. 94 Civ. 9266.

process into local rivers and disposed of them in other improper ways,[26] in contrast to the standard industry practice of pumping the substances baok into the emptied wells. Plaintiffs also alleged that the Trans-Ecuadoran Pipeline, which Texaco had constructed, had leaked large quantities of petroleum into the environment, and that they and their families had suffered various physical injuries, including poisoning and the development of pre-cancerous growths. The plaintiffs sought monetary compensation and also sought equitable relief in the form of cleanup operations, provision of access to potable water as well as to hunting and fishing grounds (plaintiff's original hunting and fishing grounds allegedly having been destroyed by defendant), establishment of an environmental monitoring fund, and other measures of restitution.

What was Texaco's response to these lawsuits? It was quite interesting. Rather than deSending on the merits, Texaco's lawyers - as lawyers often do anywhere - raised procedural defenses. They contended, first, that plaintiffs had failed to join an indispensable party, namely, the Republic of Ecuador; second, they argued that considerations of "international comity" required dismissal. And third, they contended that the cases should be dismissed on grounds of forum non conveniens. What they were really claiming, of course, is that the Ecuadoran government was a close participant in the activities for which plaintiffs sought to hold Texaco liable. Specifically, Texaco claimed that its operations in the Oriente region were conducted through a concession held by one of its subsidiaries, Texaco Petroleum Company, or "TexPet". TexPet ran the concession for a consortium that also included Gulf Oil. But Ecuador began purchasing interests in the consortium in 1974; and by 1992 had become its sole owner. Texaco also introduced into evidence a

(26)S.D.N.Y. Dkt. No. 94 Civ. 9266.

letter written by Ecuador's ambassador to the United States in which the ambassador stated that Ecuador considered these lawsuits to be an affront to Ecuador's national sovereignty, and that Ecuador's courts were open to adjudicate disputes of this kind.

The trial court dismissed the Aguinda case on all three grounds urged by Texaco, namely, forum non conveniens, international comity and fhilure to join an indispensable pa-trty.[27] on the latter ground the court found that any order of equitable relief would be unenforceable if Ecuador and its state-owned oil company, PetroEcuador, were not parties and that such an order would be, in the words of the court, "all open invitation to an international political debacle."[28] Ironically, Ecuador later filed a motion to intervene in the case - evidently because of a change of government in the country. The irony was only heightened when the trial court denied Ecuador's motion to intervene, on the ground that it was "patently, and prejudicially, untimely."[29] The court was evidently influenced by the fact that, in its view, Ecuador was unwilling to fully waive its sovereign immunity. As to the Ashanga case, it, too, was later dismissed by the court, on grounds similar to those cited in Aguinda.[30] Plaintiffs in both cases appealed to the U.S.Court of Appeals, for the Second Circuit.

Not to prolong the suspense unduly, the court of appeals vacated the trial court's judgments and remanded the case to that court for further proceedings. It ruled, first, that dismissal on grounds of forum non conveniens and comity was erroneous in the absence of a condition requiring Texaco to submit to the jurisdiction of Ecuadoran courts;

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(27)Aguinda v Texaco, Inc 945 F.Supp 625 (S.D N Y 1996)
(28)Ibid at 628
(29)Aguinda v Texaco, Inc 175 F.R.D. 50, 51 (S.D N.Y. 1997).
(30)Jota v Texaco, Inc 157 F 3d 153 (2nd Cir 1998)

second. that insofar as the court's dismissal was based on plaintiffs' failure to join the government of Ecuador as an indispensable party, that failure only meant that the complaint should be dismissed insofar as it sought to enjoin activities currently under Ecuador's control; and third, that although Ecuador's motion to intervene was indeed untimely and did not include a full waiver of Sovereign immunity, this was not necessarily pr dicial and could be reconsidered by the trial court on remand. These rulings call for several comments.

The first ground is entirely uncontroversial. It is in fact a standard condition of a forum non conveniens dismissal that defendant agree to waive any objections to the jurisdiction of the courts of the forum Convenient(31) - that is, the alternative forum sought by the defendant itself. Why the trial court did not impose such a condition is something of a mystery.(32) The court of appeals did not close the door to the plaintiffs on this issueS however. On the contrary, it instructed the trial court to reconsider the issue of forum non conveniens, as well as the issue of comity,(33) on remand. The second ground also makes eminent good sense. Ecuador is clearly not an indispensable party with regard to relief sought solely in respect of Texaco - such as damages, clean-up, and the establishment of an environmental fund. The third ruling of the court of appeals, on the other hand, strikes something of a discordant note. It must be said that the confusion began at the trial court levelr where the judge insisted that Ecuador give an express and all-encompassing waiver of

(31)See. e.v.~ in re Union Carbide Corp. Gas Plant Disaster Ithe Bhopal cased 809 F.2d 195 202-204 (2d Cir. 1987).

