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# LESSONS FROM THE CHEVRON ECUADOR LITIGATION: THE PROPOSED INTERVENORS’ PERSPECTIVE

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## INTRODUCTION

This symposium provides a welcome opportunity for scholars and practitioners with a wide range of perspectives to examine issues raised by the increasingly complex litigation related to Texaco’s oil extraction operations in the Amazon Rainforest in Ecuador. I have worked in the affected region since 1989, and my original research was the basis for the environmental allegations in the initial class action lawsuit that launched the ongoing litigation that has come to be known as “the Chevron-Ecuador Litigation.” That lawsuit, *Aguinda v. Texaco, Inc.*, was filed in federal court in New York in 1993, and asserted claims on behalf of Indigenous and settler residents who have been harmed by pollution from Texaco’s Ecuador operations. I was not involved in bringing either that case or the subsequent *Aguinda* lawsuit in Ecuador, but I have continued to work in the region in various capacities—and to regularly visit oil field facilities and affected communities—and in 2012, I was retained by a group of forty-two Indigenous Huaorani leaders from five communities to help protect their interests in the litigation.<sup>1</sup>

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1. Since 2007, I have also worked with a grassroots alliance of Huaorani communities, *Ome Gompote Kiwigimoni Huaorani* (Ome Yasuni), who came together to

Oil exploration and production is an industrial activity. Among other impacts, it generates large quantities of wastes with toxic constituents and presents ongoing risks of spills. The consortium led by Texaco extracted nearly 1.5 billion barrels of Amazon crude over a period of twenty-eight years (1964-1992).<sup>2</sup> During its tenure as operator, Texaco's wholly-owned subsidiary, Texaco Petroleum, drilled 339 wells in an area that now spans more than one million acres.<sup>3</sup> It built a 498-kilometer Trans-Ecuadorian pipeline system to transport oil from the remote Amazon region across the Andes Mountains to the Pacific coast, in addition to some 1,000 kilometers of secondary pipelines and flow lines in the rainforest and more than six hundred kilometers of unpaved roads.<sup>4</sup> Among other sources of pollution, Texaco regularly sprayed roads with crude oil for maintenance and dust control, and deliberately dumped tons of toxic drilling and maintenance wastes,<sup>5</sup> in addition to an estimated 19.3 billion gallons of oil field brine (also known as produced water), into the environment—contaminating countless rivers and streams that served as rich fisheries and freshwater resources for local communities.<sup>6</sup>

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protect their territory and culture, and defend the right of the Huaorani to continue to live freely and in accordance with their culture in what remains of their ancestral lands.

2. The initial consortium was comprised of wholly-owned subsidiaries of Texaco and Gulf (both now part of Chevron), and was operated by Texaco. Texaco first discovered commercial quantities of oil in 1967, and production (and oil exports) began in 1972. In 1974, Ecuador's newly-created national oil company (CEPE, now Petroecuador) acquired a 12.5% participating interest in the Texaco-Gulf Consortium from Texaco and a 12.5% interest from Gulf, giving it a 25% share of the stock in the consortium. REPUBLIC OF ECUADOR, MINISTRY OF ENERGY AND MINES, CONTRATO PARA LA EJECUCIÓN DE TRABAJOS DE REPARACIÓN MEDIOAMBIENTAL Y LIBERACIÓN DE OBLIGACIONES, RESPONSABILIDADES Y DEMANDAS [CONTRACT FOR IMPLEMENTATION OF ENVIRONMENTAL REMEDIAL WORK AND RELEASE FROM OBLIGATIONS, LIABILITY AND CLAIMS] 2 (May 4, 1995). Petroecuador acquired Gulf's remaining shares in 1977, making it the majority shareholder in the new CEPE-Texaco consortium, with a 62.5% interest. Texaco retained 37.5% of the stock, and continued to operate the consortium's exploration and production facilities until 1990, when a subsidiary of Petroecuador became the operator. Texaco operated the Trans-Ecuadorian pipeline until 1989. *Id.*; JOHN D. MARTZ, POLITICS AND PETROLEUM IN ECUADOR 111, 168, 186.

3. TEXACO, 17 años, 365 días al año, 24 horas al día [TEXACO, 17 years, 365 days a year, 24 hours a day], NOTICIAS [News], at 3 (1989) (Texaco company magazine distributed in Ecuador).

4. *Id.* at 3-4.

5. Drilling and maintenance wastes were either abandoned in open, unlined waste pits (large holes dug in the ground) at well sites and production stations, or discharged to waters or soils.

6. Calculations by the author based on Republic of Ecuador, Ministry of Energy and Mines, *Producciones de Petróleo, Agua de Formación y Gas Natural Dic/89* [Production of Petroleum, Formation Water and Natural Gas, Dec./89] (Dec. 1989) (unpublished document). Oil field brine, also known as produced water, is extracted with crude oil and separated in the field. Natural gas is also present in oil-bearing formations and is extracted with the oil and brine. Typically, the (oil-gas-brine) mixture is transported through small-

The operations expanded incrementally, and by the time Texaco handed over operational responsibility for the wells and other production facilities to Ecuador's national oil company, Petroecuador, in June 1990, they were producing 213,840 barrels of oil per day.<sup>7</sup> At the same time, according to government figures from December 1989, the facilities generated more than 3.2 million gallons of produced water every day, virtually all of which was dumped into the environment (via open, unlined waste pits) without treatment or monitoring, and more than 49 million cubic feet of associated natural gas every day, most of which was burned as a waste, also without environmental controls or monitoring.<sup>8</sup>

In addition to routine, willful discharges and emissions, accidental spills were common. During the time that Texaco operated the Trans-Ecuadorian pipeline, that line alone spilled more than 19 million gallons of crude oil into the environment, mostly in the Amazon basin.<sup>9</sup> By comparison, the Exxon Valdez spilled an estimated 10.8 million gallons into the Prince William Sound. Spills from secondary pipelines, flow lines, production tanks, and other facilities were also frequent and continue to this day.<sup>10</sup> In contrast to the oil

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diameter pipelines, known as flow lines, from the wells to a central production station. There, crude oil is separated from the mixture and transported by pipeline for sale. Virtually all of the produced water wastes generated by Texaco were discharged into the environment. Some of the gas was processed for use in the operations; however, most was flared, or burned as a waste, without temperature or emissions controls, depleting a nonrenewable resource and polluting the air with greenhouse gases, precursors of acid rain, carbon particulate (soot), and other contaminants. Because the facilities do not achieve complete separation, produced water wastes typically contain high levels of hydrocarbons, in addition to toxic levels of salts, heavy metals, and chemicals that have been injected down a well or used in the separation process, and it is not unusual to see black smoke released from flares. For a fuller discussion of the operations and additional sources of pollution and other environmental impacts, see JUDITH KIMERLING, *AMAZON CRUDE* 31, 37-84, 111-16 (1991); Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco*, 38 N.Y.U. J. INT'L L. & POL. 413, 417, 449-68, 473-74 (2006).

7. Ministry of Energy and Mines, *supra* note 6, at 2.

8. *Id.*; KIMERLING, *supra* note 6. As part of the produced water waste stream, the operations discharged an estimated 1,600 to 16,000 gallons of oil into the environment every day. KIMERLING, *supra* note 6, at 65, 114; Kimerling, *supra* note 6, at 456.

9. For citations and a fuller discussion, see Kimerling, *supra* note 6, at 457-58.

10. A 1972 directive with instructions for reporting spills, sent from Coral Gables, Florida (where Texaco Petroleum and Texaco's Latin America/West Africa Division were based) to the Acting Manager of Texaco Petroleum in Quito, instructed personnel in Ecuador to report "only major [oil spill] events," and "further defined" a major event "as one which attracts the attention of the press and/or regulatory authorities or in your judgment merits reporting." The instructions further directed that "[n]o reports are to be kept on a routine basis and all previous reports are to be removed from Field and Division offices and destroyed." Directive from R. C. Shields, Chairman of the Board, and signed by R. M. Bischoff, to M. E. Crawford, Acting Manager, Texaco Petroleum Co. in Quito, Ecuador (July 17, 1972).

industry's typically energetic response to spills in the United States, Texaco's response in Ecuador was limited to shutting off the flow of petroleum into the damaged portion of the pipeline, and allowing the oil already in the line to spill into the environment before making the necessary repairs. No cleanup activities were undertaken, and damages were not compensated.<sup>11</sup>

In 2002, after nine years of litigation, the *Aguinda v. Texaco* lawsuit was dismissed on the ground of forum non conveniens, in favor of litigation in Ecuador.<sup>12</sup> Forum non conveniens is a doctrine that allows a court to dismiss a case that could be litigated in a different court. In May 2003, Ecuadorian

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11. For a fuller discussion, see Kimerling, *supra* note 6, at 457-59; KIMERLING, *supra* note 6, at 69-74. Texaco's pipeline system crosses myriad rivers and streams. As a result, depending on the location and size of the release, in addition to devastating local impacts, spills can cause oil slicks on waterways and foul water supplies and fisheries for scores or even hundreds of kilometers. Moreover, because spills are not properly cleaned up, they can become sources of ongoing chronic pollution in affected watersheds for months or years.

12. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002). The district court first dismissed the *Aguinda* lawsuit in 1996, on the grounds of forum non conveniens, international comity, and the failure to join indispensable parties (Petroecuador and Ecuador). *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996), *rev'd sub nom. Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998). At the time, Ecuador's government vigorously opposed litigating the plaintiffs' claims in the United States, and the district court agreed with Texaco and Ecuador that the "Ecuadorian-centered" case did not belong in U.S. courts. In a brief opinion, Judge Jed Rakoff also directed the plaintiffs to "face the reality" that the power of U.S. courts "does not include a general writ to right the world's wrongs." *Aguinda*, 945 F. Supp. at 627-28. In response to the dismissal, Ecuador's government—which had a new President—reversed its opposition, and Ecuador and Petroecuador moved to intervene as parties aligned with the plaintiffs. The district court denied the motion to intervene and the plaintiff's then-pending motion for reconsideration. On appeal, the Second Circuit held that the district court had erred by dismissing the complaint on the grounds of forum non conveniens and international comity without first "securing a commitment by Texaco to submit to the jurisdiction of the Ecuadorian courts," and remanded for further proceedings. *Jota*, 157 F.3d at 159-63. The appellate court also held that the district court's reasoning regarding the failure to join an indispensable party did not support dismissal of all of the plaintiffs' claims; instead, it sufficed only to support dismissing claims that sought to enjoin activities currently under Ecuador and Petroecuador's control. *Id.* at 163. On remand, Texaco "unambiguously agreed in writing to be[] sued . . . in Ecuador, to accept service of process in Ecuador, and to waive . . . any statute of limitations-based defenses that may have matured since the filing" of the complaint. *Aguinda*, 142 F. Supp. 2d at 539. *See also* *Aguinda v. Texaco*, Nos. 93 Civ. 7527, 94 Civ. 9266 (S.D.N.Y. June 21, 2001) (stipulation and order). In addition, Texaco offered to "satisfy judgments that might be entered in plaintiffs' favor [by the Ecuadorian courts], subject to [its] rights under New York's Recognition of Foreign Country Money Judgments Act." *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011) (brackets in original) (quoting Texaco's Memorandum of Law in Support of Its Renewed Motion to Dismiss Based on Forum Non Conveniens and International Comity at 16-17). For a fuller discussion, see Kimerling, *supra* note 6, at 487-90 (early opposition to the *Aguinda* lawsuit by Ecuador's government); *id.* at 514-26 (the first dismissal and political instability in Ecuador); *id.* at 650-52 (subsequent political turmoil and changing positions in submissions by Ecuador to the *Aguinda* court).

lawyers contracted by the *Aguinda v. Texaco* plaintiffs' lawyers filed a new lawsuit against ChevronTexaco (now Chevron)<sup>13</sup> in Lago Agrio, Ecuador, the boom town that sprang up around Texaco's first commercial field. After another nine years of litigation, the Ecuadorian court found Chevron liable for more than \$19 billion in total damages, the largest amount ever awarded in an environmental lawsuit.

Chevron, however, is contesting the validity of the judgment in two other fora: an arbitration proceeding against Ecuador at The Hague ("the BIT Arbitration"), and a lawsuit against the Lago Agrio plaintiffs and their lead lawyers and associates in federal court in New York (*Chevron v. Donziger*). Both cases are based on allegations of fraud and other misconduct by the Lago Agrio plaintiffs' legal team, allegations of improper collusion between representatives of the plaintiffs and Ecuadorian government officials, and allegations of systemic failures in the administration of justice in Ecuador.<sup>14</sup>

In this Article, I will not attempt to chronicle the increasingly complex litigation related to the Lago Agrio lawsuit. Instead, I begin by offering some observations, from the field, on the application of the forum non conveniens doctrine by the *Aguinda v. Texaco* court to dismiss the initial lawsuit, and then discuss one of the affected Indigenous peoples, the Huaorani. The Article concludes by suggesting some lessons that could be learned from the experience of the Huaorani with the litigation.

#### I. APPLICATION OF THE FORUM NON CONVENIENS DOCTRINE BY THE *AGUINDA v. TEXACO* COURT

I have written elsewhere at length about the operations that gave rise to *Aguinda v. Texaco*, the litigation of that lawsuit in federal court in New York, and the decision to dismiss the case in favor of litigation in Ecuador,<sup>15</sup> so this

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13. In 2001, Chevron acquired Texaco and adopted the name ChevronTexaco. In 2005, ChevronTexaco changed its name to Chevron, "to reduce the confusion caused by the combined name." *Company News; ChevronTexaco Drops Half Its Corporate Name*, N.Y. TIMES, May 10, 2005, at C4.

14. *See generally* Plaintiffs' Amended Complaint, *Chevron Corp. v. Donziger*, No. 11-CV-0691 (LAK) (S.D.N.Y. Apr. 20, 2011) [hereinafter *Chevron v. Donziger Complaint*]; Claimants' Notice of Arbitration, In the Matter of An Arbitration Under The Rules of the United Nations Commission on International Trade Law, *Chevron Corporation and Texaco Petroleum Company vs. Republic of Ecuador* (Sept. 23, 2009) [hereinafter *BIT Notice of Arbitration*]. In addition to legal proceedings, Chevron has lobbied the office of the United States Trade Representative and members of Congress to eliminate trade preferences for Ecuador under the 1991 Andean Trade Preference Act.

15. For a detailed examination of the *Aguinda v. Texaco* litigation, which includes a discussion of governments and policy in Ecuador and Texaco's operations and impacts, see generally Kimerling, *supra* note 6. For the study that prompted the *Aguinda* litigation (which includes photographs, maps and a contemporaneous discussion of oil exploration and

Article will cut to the chase: The application of the forum non conveniens doctrine to dismiss *Aguinda v. Texaco* was colored by a series of detailed, but questionable, factual assumptions.

When a federal court applies the forum non conveniens doctrine, it first determines whether there is an alternative forum, and then balances private and public interest factors to determine whether they overcome the ordinarily strong presumption in favor of the plaintiffs' chosen forum.<sup>16</sup> In *Aguinda*, the district court ruled that Texaco had demonstrated that (1) Ecuador's courts provide an alternative forum and (2) the balance of private and public interest factors "tips overwhelmingly in favor of dismissal."<sup>17</sup> Despite the fact that Texaco's headquarters was just a few miles from the courthouse where the lawsuit had been filed, the judge, Jed Rakoff, concluded that the case has "everything to do with Ecuador and nothing to do with the United States."<sup>18</sup>

Some of the facts used by the Court to support its legal analysis were uncontested. For example, there were no allegations of injury in the United States; Texaco's wholly-owned subsidiary, Texaco Petroleum, built and operated the facilities; and after operations began, Ecuador acquired majority ownership of the assets and continued to operate them after Texaco Petroleum's contract expired. Other facts, however, were in dispute. One area that was especially germane relates to control of the operations. While not determinative, by itself, of the legal questions, the factual issue of where decisions were made about the technology and practices that caused the pollution, and who made them, was a material element of the analysis of both private and public interest factors, and clearly colored the decision to dismiss.

The proposition—advocated by Texaco and accepted by the Court without live testimony<sup>19</sup>—that Ecuadorians controlled the relevant decisions, that no one from Texaco or anyone else operating out of the United States made any material decisions or was involved in designing, directing, guiding or assisting the activities that caused the pollution, and that environmental practices were heavily regulated by Ecuador, was a recurring theme. The Court also distinguished Texaco from Texaco Petroleum, the subsidiary that operated in Ecuador. That distinction, and the portrait of Texaco Petroleum as essentially an Ecuadorian company whose operations were far removed from the parent, is

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production in Ecuador's Amazon region by Texaco and other companies and the impacts of those operations), see KIMERLING, *supra* note 6.

16. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981); *Aguinda*, 142 F. Supp. at 538.

17. *Aguinda*, 142 F. Supp. 2d at 548.

18. *Id.* at 537.

19. For example, the Court cited a total of eleven pages of (self-serving) deposition testimony by four Texaco managers for the proposition that the record "clearly establishes that all of the Consortium's key activities, including the decisions and practices here at issue, were managed, directed, and conducted by Consortium employees in Ecuador." *Id.* at 548.

dramatically different from the image of “Texaco” in Ecuador and the impression there that the government had contracted with *the* U.S. company, Texaco. It is also at odds with the portrait cultivated by Texaco before it was sued, of a multinational industry leader that transferred world class technology to Ecuador. Altogether, the *Aguinda* Court’s depiction of Texaco’s role in the operations is clearly incongruous with reality of oil development in Ecuador, including the environmental law vacuum and culture of impunity in the oil frontier, the experience of Amazonian peoples and other Ecuadorians with the company, and the portrait that Texaco cultivated during its tenure in Ecuador.<sup>20</sup>

Ecuador relied on Texaco, as the operator of the first commercial oil fields in the Amazon region, to transfer hydrocarbon extraction technology. Ecuadorian officials saw Texaco as a prestigious international company with vast experience and access to “world class” technology and capital. They relied on Texaco to design, procure, install, and operate the infrastructure that turned Ecuador into an oil exporter. In its contract with the State, Texaco agreed to use

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20. See, e.g., Texaco, 25 años preparando manos Ecuatorianos para manejar nuestro patrimonio [Texaco, 25 Years Preparing Ecuadorian Hands to Manage Our Patrimony], *EL COMERCIO*, June 15, 1990 (paid advertisement by Texaco in major Ecuadorian newspaper stating that “Texaco, a company known around the world” had “share[d] its technology with Ecuador” and “trained more than 700 Ecuadorians in technical and administrative areas of the petroleum industry”); *Se va la Texaco* [Texaco Leaves], *HOY* June 6, 1992 (reporting Texaco’s departure from Ecuador on the occasion of the expiration of its production contract; referring to the reversion to the State of “all of the infrastructure installed by the foreign company” during its 28 years in Ecuador; and quoting a statement by the General Manager of a Petroecuador subsidiary, that “through the work of the company [Texaco] in the 1960s and 1970s Ecuador entered the modern world”) (emphasis added); Texaco, *Artículo de Fondo* [Leading Article], *NOTICIAS* [News], 1989 (company magazine distributed to workers in Ecuador, describing “Texaco” as “a serious and efficient” company, with operations worldwide: “when we sign a contract it is to fulfill it; because of this our image is beloved and respected in 74 countries of the world, where TEXACO maintains its operations” and stating, “we have demonstrated our sincere desire to transfer technology to the national employees, training them for the complex tasks of the petroleum industry and gradually reducing expatriate personnel”). The sources cited above in this footnote were not included in submissions to the *Aguinda* Court but offer a contemporaneous look at Texaco that clearly contradicts the portrait of the company in the decision to dismiss and the finding by the Court that the plaintiffs’ claims have “nothing to do with the United States.” For a fuller discussion, see Kimerling, *supra* note 6, at 613-20. For a fuller discussion of the evidence in the record and analysis of private and public interest factors by the District Court, which also concludes (i) that despite considerable gaps in the litigation record, many evidentiary roads lead to the United States, including significant (albeit incomplete) evidence that the Ecuador operations were part of an international corporate enterprise that relied on the parent company’s technical expertise, financial and human resources, and image as a U.S.-based multinational corporation, and (ii) that the balancing of private and public interest factors by the Court was “lopsided” and although the Court properly considered a number of factors that favored litigation in Texaco’s preferred forum, it did not take into account a number of factors that favored the plaintiffs’ choice of a U.S. forum, see *id.* at 528-625.

