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The Secret Trade Courts

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Editorial

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In Ecuador, residents of the country's eastern rainforest are suing ChevronTexaco. They say that the methods Texaco used to drill for oil in the 1970's and 1980's caused billions of dollars in environmental damage and health problems that continue today. ChevronTexaco, which stands a good chance of losing the lawsuit, has now demanded that the government-owned Ecuadorean oil company pay whatever damages are imposed and the costs of cleanup. On this issue ChevronTexaco has a good chance of winning. The reason is that its demand will be heard by arbitrators, not by a court, and arbitration greatly favors corporations.

Some arbitration is necessary in international trade, not least because courts in many poor countries are corrupt, inept or unfair. Partly for this reason, the United States trade representative has pushed countries to include clauses in trade agreements allowing companies to take trade disputes to arbitration, bypassing courts. But the arbitration process itself is often one-sided, favoring well-heeled corporations over poor countries, and must be made fairer than it is today. Unlike trials, arbitrations take place in secret. There is no room in the process to hear people who might be hurt, in this case Ecuador's rainforest dwellers. There is no appeal. And the rules of the game are such that when companies seek to recover damages, arbitration panels tend to focus narrowly on the issue of whether a company's profits were affected by a government action. They need not consider whether the action or law in question was necessary to protect the environment or public health, or even to stop a corporation's harmful behavior.

The result is that polluters who are shut down can and do receive considerable compensation. When Mexico barred Metalclad, an American company from building a toxic-waste treatment plant without a permit on a site authorities considered dangerous, the company won a \$16.7 million judgment. Such suits discourage environmental regulation. When an American manufacturer of a gasoline additive filed an arbitration claim against Canada, Canada revoked a rule prohibiting the additive and paid the company \$18 million.

Companies also use arbitration to insulate themselves from the risks of doing business. Claiming damage from Argentina's decision to let the peso float in 2001 and 2002, at least 27 companies have filed for arbitration - even though the decision was arguably necessary to fend off an economic depression and even though ordinary Argentines suffered greatly during the crisis.

The trade agreements that set the rules should direct arbitration panels to take a much broader view - to consider not just corporate interests but the needs of governments and their citizens. They should also be required to invite a wider range of views. Because their decisions have great public impact, arbitration panels owe the public a hearing.