(32)Texaco had argued that TexPet was subject to the jurisdiction of Ecuadoran courts, but had not disputed that it was not amenable to suit in Ecuador. Rota. 157 F.3d at 159.

(33)The court said that it would be appropriate for the trial court to "reconsider the merits of the comity issue in light of Ecuador's changed litigating position" - i.e., that the government now wished to intervene. Ibid., at 160.

sovereign immunity.(34) A waiver would be necessary under the United States Foreign Sovereign Immunity Act of 1976~ since the tort exception under that statute only applies to torts committed in the United States - which these alleged torts clearly were not. However, it is perfectly clear that the United States legislation does not require an express waiver; an implied waiver is sufficient.(35) A motion to intervene as a party in an action could be considered as an implied waiver or as a separate ground for non-immunity if the state makes a counterclaim.(36) S07 it would seem that it was entirely unnecessary for the trial and appellate courts to tie themselves into knots on this issue.

To sum up, the trial court now has plenty of work to keep it busy for some time to come on this case. There is no way of knowing how it will come out on these issues so as they say in the news media, we will just have to "stay tuned." It will be interesting to see whether the trial court actually reaches conclusions that are different from those it arrived at the first time around and to see what happens orl what would seem to be an inevitable appeal of the trial court's next orders.(37)

The final case I would like to discuss involved claims by individuals and other plaintiffs that another American oil company, Unocal, under a

(34)"The [trial] Court had explicitly advised Ecuador that its unqualified participation in the litigation would be required to enable it to intervene, and Ecuador elected not to fully relinquish its sovereign immunity." Ibid., at 163.

(35)Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C.A. § 1605(a)(1) (1976).

(36)FSIA, ibid., § 1607.

(37)Postscript: The trial court dismissed the Aguinda and Jora cases on May 30, 2001, saying: "Because Texaco has carried its burden on every element of the motion, and because the record establishes overwhelmingly that 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 on the ground offorum non Convenient 2001 WL 579776 (S. D. N.Y.).

joint venture agreement with the Burmese government.[38] (The court in its opinion refers to the country as "Burma", and I will maintain that nomenclature.) Again, plaintiffs claimed compensatory and equitable relief, on the ground that they had been injured as a result of violations of their internationally protected human rights by the government of Burma. In particular, plaintiffs alleged that the Burmese government had committed numerous human rights abuses, including torture, forced labor and confiscation of property - all in furtherance of a joint venture to extract natural gas from the Andaman Sea and pipe it across Burma to Thailand.[39] Unocal was liable for these violations, according to the plaintiffs, because it had participated in the natural gas project as a joint venturer or implied partner with the government of Burma.

The case is interesting for present purposes because the project involves what can, without any exaggeration be characterized as alleged damage to the human environment namely, the destruction of numerous villages in the pipeline area, the burning of homes, the clearing of forests, and the like.

Plaintiffs in this case based their suit on a rather unique American law, the original purpose of which is shrouded in a certain amount of obscurity. The law is called the Alien Tort Claims Act,[40] and was part of the Judiciary Act of 1789. This statute gives federal courts subject matter jurisdiction over suits by aliens, for torts committed in violation of the law of nations or a treaty of the United States. The court noted that to qualify under the Actr plaintiffs must normally allege that a violation of international law was committed by a defendant who was at least acting

(38)National Coalition Government of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D. Cal. 1997)

(39)Ibid. at 334.

(40)28 U.S.C. § 1350.

under color of official authority. Defendant Unocal contended that plaintiffs could not meet this requirement, since it is a private entity. The court began by finding that plaintiffs' claims of torture in violation of international law "easily satisfy the [Act's] requirement that the individual plaintiffs allege a violation of international law.(41) However, the court also found that some of the plaintiffs who limited their claims to expropriation of their property, had not alleged a sufficient violation of international law and therefore could not bring suit under the Act