“modern and efficient” equipment,<sup>21</sup> hire a minimum percentage of Ecuadorian workers,<sup>22</sup> train Ecuadorian students,<sup>23</sup> and turn over the field operations and equipment to Petroecuador “in good condition” when the contract ended in 1992.<sup>24</sup>

As for environmental law and policy, there have been boilerplate environmental protection directives in Ecuador’s law since at least 1971.<sup>25</sup> However, Texaco ignored the laws and successive governments failed to implement or enforce them. In the environmental law vacuum, Texaco set its own environmental standards, and policed itself.<sup>26</sup> As Petroecuador’s “professor,” Texaco also set the standards for that company’s operations. Texaco’s standards and practices, however, did not include environmental protection. The company did not instruct its Ecuadorian personnel about environmental matters, and oil field workers who were trained by Texaco were so unaware of the hazards of crude oil during the 1970s and 1980s that they applied it to their heads to prevent balding. They sat in the sun, or covered their hair with plastic caps overnight. To remove the crude, they washed their hair with diesel. The rumors attributing medicinal qualities to Amazon crude are not entirely surprising, considering its status at that time as the harbinger of a great

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21. Supreme Decree No. 925, ch. IX, cl. 40.1 (Aug. 16, 1973).

22. *Id.* at ch. IX, cl. 36.1.

23. *Id.* at ch. IX, cl. 38.1.

24. *Id.* at ch. IX, cl. 51; *see also id.* ch. V, cl. 18.2(a), (b) (transfer of ownership and operation of the trans-Ecuadorian Pipeline System).

25. For example, Ecuador’s Law of Hydrocarbons has included boilerplate environmental directives since at least 1971. Early provisions required oil field operators to “adopt necessary measures to protect the flora, fauna and other natural resources” and prevent contamination of water, air, and soil. Similarly, Texaco’s production contract with Ecuador, signed in 1973, required Texaco “to adopt suitable measures to protect flora, fauna, and other natural resources and to prevent contamination of water, air and soil under the control of pertinent organs of the state.” In theory, these and other comparable requirements in generally applicable laws, such as the 1972 Water Law, offer mechanisms for regulation of significant sources of oil field pollution. In practice, however, Texaco and other oil companies have ignored the laws, and successive governments have failed to implement and enforce them. For citations and a fuller discussion, see Kimerling, *supra* note 6, at 433-35.

26. Irrespective of government regulation, Texaco had a duty of care under Ecuador’s Civil Code. Ecuador first adopted the Civil Code in 1857, copying nearly verbatim the Chilean Civil Code, and subsequently amended it on many occasions. Many of the general rights and obligations established by the Civil Code, for example to indemnify and repair injuries to persons and property, are comparable to common law tort principles that are particularized and applied by courts in the United States. For citations and a fuller discussion, see JUDITH KIMERLING, *EL DERECHO DEL TAMBOR: DERECHOS HUMANOS Y AMBIENTALES EN LOS CAMPOS PETROLEROS DE LA AMAZONÍA ECUATORIANA* [THE LAW OF THE DRUMMER: HUMAN AND ENVIRONMENTAL RIGHTS IN THE ECUADORIAN AMAZON OIL FIELDS] 36, 56-75 (1996); Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador’s Amazon Oil Fields*, 2 SW. J. L. & TRADE AM. 293, 336-40 (1995).



future for the nation and Texaco's neglect of environmental and human health concerns.

In 1990, when government officials were confronted with my study documenting shocking pollution and other impacts from operations by Texaco and other companies (subsequently published in English as *Amazon Crude* and in Spanish as *Crudo Amazónico*), they professed ignorance. Texaco was their "professor," they explained; the company taught them how to produce oil, but did not teach environmental protection.<sup>27</sup>

That basic view, that public officials did not realize that industry operations were taking a serious toll on the environment until international environmentalists put a spotlight on the region, has been echoed by others. According to General Rene Vargas Pazzos, a key policy maker in the military government that ruled Ecuador when the oil rush began, government officials did not question Texaco about environmental practices because they did not question the company's technical expertise or know that the operations could damage the environment:

We thought oil would generate a lot of money, and that development would benefit the country. But we did not have technical know-how, and no one told us that oil was bad for the environment . . . We were fooled by Texaco. We were betrayed. We trusted the company . . . Texaco was responsible for all of the operations . . . . . We were not experts . . . The Hydrocarbons Directorate approved the work, but the technology came from Texaco. It is like contracting a doctor. You go in, and can see that the room is fine. But with the operation, it is beyond your control and know-how . . .

We were happy about the petroleum. We said, "Do it, and tell us what it will cost" . . . But we did not know about environmental issues . . . We thought Texaco used the best methods . . . . Texaco was the operator. We did not interfere in technical decisions because that was Texaco's responsibility. That is what we paid them for . . . . We controlled only the production rates, the payment of taxes [and things like that] . . . .<sup>28</sup>

According to Vargas, all of the work plans and technical specifications for the operations were elaborated and approved by Texaco in the United States and sent to Quito from the company's Latin America/West Africa Division, based in Coral Gables, Florida. According to Margarita Yopez, who worked for Texaco Petroleum from 1973-1989 and was based in Quito, the operations were closely supervised from the Coral Gables office: Every department head in Quito had a direct telephone line to a supervisor in Coral Gables; important contracts for field operations were approved and signed in the United States; expenditures were closely supervised from the United States; and the Quito

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27. KIMERLING, *supra* note 6, at ix, xxvi.

28. Interview with General Rene Vargas Pazzos (Ret.), former General Manager of Petroecuador, 1973-1975, and former Minister of Natural Resources, 1976-1977, in Quito, Ecuador (July 4, 2001).

office had a full-time employee to microfilm all reports and other written materials to send to Coral Gables in a daily mail pouch.<sup>29</sup>

Texaco's international prestige and day-to-day control, as the operator, of field activities gave the company enormous power in the oil patch. That power can hardly be overestimated, and was compounded by systemic deficiencies in the rule of law and good governance in Ecuador. Texaco's power and the culture of impunity in the oil fields—the belief that companies can do whatever they want and suffer no adverse consequences as long as they get the oil—is illustrated in a remark by a worker in 1993, the year after Texaco's contract expired. The man worked for a subcontractor, driving a truck that dumped untreated oil on roads for dust control and maintenance purposes. When asked what he thought about the practice, he replied:

Three years ago, I went to a training course . . . and a *gringo* from Texaco told us that oil nourishes the brain and retards aging. He said that in the United States they do this on all of the roads, and people there are very intelligent.

When I asked him if he believed what the trainer from Texaco had said, he answered: "It doesn't matter what I think; here, Texaco, and now Petroecuador, *manda* (give the orders). Everyone works for them."<sup>30</sup>

I have written at length about the environmental impacts of Texaco's operations in other publications, so for now I will simply add that pollution and other impacts have made large areas of ancestral Huaorani lands uninhabitable to them. The damages are so serious and widespread that other oil companies have gone to great lengths to try to distinguish their operations: 'We are not like Texaco; we use international standards and best practice to protect the environment' has become a common refrain.<sup>31</sup>

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29. A social worker, Yepez was based in Quito and regularly traveled to the field. Unsworn Declaration by Bertha Margarita Yepez Silva, Exhibit 2 in Brief of Amicus Curiae, Federation of Comunas Union of Natives of the Ecuadorian Amazon (FCUNAE) et al., *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (S.D.N.Y. Mar. 9, 1994). I served as co-counsel on the amicus brief, which was filed in support of the *Aguinda v. Texaco* plaintiffs' opposition to Texaco's initial motions to dismiss the case. In April 1994, District Court Judge Vincent Broderick (who presided over the case at that time) reserved decision on whether to dismiss and ordered limited discovery. *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y. April 11, 1994). In March 1995, while discovery was underway, Judge Broderick passed away. *Aguinda v. Texaco* was reassigned, ultimately to Judge Jed Rakoff.

30. The exchange took place on Sept. 26, 1993, when I met the worker while hitchhiking on the road that Texaco built from Coca to the Shirpuno River.

31. In the wake of *Amazon Crude*, environmental protection has become an important policy issue in Ecuador. Since the early 1990s, both government officials and oil companies must at least appear to be 'green.' However, the implementation of environmentally significant changes in the oil fields has lagged, despite both public pledges by a growing number of companies to voluntarily raise environmental standards, and a trend on paper toward increasingly detailed, albeit incomplete, environmental legal rights and requirements, including constitutional recognition since 1984 of the right of individuals to live in an

The *Aguinda* Court's determination that Ecuador provided an adequate alternative forum was also colored by questionable factual assumptions, including erroneous and unsupported findings of fact about the history of litigation in Ecuador's courts. For example, the Court found that some plaintiffs had already "obtained tort judgments" against Texaco Petroleum and Petroecuador in Ecuadorian courts "on some of the very claims alleged" by the *Aguinda* plaintiffs,<sup>32</sup> a finding that is clearly erroneous.<sup>33</sup>

environment "free from contamination," expanded constitutional group environmental rights since 1998, and constitutional recognition of "rights of nature" since 2008. In addition to the legacy of Texaco, the implementation of environmental law in the oil fields has been hampered by the absence of political will, inadequate financing, lack of technical capacity, oil industry influence and resistance to regulation, corporate control of environmental decision-making, and the failure of the rule of law and good governance generally. For a study of a corporate initiative claiming to apply best practice and international standards in Ecuador, which includes a fuller discussion of environmental law, see Judith Kimerling, *International Standards in Ecuador's Amazon Oil Fields: The Privatization of Environmental Law*, 26 COLUM. J. ENVTL. L. 289 (2001) (environmental standards and practices); Judith Kimerling, *Uncommon Ground: Occidental's Land Access and Community Relations Standards and Practices in Quichua Communities in the Ecuadorian Amazon*, 11 L. & ANTHROPOLOGY 179 (2001) (community relations standards and practices); Judith Kimerling, *Rio + 10: Indigenous Peoples, Transnational Corporations and Sustainable Development in Amazonia*, 27 COLUM. J. ENVTL. L. 523 (2002) (environmental and community relations standards and practices). The study concludes that some things are changing in Ecuador's oil frontier, but the companies are still firmly in control of oil field operations, including environmental and community relations standards and practices. Voluntary initiatives have led some companies to share some financial benefits of development with local communities, but a vast gap remains between the promises of sustainable development and respect for the rights of Indigenous peoples and the reality of development in the oil fields. Some companies may be raising levels of environmental protection in some areas, at least in the short term; however, those protections are very limited, at best, and they are not certain and need independent verification and long-term monitoring. Two key questions are whether groundwater resources are protected from contamination by waste injection activities and buried wastes and pipelines, and whether aging pipelines, well casings, and other equipment are properly inspected and maintained. As a general matter, although voluntary initiatives by oil companies are clearly needed to raise levels of environmental protection, they are not without peril. The promise to apply "international standards," "cutting edge technology," "best practice," and/or "corporate responsibility" has become a tool that oil companies can use to dominate and control environmental information, decision-making, and implementation; deflect and discourage meaningful oversight; rebuff and belittle grievances by affected populations; and paint a veneer of environmental excellence and social responsibility to camouflage business as usual. In addition, they can operate to undermine the development of national environmental law and capacity in developing nations like Ecuador, by arbitrarily legitimizing norms that have been defined by special interests and reassuring government officials and other stakeholders that standards and practices are improving. Although the voluntary initiatives cannot be divorced from the social, economic and political context in which they operate, a major source of abuse can be linked to the widespread confusion, outside of industry circles, about the source and substance of applicable norms.

32. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, at 539-40 (S.D.N.Y. 2001) (rejecting plaintiffs' argument that Ecuador's courts do not provide an adequate alternative

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Another major finding, that the description of systemic shortcomings in Ecuador's legal and judicial system by the U.S. Department of State in its Country Reports on human rights was largely limited to cases involving confrontations between political protestors and the police, is also erroneous and

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forum because they are unreceptive to tort claims).

33. The *Aguinda* court cited affidavits and exhibits submitted by Texaco in support of the finding. However, a review of the record shows that none of the lawsuits relied on by the court resulted in a final judgment for the plaintiff. The only case in which a plaintiff won a tort judgment—an action by the municipal government of Joya de las Sachas against Petroecuador and its insurer for damages caused by an oil spill from a former Texaco facility in 1992—was overturned on appeal. Ecuador's Supreme Court ruled that the local civil court, where the action had been filed, should not have allowed the case to proceed under provisions of the Code of Civil Procedure that provide for summary oral proceedings. The Supreme Court vacated the entire proceeding and assessed costs for the defendants' attorneys, to be paid by the lower court judge who adjudicated the case and the judges of the intermediate appellate court who signed the majority opinion upholding the lower court's judgment. Although a translation of the Supreme Court's decision was included in exhibits submitted by Texaco to the *Aguinda* Court, the affidavit that accompanied the judgment and described the case (by Texaco Petroleum attorney Adolfo Callejas Ribadeneira) did not mention the assessment against the judges and stated, inaccurately, that the Supreme Court "ordered that it [the case] be refiled in the appropriate legal form." No information was included about subsequent litigation; however, exhibits submitted to the *Aguinda* Court by the plaintiffs included an affidavit by the attorney who represented Joya de las Sachas in the lawsuit. That affidavit stated that municipal officials decided not to pursue the case after the judgment was overturned because they concluded that "it is impossible to win an action of that sort"—even if they won again in the local court, the judgment would not survive appeal by Petroecuador because of the company's political influence in Quito. As a result, the legal claim was apparently abandoned. The other lawsuits cited in the submissions relied on by the *Aguinda* Court were based on the "very occurrences" at issue in *Aguinda* and fall into two groups. Four cases, involving six colonists, were filed after the *Aguinda* litigation was underway (in 1997 and 1999). The plaintiffs were apparently members of the putative *Aguinda* class; however, no judgments had been issued yet in any of those cases, even by a court with original jurisdiction. The second group of cases are four lawsuits by municipal governments against Texaco Petroleum. Those cases were filed in 1994, in the wake of *Aguinda v. Texaco*, and were settled and withdrawn prior to adjudication, in connection with the remedial accord negotiated by Texaco and Ecuador in 1994-95. (The accord is discussed *infra* note 45). In Ecuador, the settlements and subsequent payments to local officials were generally regarded as the result of political processes, not judicial proceedings, and many people saw them as part of a strategic effort by Texaco to undermine *Aguinda* and curry favor among political elites for the company's limited remedial program. Thus, notwithstanding the voluminous materials submitted by Texaco to the *Aguinda* Court, not a single (standing) tort judgment in a plaintiff's favor appears in the record, either for the claims alleged by the *Aguinda* plaintiffs or for similar ones. Moreover, the record shows that every such tort lawsuit that is explicitly identified therein either (i) had been settled by Texaco (and withdrawn by the plaintiff) prior to adjudication; (ii) had not yet been adjudicated by the court with original jurisdiction; or (iii) had been overturned on appeal. The only tort judgment in favor of a plaintiff (by a municipality against Petroecuador based on claims that were similar to some of the allegations in *Aguinda*) was vacated on appeal by the Supreme Court, which also assessed costs for the defendants' attorneys against the judges who ruled in the plaintiff's favor. For citations and a fuller discussion, see Kimerling, *supra* note 6, at 534-45.

suggests a lack of candor by the Court. Remarkably, the Court misquoted the State Department report. Judge Rakoff evidently reviewed reports describing human rights practices during 1998 and 1999. Both reports state that “[t]he most fundamental human rights abuse [in Ecuador] stems from shortcomings in the politicized, inefficient, and corrupt legal and judicial system.”<sup>34</sup> However, the latter report is quoted by the Court as “describ[ing] Ecuador’s legal and judicial systems as ‘politicized, inefficient and *sometimes* corrupt’ as far as certain ‘human rights’ practices are concerned.”<sup>35</sup> The misquotation is especially troubling because the same statement was quoted correctly by Judge Rakoff on two prior occasions, and the litigation record suggests that the Court allotted appreciable attention to considering its proper meaning.<sup>36</sup>

Another finding, that Ecuador had recently taken steps to further the independence of its judiciary, is technically accurate. However, the effectiveness of those steps had not been demonstrated, and events soon proved that the *Aguinda* Court’s optimistic view was premature. This is not surprising because the *Aguinda* Court’s expectations turned a blind eye to the historical and political context of the reform efforts, including both the repeated failure of previous reforms to establish an impartial judiciary and combat corruption generally and Ecuador’s volatile political history. A related finding, that there would be little chance of corruption or undue influence in lawsuits by the *Aguinda* plaintiffs because they would be subject to public and political scrutiny, was speculative and sanguine. In addition, it was contradicted by both the historical record and references in the litigation record to prior judicial proceedings related to high profile corruption scandals that had prompted considerable public outrage, but were nonetheless reportedly tainted by external influences.<sup>37</sup>

The *Aguinda* plaintiffs appealed the decision by Judge Rakoff to the

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34. U.S. Department of State, Ecuador Country Report for Practices in 1998 1 (Feb. 26, 1999); U.S. Department of State, Ecuador Country Report for Practices in 1999 1-2 (Feb. 25, 2000).

35. *Aguinda*, 142 F. Supp. 2d at 545 (emphasis added).

36. For a fuller discussion, see Kimerling, *supra* note 6, at 525-26, 546, 552-69. See also U.S. DEP’T OF COMMERCE, COUNTRY COMMERCIAL GUIDE, ECUADOR FY 2000 3, in Letter from Paolo Di Rosa, Attorney Advisor, Office of the Legal Advisor, U.S. Dep’t of State, Western Hemisphere Affairs, to Edward Scarvalone, Esq., Assistant U.S. Attorney, submitted by Edward Scarvalone for Mary Jo White, United States Attorney, to The Honorable Jed S. Rakoff, United States District Court, *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (S.D.N.Y. June 8, 2000), tab C (annual guide prepared by the U.S. Embassy with assistance from several U.S. government agencies to provide guidance on the “commercial environment” in the host country, describing Ecuador’s judicial system as “dysfunctional” and included in Department of State submission to the *Aguinda* Court in response to query from Judge Rakoff following his decision to reopen the record to receive additional submissions related to the administration of justice in Ecuador).