But on the crucial question of state action, the court said that the applicable test was as follows: "'A private individual acts under color of law ... when he acts together with state officials or with significant state aid.'"(42) While the court considered that it could not rule finally on the question of state action, since the case was before it on a motion by defendant to dismiss and therefore the factual record was incomplete, it nonetheless made preliminary findings. Specifically, the court looked to the concept of "joint action", according to which "' private persons, jointly engaged with state officials in the challenged action, are acting "under color" of law(43) The court stated that "'joint action exists where a private party is a 'willful participant in joint action with the state or its agents(44). The court cited a statement by the president of Unocal, in which the president said to opponents of the pipeline: "'What I'm saying is that if you threaten the pipeline, there's gonna be more military. If forced labor goes hand in glove with the military, yes there will be more forced labor. For

(41)National Coalition Government of the Union of Burma, 176 F.R.D. at 345.
(42)Ibid., quoting Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995), rehearing denied 74 Cir. 1996).
(43)Ibid., at 346, quoting Dennis v. Sparks, 449 U.S. 24, 27-28 (1980).
(44)Ibid., voting Collins v. Womancare, 878 F.2d 114Sn at 1154 (gth Cir. 1989).

every threat to the pipeline, there will be a reaction.t [45] Based on this and other evidence, the court concluded that the plaintiffsX allegations "are sufficient to support subject-matter jurisdiction under the [Alien Tort Claims Act] because, when construed in the light most favorable to plaintiffs, they suggest that Unocal may have been 'a willful participant in joint action with the State or its agents. [46] "In other words," concluded the court. "defendants' challenged actions are allegedly inextricably intertwined with those of the [Burmese] government."

This decision therefore displays a rather generous attitude of an American court toward a claimed human rights violation, when the defendant was not a foreign state but a private company engaged by the state to work on a project involving the extraction and transmission of a natural resource. While not all cases have been this generous to plaintiff claiming human rights deprivations, this decision should serve as a warning to companies engaging in such operations that they may be held responsible - or at least subject to the jurisdiction of U.S. courts – ill respect of alleged human rights violations by governments of other countries.

Once again, we see an illustration of the rather remarkable degree of "interconnectedness" that characterizes the world we live in - a world in which poor and marginalized people in one country go to court in another country, half way around the globe, seeking redress for actions of their own government in connection with a pipeline project being constructed by a company headquartered in the forum stateX And they do this by suing the company - for violations of international law. As Alice said in Through the Looking Glass, things are getting "curiouser and curiouser"!

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(45)Ibd ., at 348.

(46)Ibid., quoting Collins, stem note 43.

Conclusion

In would like to conclude by referring to a story you may have seen recently in the news media, about the diminishing ice sheet in Greenland. Scientists have discovered that the southern half of this ice sheet - which is the second largest in the world, after one in Antarctica – has shrunk substantially in the last five years.(47) The scientists reported that on average, Greenland has lost about 2 cubic miles of ice a year from 1993 to 1998. It is well known that melting of polar ice caps will cause sea levels to rise around the world - a phenomenon that is already occurring due to rising global temperatures. Equally alarming is that this melting could also disrupt the ocean currents that moderate Earth's climate by distributing heat around the world. One of the scientists who conducted this study said there was a possibility that: "putting more fresh water into the Atlantic will cause things to change in a hurry. (48) He explained that it is likely that the climate system responds to alterations such as this "as if a light switch were being thrown: A little pressure may not cause the system to change but when the pressure reaches a certain point it flips suddenly." (49)

The problem is that the scientists have no idea whether the melting of the Greenland ice sheet will cause Significant pressure on the switch or whether the switch is close to flipping,. This brings into sharp focus the importance of dealing with scientific uncertainty according to the "precautionary principle," which counsels caution in the face of such uncertainty, where potentially serious and irreparable effects are involved. The phenomenon also demonstrates, once again, that all of us on planet Earth are in it together, that we all have an interest in the long term health

(47)William K. Stevens, Surveys Uncover Substantial Melting of Greenland Ice Sheet, N.Y. TIMES, March 9, 1999, at A13.
(48)Ibid., quoting Dr. Richard Alley.
(49)IbidS (quote is from story).

of the biosphere.

I have tried to illustrate in these remarks the degree to which we are interconnected with humans in other parts of the world, and with nature and the biosphere generally. The following statement, which has been attributed to Chief Seattle, patriarch of the Duwamish and Squamish Indians of Puget Sound in the U.S. State of Washington, sums up the situation nicely. Chief Seattle said,

All things are connected like the blood that unites us all. Man did not weave the web of life, he is merely a strand in it. Whatever he does to the web, he does to himself.

These words have even more force today than when they were uttered, a century and a half ago.