37. Kimerling, *supra* note 6, at 417-21, 517-18, 523-26, 532-71.

Second Circuit Court of Appeals. However, because *forum non conveniens* involves the exercise of discretion by the trial court, appellate courts have limited powers of review. In *Aguinda*, the Second Circuit found no abuse of discretion.<sup>38</sup>

In its review of the district court judgment, the Second Circuit did not repeat all of the detailed factual rulings by Judge Rakoff, but it quoted his general finding that *Aguinda* “has everything to do with Ecuador and nothing to do with the United States” and apparently relied on at least some of the more specific findings to reject the plaintiffs’ appeal.<sup>39</sup> The Second Circuit also found it “significant” that Ecuador and Petroecuador could be joined in a lawsuit in Ecuador but not in a U.S. forum, because they enjoy sovereign immunity here.<sup>40</sup> That factor was also cited by the district court and is related to Texaco’s contention that Ecuador and Petroecuador had primary control of the challenged operations<sup>41</sup> and, as a result, that it would be unfair for a lawsuit to proceed on the plaintiffs’ claims without Petroecuador.

However, reliance on that factor now appears misplaced. Despite representations to the *Aguinda* court by Texaco that “Petroecuador can and will be brought into” the lawsuit if it is filed in Ecuador, “[y]ou can’t try. . . [this case] without having Petroecuador present,” and “[i]t just is almost a matter of fundamental fairness,”<sup>42</sup> Chevron did not seek to implead Petroecuador in the *Lago Agrio* lawsuit. Instead, it filed an arbitration claim against Petroecuador with the American Arbitration Association in New York, seeking damages and indemnification of all fees, costs and expenses relating to the litigation in Ecuador, including any adverse judgment that might be rendered in favor of the *Aguinda* plaintiffs there.<sup>43</sup> Ecuador and Petroecuador challenged the

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38. *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002). Dismissal was conditioned on Texaco’s agreement to submit to the jurisdiction of Ecuador’s courts. A second condition required Texaco to agree to waive defenses based on statutes of limitations for limitation periods expiring between the date the lawsuit was filed and 60 days after the final judgment of dismissal; on appeal, the Second Circuit directed the district court to extend that time period to one year after dismissal.

39. *Id.* at n.4 (quoting *Aguinda*, 142 F. Supp. 2d at 537).

40. *Id.* at 479.

41. *Aguinda*, 142 F. Supp. 2d at 550-51.

42. Transcript of Argument on Renewed Motion to Dismiss at 23-24, *Aguinda v. Texaco*, No. CV-93-7527 (S.D.N.Y. Feb. 1, 1999); *see also, e.g.*, Texaco Inc.’s Memorandum of Law in Support of its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity at 42-43, *Aguinda v. Texaco*, No. 93 Civ. 7527 (S.D.N.Y. Jan. 11, 1999) (arguing that “[a] defendant’s inability to implead non-parties weighs heavily in favor of dismissal;” that Ecuador and Petroecuador “are subject to suit and have been sued in Ecuador for similar claims;” and alleging that “it is doubtful that a trial here could provide Texaco with due process given Ecuador and Petroecuador’s preeminence in the activities at issue . . .”).

43. Am. Arbitration Ass’n, Demand for Arbitration and Statement of Claim, Chevrontexaco Corporation and Texaco Petroleum Company against Empresa Estatal

proceeding in a lawsuit in New York, and in 2007, U.S. District Court Judge Leonard Sand stayed the arbitration on the ground that Ecuador was not contractually bound to arbitrate disputes with Chevron.<sup>44</sup>

In response, Chevron initiated another arbitration proceeding against Ecuador in The Hague (“the BIT Arbitration”). That proceeding, which is currently underway, alleges that Ecuador violated a bilateral investment treaty with the United States (“BIT”) by “permitting” the Lago Agrio lawsuit to proceed despite an earlier settlement agreement with Texaco,<sup>45</sup> and by

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Petroleos del Ecuador, A/S/A/ Petroecuador (June 11, 2004). The post-dismissal arbitration claim in New York not only raises questions about Texaco’s candor with the *Aguinda* Court, but also makes a mockery of the company’s general argument that litigation in New York is inconvenient. As a general matter, Chevron now claims that it is not bound by Texaco’s representations to the *Aguinda* Court and has used that contention in another context, to argue that Chevron did not agree to submit to the jurisdiction of Ecuador’s courts. However, both the trial and intermediate appellate courts in the Lago Agrio litigation have rejected that argument. In addition, the Second Circuit has concluded that Chevron “remains accountable for the promises upon which we and the district court relied in dismissing [the *Aguinda*] Plaintiffs’ action,” and that Texaco’s promises to submit to Ecuadorian jurisdiction and satisfy any judgment issued there, subject to its rights under New York’s Recognition of Foreign Country Money Judgments Act, are “enforceable against Chevron.” *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 389-90, nn. 3-4 (2d Cir. 2011); *but see* *Chevron Corp. v. Donziger*, 886 F. Supp. 2d 235 (S.D.N.Y. 2012) (ruling on a partial summary judgment motion holding, among other things, that “the statement” by the Second Circuit that those promises are enforceable against Chevron “was unnecessary to the result” in the decision in which it was made, and thus has no preclusive effect in the *Chevron v. Donziger* case).

44. *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452 (S.D.N.Y. 2007), *aff’d*, 296 F. App’x 124 (2d Cir. 2008), *cert. denied*, 557 U.S. 936 (2009). Chevron based its claim on the 1965 Joint Operating Agreement (“JOA”) between its predecessors and Gulf Oil Company, which contained an agreement to arbitrate and an indemnity provision. The court found that neither Ecuador nor Petroecuador had ever signed the JOA and that under Ecuadorian law, the JOA did not become binding on Petroecuador’s predecessor (CEPE) when it took over Gulf’s interests in the oil consortium. Thus, Ecuador was not contractually bound to arbitrate under the JOA. *ChevronTexaco*, 499 F. Supp. at 455.

45. In 1994-95, Texaco and Ecuador signed a series of agreements which did not mention the *Aguinda* lawsuit, but purported to address how Texaco would remedy the contamination at issue in the litigation. Publicly, Texaco and Ecuador vowed that the company would voluntarily clean up damaged areas and compensate the affected communities. Under the accord, Texaco Petroleum agreed to implement limited remediation work, make payments to Ecuador for socio-economic compensation projects, and negotiate contributions to public works with municipal governments of four boom towns that grew up around the company’s operations and, in the wake of *Aguinda v. Texaco*, sued Texaco Petroleum in Ecuador. In exchange, the government and Petroecuador agreed to liberate Texaco Petroleum and Texaco, and their subsidiaries and successors, from all liability to the Ecuadorian state and national oil company related to contamination from the operations. *See* CONTRATO PARA LA EJECUCIÓN DE TRABAJOS DE REPARACIÓN MEDIOAMBIENTAL Y LIBERACIÓN DE OBLIGACIONES, RESPONSABILIDADES Y DEMANDAS [CONTRACT FOR IMPLEMENTATION OF ENVIRONMENTAL REMEDIAL WORK AND RELEASE FROM OBLIGATIONS, LIABILITY AND CLAIMS] (May 4, 1995) [hereinafter Remediation Contract]. The “remedial

improperly colluding with the plaintiffs in the Lago Agrio litigation and denying due process rights to Chevron.<sup>46</sup> It seeks a declaration that Ecuador or

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work” undertaken by Texaco pursuant to the accord was very limited in scope and largely cosmetic, and did not contain or reverse the tragic environmental legacy of the operations or benefit affected rural populations. Indeed, the accord—which was negotiated behind closed doors, without meaningful participation by affected communities, transparency, or other democratic safeguards—seemed more like an agreement between polluters to limit cleanup requirements and lower and divide their costs than a remediation program based on a credible assessment of environmental conditions and measures that are needed to remedy them. The decision-making processes and final release of Texaco and its corporate family after the “remedial” work had been completed (in 1998, in a document called the “Final Act”) reflected the enduring political and economic power of Texaco and the selective application of the law in the oil frontier. Inasmuch as it liberates the company from environmental obligations to the State, it also raises serious questions of law and legitimacy. Many people in Ecuador saw the accord as an effort to derail the *Aguinda* lawsuit and help Texaco evade responsibility for its environmental legacy, and it remains controversial to this day. For a fuller discussion of the agreements and remedial work, see Kimerling, *supra* note 6, at 493-514, 523. Although the Remediation Contract clearly states that the release of claims provisions apply to claims by the government and Petroecuador, and does not include a hold harmless provision, Chevron now argues that the Remediation Contract and Final Act granted a complete release from any and all environmental liability derived from the operations, including claims by third parties; that Ecuador and Petroecuador retained responsibility for any remaining or future impacts; and that any such claims should be made against Ecuador instead of Chevron. Ecuador’s (current) government maintains that the accord operated only to release Chevron from claims by Ecuador and Petroecuador, and that Ecuador expressly rejected a proposal by Texaco during the settlement negotiations to extend the release to claims by residents of the Amazon; that the accord does not contain any hold harmless or indemnification obligation in favor of Chevron; and that it does not require Ecuador to intervene in the Lago Agrio lawsuit or other private litigation by third parties. BIT Third Interim Award on Jurisdiction and Admissibility, PCA Case No. 2009-23, In the Matter of An Arbitration Before a Tribunal Constituted in Accordance with the Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investments, of 27 August 1993 (“the Treaty” or “BIT”) and the UNCITRAL Arbitration Rules 1976, Between Claimants Chevron Corporation (U.S.A.) and Texaco Petroleum Company (U.S.A.) and Respondent The Republic of Ecuador (Feb. 27, 2012) [hereinafter BIT Third Interim Award].

46. In support of its claims, Chevron contends that the Lago Agrio plaintiffs’ had no right to sue for environmental remedies when the settlement agreement with Ecuador and Petroecuador was negotiated, and only Ecuador could legally demand environmental remediation of the affected areas. Thus, the argument goes, the release of liability to Ecuador fully discharged Chevron from “any and all environmental liability,” and Ecuador and Petroecuador “retained responsibility for any remaining environmental impact and remediation work.” BIT Notice of Arbitration, *supra* note 14, at ¶ 21; *see also id.* ¶¶ 13, 26. Despite the fact that the *Aguinda v. Texaco* lawsuit—which was pending when the release was negotiated—clearly sought both damages and equitable relief for environmental remediation, Chevron now argues that *Aguinda* was “generally” an action for damages to individuals, unlike the Lago Agrio lawsuit which seeks to vindicate public rights to remediation. *See* Plaintiffs’ Complaint, ¶ 90, *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (S.D.N.Y. Nov., 3, 1993) (seeking damages and equitable relief “to remedy the contamination and spoliation of [plaintiffs’] properties, water supplies and environment”); BIT Notice of Arbitration, *supra* note 14, at ¶¶ 25, 30, 34. Chevron further alleges that the



Petroecuador is exclusively liable for any judgment rendered in the Lago Agrio lawsuit, and an order requiring Ecuador to so inform the court; a declaration that any judgment against Chevron is not final or enforceable, and an order directing Ecuador to enjoin enforcement of any judgment and represent to any court where the plaintiffs seek enforcement that the judgment is not final, enforceable, or conclusive; an order requiring Ecuador to protect and defend Chevron in connection with the Lago Agrio litigation; and indemnification from Ecuador for any liability, costs, and moral damages.<sup>47</sup>

right of private parties to sue in Ecuador to remedy generalized environmental injuries was first granted by a statute that was enacted in 1999 (after the final release), and that the Lago Agrio lawsuit is based on improper retroactive application of that law. *Id.* ¶¶ 28, 32. Chevron also asserted that defense in the Lago Agrio litigation; however, the Lago Agrio Court ruled that the law, the Environmental Management Act, is procedural in nature and does not confer new rights. As such, its application in the litigation does not violate the general rule in Ecuador against retroactive application of the law. Provincial Court of Justice of Sucumbios, Case No. 2003-0002, In the suit of Maria Aguinda and others against Chevron Corporation, at 27-28 (Judge Nicolas Zambrano, Feb. 14, 2011) [hereinafter Lago Agrio Judgment]. The substantive right of the Lago Agrio plaintiffs to sue and seek redress for the harms that were alleged and adjudicated in the Lago Agrio lawsuit is established by provisions in Ecuador's Civil Code that long pre-date the conduct and claims at issue in the case. *See id.* at 28, 74-90. Inspired by Roman law, the Napoleonic Code, and ancient Spanish civil codes (based primarily on Roman law), Ecuador's Civil Code establishes generally applicable civil liability rights and obligations that include special causes of action, called "popular actions," when activities threaten a large number of people with injury. Kimerling, *supra* note 26, at 293, 323-34, 351-57. Popular actions were a cornerstone of law in the Roman Republic. They provided a mechanism for any citizen to take legal action to defend the collective interests of the citizenry against a shared threat or injury. For a fuller discussion, see *id.* at 356-57 (finding that, although no test cases had yet been attempted in Ecuador, generally-applicable causes of action established by the Civil Code, including popular actions, could have far-reaching applications to redress and remedy both petroleum-related pollution that threatens human health and the environment, and hazardous operations that place individuals or natural resources at serious risk of injury). For the Spanish-language edition of that study, see KIMERLING *supra* note 26. Relevant provisions of the Environmental Management Law provide that, in popular actions to remedy environmental harms, the rules of procedure for summary verbal proceedings shall apply, and the president of the provincial court(s) in the place(s) where the harms occur shall have original jurisdiction. *Ley de Gestión Ambiental* [Environmental Management Law], R.O. No. 245, arts. 41-43 (July 31, 1999). The Lago Agrio Court also cited a number of substantive environmental laws and regulations that were in effect at the time of the harmful operations, and concluded that Texaco (Chevron) had an obligation under those laws to prevent harm to the environment; that the failure by the State to exercise its control under those laws did not contradict the company's obligation or release Chevron from its responsibility to remedy injuries to third parties; and that the company's contamination violated Ecuadorian law. Lago Agrio Judgment, *supra*, at 60-74, 78-79, 125, 169, 173-75. For a fuller discussion of environmental law in effect at the time of the operations, see Kimerling, *supra* note 26.

47. BIT Notice of Arbitration, *supra* note 14, at VI; BIT Third Interim Award, *supra* note 45, at Part III, 39-40. Both the *Aguinda* plaintiffs and Ecuador sued in federal court in New York seeking to stay the BIT arbitration. However, Judge Sand found, without ruling on the merits, that Chevron's claim that it was being denied due process in the Lago Agrio litigation presented an arbitrable issue, and declined to issue a stay. Memorandum & Order,

In response to Chevron's allegations in the BIT arbitration, Ecuador has emphasized that the lawsuit in Lago Agrio is a private litigation between private parties, and characterized the arbitration as an "attempt to 'transform what is fundamentally a private environmental dispute into an 'investment dispute' against a sovereign."<sup>48</sup> Moreover, the relief sought by the company—to "close" the case in Lago Agrio—would amount to an unconstitutional violation of the independence of "the legal system."<sup>49</sup> In response to the company's allegations that the Lago Agrio litigation is tainted by fraud, Ecuador has denied interfering in the judicial process and accused Chevron of attacking the Ecuadorian State because the government "refused to interfere . . . to disqualify the case."<sup>50</sup>

The arbitration panel, however, has issued an interim award ordering Ecuador, "whether by its judicial, legislative, or executive branches," to take "all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgment" by the Lago Agrio court, pending a final resolution of the arbitration on the merits.<sup>51</sup> A full discussion of the BIT Arbitration is beyond the scope of this Article. However, it raises a number of problematic issues because Chevron is seeking to resolve legal issues of great consequence without transparency or participation by the people who are most directly affected by the legal action; because the arbitration panel maintains that it can order national courts to act under international law irrespective of "constraints"<sup>52</sup> under domestic law and effectively override a domestic legal action, even to the detriment of parties

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Republic of Ecuador v. Chevron Corp., Nos. 09 Civ. 9958 (LBS), 10 Civ. 316 (LBS), 2010 WL 1028349 (S.D.N.Y. Mar. 16, 2010), *aff'd*, 638 F.3d 384 (2d Cir. 2011).

48. BIT Third Interim Award, *supra* note 45, at Part III, 41, 73-75.

49. *Id.*

50. *Id.*

51. Second Interim Award on Interim Measures, PCA Case No. 2009-23, In the Matter of An Arbitration Before a Tribunal Constituted in Accordance with the Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investments, Signed 27 August 1993 ("the Treaty") and the UNCITRAL Arbitration Rules 1976, Between Claimants Chevron Corporation (U.S.A.) and Texaco Petroleum Company (U.S.A.) and Respondent The Republic of Ecuador (Feb. 16, 2012). *See also generally*, BIT Third Interim Award, *supra* note 45; Fourth Interim Award on Interim Measures, PCA Case No. 2009-23, In the Matter of An Arbitration Before a Tribunal Constituted in Accordance with the Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investments, Signed 27 August 1993 ("the Treaty") and the UNCITRAL Arbitration Rules 1976, Between Claimants Chevron Corporation (U.S.A.) and Texaco Petroleum Company (U.S.A.) and Respondent The Republic of Ecuador (Feb. 7, 2013) at Part IV (declaring that Ecuador has violated the interim award and directing Ecuador to show cause why it should not compensate Chevron for any harms caused thereby) [hereinafter BIT Fourth Interim Award].

52. BIT Fourth Interim Award, *supra* note 51, at 29.

who are not party to the arbitration; and because it presents a potential conflict between international investor arbitration norms and international (and national) human rights norms that protect the rights of groups and individuals who have been harmed by Chevron's operations.<sup>53</sup>

As a general matter, then, the basic determination by the *Aguinda v. Texaco* Court, that the *Aguinda* case has "nothing to do with the United States," is remarkable in light of the reality of oil development in Ecuador. It represents an abdication of responsibility by the federal judiciary and overlooks important public interests in the United States: to help protect the global environment and deter harmful conduct by U.S. companies when they operate abroad; to provide a forum to administer justice and remedy injuries in other countries that result from the activities of U.S. corporations; and to provide due process to U.S. companies when they are accused of harmful conduct in a foreign country.

The subsequent developments in the *Aguinda* case and related litigation (including *Chevron v. Donziger* and the BIT Arbitration) raise additional concerns about the forum non conveniens doctrine. After arguing for nine years that the case should be litigated in Ecuador instead of New York, Chevron is now back in New York saying that Ecuador's courts do not provide an adequate forum to administer justice. I understand that there are very serious allegations about the conduct of the litigation in Ecuador—and want to be clear that the Huaorani did not participate directly in the Lago Agrio litigation, or in any of the alleged misconduct, even though they now have an interest in the Lago Agrio judgment because it is based in significant part on injuries to them and is meant to remedy those harms. But if Chevron's collateral attacks on the judgment (through *Chevron v. Donziger* and the BIT arbitration) succeed, what will happen to the claims of the Huaorani and other victims who have clean hands? What will happen to Chevron's obligations to them? These are important questions that appear to be eclipsed by the current, complex litigation.

The doctrine of forum non conveniens is meant to serve the interests of justice and the convenience of the parties, but this case teaches us that in transnational litigation, it is subject to abuse and can be used as a litigation tactic to avoid hearing cases by foreign plaintiffs. The standard to establish that an alternative forum exists is not exacting, so normally there is no serious inquiry into the adequacy of the alternative forum. The private and public interest factors are malleable, so it is not unreasonable to think that, more often than not, no two judges would apply them the same way. Moreover, at the end of the day, defendants may not be held to what comes out of their chosen forum, and the final judgment could come from legal and political systems that

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53. For a fuller discussion, see Judith Kimerling, *Oil, Contact, and Conservation in the Amazon: Indigenous Huaorani, Chevron, and Yasuni*, 24 *COLO. J. INT'L ENVTL L. & POL'Y* 43, 77-85 (2013).

have no contacts with the plaintiffs or their injuries—in this case, Argentina, Brazil, and Canada – instead of the alternative forum or the United States.<sup>54</sup>

Thus, the doctrine of *forum non conveniens* gives defendants in international human rights and transnational tort cases<sup>55</sup> a powerful tool, and leaves plaintiffs with enormous uncertainty. It can also send a troubling message: that laws and institutions in the United States create and protect corporations, but decline to act when they harm people abroad. Although litigation by foreign plaintiffs in U.S. courts based on development activities that are implemented in a foreign country raises difficult legal, political, and practical issues, there is a significant public interest in the United States in providing a forum to administer justice. U.S. courts have considerable experience with complex civil litigation (including class action litigation)<sup>56</sup> and

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54. Chevron has vowed not to pay the Lago Agrio judgment and has limited assets in Ecuador. In response, representatives of the Lago Agrio plaintiffs have filed enforcement actions in Canada, Brazil, and Argentina, and have publicly pledged to file additional actions in other countries.

55. Although a recent decision by the Supreme Court (*Kiobel*) severely limits the authority of U.S. courts under the Alien Tort Statute (ATS) to adjudicate claims for violations of international law that occur in other countries, transnational tort litigation—based on conduct in the United States initiating, directing, assisting and/or guiding events to be implemented elsewhere—may offer foreign plaintiffs who have been injured by U.S. corporations a promising alternative. See *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013) (applying a presumption against extraterritoriality to claims under ATS); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004) (limiting substantive reach of ATS to a “modest number of international law violations”). The *Aguinda v. Texaco* complaint included common law tort claims and an ATS claim, and alleged (but did not convince the court) that “a substantial part of the tortious acts and omissions” took place in the judicial district where the case was filed, at Texaco’s headquarters in White Plains, New York. Plaintiffs’ Complaint, *Aguinda v. Texaco, Inc.*, No. 93-CV-7527 (S.D.N.Y. Nov. 3, 1993).

56. For example, in U.S. federal courts, Rule 23 of the Federal Rules of Civil Procedure (which authorizes class action litigation) is cognizant of the potential for overzealousness and collusion, and includes procedures that are designed to protect the interests and due process rights of persons who are purportedly represented in a lawsuit, but do not participate in the proceedings. As a result, although accountability and adequate representation are nonetheless recurring problems in class actions, in other cases, class action litigation can be a powerful vehicle to change corporate behavior and obtain remedies for large numbers of people. For a discussion of procedural mechanisms in U.S. class action law to protect class members and proposals for reform, see John C. Coffee, Jr. *Class Action Accountability: Reconciling Exit, Voice, And Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000). In addition, courts in the United States have procedures to allow third parties to intervene in a lawsuit to protect their interests in the litigation, although the effectiveness of those procedures is also uneven. By contrast, in Ecuador, group litigation is new and untested, and although basic principles of due process are recognized under Ecuadorian law, there are no clear procedures or precedents to protect third parties who may be affected by the litigation. In the Lago Agrio lawsuit, there was no class certification process or other review by the court of the cohesion of the claimant group or the legitimacy and adequacy of representation. In addition, there was no procedure for absent members of the claimant group to intervene in the litigation.

remedies, and are held in high regard by many people around the world. The *Aguinda* case shows that even with twenty-three years in the spotlight and considerable legal and political activity, peoples' rights are still being violated and no one is accepting responsibility. Until governments effectively implement the rule of law to protect human rights and the environment and provide credible, impartial fora to adjudicate grievances and remedy injuries that are caused by U.S. corporations when they operate abroad, U.S. courts should not use the *forum non conveniens* doctrine to deny foreign plaintiffs with real grievances a day in court.

## II. THE HUAORANI AND TEXACO

The Huaorani (also spelled "Waorani" and "Waadani") are not the only Indigenous people who have been harmed by Chevron's operations. However, they have been especially hard hit because the Huaorani are a recently-contacted people, and the family groups who lived in the areas where Texaco operated had no contact with the outside world when the company—and what they call "the civilization"—arrived.

The Huaorani are hunters and gatherers who have lived in the Amazon Rainforest since before written history. Their ancestral territory spans some 20,000 square kilometers, and includes lands where some of the infrastructure that Texaco built is located and lands that were colonized by settlers (colonists) who followed the road that Texaco built into Huaorani territory after the Huaorani had been displaced.

Huaorani ancestral territory also includes the area now known as Yasuni National Park and Biosphere Reserve. Yasuni is world-renowned for carbon rich forests and extraordinary biological diversity, and is an important refuge for fresh water dolphins, harpy eagles, black caimans, and other threatened species and regional endemics. The Huaorani are legendary, even among other Indigenous peoples in Ecuador's Amazon region, for their knowledge about the "giving"<sup>57</sup> rainforest and its plant and animal life. They are also renowned for their warriors, and long hardwood spears and blowguns.

In Ecuador, the Huaorani are also known as "*Aucas*," a term that means "savages" and is considered deeply insulting by the Huaorani. Their name for themselves, Huaorani, means *humanos* (human beings, or people). They refer to outsiders as *cowode*, which means *desconocidos* (strangers). For centuries, Huaorani warriors defended their territory from intrusions by *cowode* who

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57. The term "giving" is borrowed from Laura Rival, *The Growth of Family Trees: Understanding Huaorani Perceptions of the Forest*, 28 *MAN* 635 (1993) (describing the relationship of the Huaorani with their "giving environment") and from Huaorani who live in Yasuni, and say that their rainforest territory, *Ome*, "gives us everything" and "gives us life and our way of life."

sought to exploit the Amazon and conquer its inhabitants. They were the only known tribe in Ecuador to survive the rubber extraction boom—which ended around 1920—as “a free people” with vast territory. In 1956, the Huaorani became world famous for spearing to death five North American evangelical missionaries from the U.S.-based Summer Institute of Linguistics and Wycliffe Bible Translators (“SIL/WBT”)<sup>58</sup> who were trying to make “contact” with them.<sup>59</sup> The first peaceful, sustained contacts between Huaorani and outsiders were in 1958, when SIL/WBT missionaries convinced Dayuma, a Huaorani woman who was living as a slave on a *hacienda* near Huaorani territory, to return to the forest where she had lived as a child and help the missionary-linguists relocate her relatives into a permanent settlement, teach them to live as Christians, and translate the *Bible* into their native tongue.<sup>60</sup>

In 1967, Texaco struck oil near Huaorani territory. The discovery was heralded as the salvation of Ecuador’s economy, the product that would pull the nation out of chronic poverty and “underdevelopment” at last. At the time, the national economy was centered on the production and export of bananas.<sup>61</sup>

Oil exports began in 1972, after Texaco completed construction of the Trans-Ecuadorian Pipeline. The “first barrel” of Amazon Crude was paraded through the streets of the capital, Quito, like a hero. People could get drops of crude to commemorate the occasion and after the parade, the oil drum was placed on an alter-like structure at the Eloy Alfaro Military Academy.<sup>62</sup> But the reality of oil development turned out to be far more complex than its triumphalist launch. For the Huaorani, the arrival of Texaco’s work crews meant dislocation and destruction rather than progress.

Texaco’s discovery of commercially valuable oil sparked an oil rush and petroleum quickly came to dominate Ecuador’s economy.<sup>63</sup> The company

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58. For an analysis of the relationship between Summer Institute of Linguistics and Wycliffe Bible Translators, which includes a critique of their work with the Huaorani, see DAVID STOLL, *FISHERS OF MEN OR FOUNDERS OF EMPIRE? THE WYCLIFFE BIBLE TRANSLATORS IN LATIN AMERICA* (1982).

59. See, e.g., ‘Go Ye and Preach the Gospel’: Five Do and Die, *LIFE MAGAZINE*, Jan. 39, 1956; ELISABETH ELLIOT, *THROUGH THE GATES OF SPLENDOR* (1957) (account of SIL/WBT’s “Operation Auca” written by the widow of one of the slain missionaries).

60. See ETHEL EMILY WALLIS, *THE DAYUMA STORY: LIFE UNDER THE AUCA SPEARS* (1971); ELISABETH ELLIOT, *THE SAVAGE MY KINSMAN* (1996) (originally published in 1961, revised in 1981); STOLL, *supra* note 58; Judith Kimerling, *Dislocation, Evangelization & Contamination: Amazon Crude and the Huaorani People*, in *ETHNIC CONFLICT AND GOVERNANCE IN COMPARATIVE PERSPECTIVE* 70 (Working Paper Series, No. 215, Woodrow Wilson International Center for Scholars, 1995).

61. The other principal exports were cocoa and coffee. MARTZ, *supra* note 2, at 157.

62. Interview with Mariana Acosta, Executive Director, Foundation Images for a New World, in Quito, Ecuador (Mar. 3, 1994).

63. For citations and a fuller discussion of the oil boom and governments and petroleum policy in Ecuador, see Kimerling, *supra* note 6, at 417-26.

named the first commercial field Lago Agrio, after an early Texaco gusher in Sour Lake, Texas; erected a one-thousand barrel per day (bpd) refinery that had been prefabricated in the United States; and expanded exploration and production deeper into the rainforest.<sup>64</sup> Production rose to more than two-hundred thousand barrels per day by the end of 1973 and that same year, government income quadrupled.<sup>65</sup>

Initially, the oil boom stimulated nationalist sentiments in petroleum policy makers. The government claimed state ownership of oil resources, created a state oil company (*Corporación Estatal Petrolera Ecuatoriana* (“CEPE”), now Petroecuador), acquired ownership interests in the consortium that developed the fields,<sup>66</sup> raised taxes, and demanded investments in infrastructure.

Before long, however, government officials learned that they have less power than commonly believed. Although relations between Ecuador and Texaco and other oil companies have not been static, at the core of those relationships lies an enduring political reality. Since the oil boom began, successive governments have linked national development plans and economic policy with petroleum, and the health of the oil industry has become a central concern for the State. At the same time, because oil is a nonrenewable resource, levels of production—and revenues—cannot be sustained without ongoing operations to find and develop new reserves, activities that are capital intensive and technology driven. Oil development has accentuated Ecuador’s dependence on export markets and foreign investment, technology, and expertise rather than providing the answer to Ecuador’s development aspirations.

When confronted with the realities of governance and oil politics, governments in Ecuador have vacillated over the extent to which petroleum policy should accommodate the interests of foreign oil companies or be nationalistic in outlook. Alarm over forecasts of the depletion of productive reserves has become a recurring theme in petroleum politics, as have the twin policy goals of expanded reserves and renewed exploration, and the corollary need to reform laws and policies to make the nation more attractive to foreign investors. The focus on economic and national development issues has eclipsed environmental and human rights concerns. Even the more nationalistic and populist policy makers have prioritized the need to promote oil extraction, and generally endeavored to maximize the State’s share of revenues and participation in oil development, while disregarding environmental protection

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64. KIMERLING, *supra* note 6.

65. MARTZ, *supra* note 2, at 4. The initial bonanza and easy money from Texaco’s early finds, however, were relatively short-lived, and in 1977, only a “flood of foreign borrowing” by the government sustained Ecuador’s economic growth. *Id.* at 207-08. Because of its oil reserves, Ecuador has been able to secure massive loans for its size and has accumulated a staggering foreign debt over the years.

66. *See supra* note 2.

and the rights of the Huaorani and other affected Indigenous peoples. At the same time, income inequality and the percentage of Ecuadorians living in poverty have remained stubbornly high.

When the oil rush began, Ecuador's institutions had very little influence in the Amazon.<sup>67</sup> The Huaorani who lived in the areas where Texaco wanted to operate were free and sovereign, living in voluntary isolation in the forest. The discovery of black gold made the conquest of Amazonia, and pacification of the Huaorani, a national imperative. It also provided infrastructure to penetrate remote, previously inaccessible areas and monies to support the military and bureaucracy. Ecuador launched a national integration policy to incorporate the Amazon region into the nation's economy and assimilate its native peoples into the dominant national culture. Successive governments have viewed the Amazon as a frontier to be conquered, a source of wealth for the State, and an escape valve for land distribution pressures in the highland and coastal regions.

The government aggressively promoted internal colonization and offered land titles and easy credit to settlers who migrated to the Amazon, cleared the forest, and planted crops or pasture, even though most soils in the region are not well-suited to livestock or mono-crop production.<sup>68</sup> Government officials pledged to civilize the Huaorani and other Amazonian peoples.

On a visit to the Amazon in 1972, Ecuador's President, General Rodriguez Lara, rebuffed an appeal from a neighboring tribe for formal recognition of Indigenous peoples in the government's new development policies and protection of their lands from settlers. The president general said that all Ecuadorians are "part Indian," with the blood of the Inca, Atahualpa, and insisted that he, too, was "part Indian," although he did not know where he had acquired his "Indian" blood. "There is no more Indian problem," he proclaimed, "we all become white when we accept the goals of the national culture."<sup>69</sup> Within ten days, the President's declaration of national ethnic homogeneity was codified by executive decree in the National Law of Culture.<sup>70</sup> Despite that ideal of national culture, established by administrative decree, Ecuadorian society has continued to be multi-ethnic and multi-cultural, and both racism against Indigenous peoples and extremes of wealth and

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67. For a fuller discussion of Amazon policy and the rights of Indigenous peoples in Ecuador, see Kimerling, *supra* note 6, at 426-33.

68. KIMERLING, *supra* note 6. See also *Ley Especial Para Adjudicación de Tierras Baldías en la Amazonia* [Special Law for Adjudication of Titles to Uncultivated Wastelands in the Amazon], Supreme Decree No. 196, R.O. No. 2 (Feb. 17, 1972); *Ley de Colonización de la Región Amazonica* [Law for Colonization of the Amazon Region], Decree No. 2091, R.O. No. 504 (Jan. 12, 1978).

69. NORMAN E. WHITTEN, JR., INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, ECUADORIAN ETHNOCIDE AND INDIGENOUS ETHNOGENESIS: AMAZONIAN RESURGENCE AMIDST ANDEAN COLONIALISM 10-12 (1976).

70. *Id.* at 13.



poverty persist.

Ecuador's law incorporated the doctrine of *terra nullius*, a racist doctrine that was used by European colonial powers in the Age of Discovery to provide a legal justification for annexing territories that were inhabited by Indigenous peoples and asserting legal and political sovereignty over Indigenous peoples. The doctrine of *terra nullius* has been aptly described by Peter Russell as both "confused and confusing,"<sup>71</sup> but it has nonetheless had an enduring effect on the way that Ecuador and Chevron have defined their relationship with the Huaorani. Essentially, it is a legal fiction that treats lands that were claimed by discovering European states as uninhabited—and thus belonging to no one—despite the presence of Indigenous peoples. The doctrine denies property and political rights to Indigenous peoples based on the racist presumption that even though they lived on the land at the time of colonization, they were "savages" who were incapable of exercising political sovereignty or owning their lands, and their political economies were so "underdeveloped" that their very existence as self-governing societies, in possession of their lands, could be denied.<sup>72</sup>

In conjunction with the Doctrine of Discovery—a related international legal construct that can be traced back more than five hundred years to papal documents authorizing "discovery" of non-Christian lands, and which states that a Christian monarch who locates, or discovers, non-Christian, "heathen" lands has the right to claim dominion over them<sup>73</sup>—the doctrine of *terra nullius* has served as a legal justification for violating the rights of the Huaorani. In a preliminary study of the Doctrine of Discovery for the United Nations Permanent Forum on Indigenous Issues, then-forum member Tonya Gonnella Frichner identified two key elements of the doctrine: dehumanization and dominance. Frichner found that the institutionalization of the doctrine in law and policy at national and international levels "lies at the root of the violations of indigenous peoples' human rights . . . and has resulted in State claims to and the mass appropriation of the lands, territories and resources of indigenous peoples."<sup>74</sup> Although Frichner primarily examined the operation of the Doctrine of Discovery and related "framework of dominance"<sup>75</sup> in U.S. federal Indian law, her findings are consistent with the experience of the Huaorani in

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71. PETER H. RUSSELL, *RECOGNIZING ABORIGINAL TITLE: THE MABO CASE AND INDIGENOUS RESISTANCE TO ENGLISH-SETTLER COLONIZATION* 38 (2005).

72. For a fuller discussion, see *id.* at 30-42; STEVEN T. NEWCOMB, *PAGANS IN THE PROMISED LAND* (2008); Tonya Gonnella Frichner, United Nations Permanent Forum on Indigenous Issues, *Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery*, E/C.19/2010/13 (Feb.4, 2010).

73. NEWCOMB *supra* note 72; Frichner *supra* note 72.

74. Frichner *supra* note 72.

75. *Id.*

Ecuador. There, a European colonial power and successor nation state have similarly used the Doctrine of Discovery, framework of dominance, and legal fiction of *terra nullius* to assert both a supreme, overriding title to Huaorani lands, territory, and resources and a paramount right to subjugate and govern the Huaorani, and appropriated Huaorani lands for oil extraction without consent or compensation. That, in turn, has resulted in dispossession and new problems and challenges for the Huaorani.

This remarkable claim—that the Amazon region was “*tierras baldías*,” vacant, uncultivated wastelands which belonged to the State because they had no other owner, despite the presence of the Huaorani and other Indigenous populations—was the prevailing doctrine in Ecuadorian law when the oil rush began.<sup>76</sup> It was not until 1997 that Ecuador affirmed, in a submission to the Inter-American Commission on Human Rights for a report on human rights in Ecuador, that “the processes of ‘directed colonization’ and the consideration of large tracts of the Amazon basin as ‘*tierras baldías*’ may be considered superseded.”<sup>77</sup> By then, oil extraction and internal colonization by settlers had displaced the Huaorani from many areas.<sup>78</sup> Moreover, notwithstanding that

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76. See, e.g., *Ley de Tierras Baldías y Colonización* [Uncultivated Wastelands and Colonization Law], Supreme Decree No. 2172, R.O. No. 342 (Nov. 28, 1964); *Ley de Tierras Baldías y Colonización* [Uncultivated Wastelands and Colonization Law], Supreme Decree No. 2753, R.O. No. 663 (Jan. 6, 1966); *Ley Especial Para Adjudicación de Tierras Baldías en la Amazonia* [Special Law for Adjudication of Titles to Uncultivated Wastelands in the Amazon], Supreme Decree No. 196, R.O. No. 2 (Feb. 17, 1972); *Ley de Colonización de la Región Amazonica* [Law for Colonization of the Amazon Region], Decree No. 2091, R.O. No. 504 (Jan. 12, 1978); JORGE O. VELA & JUAN LARREA HOLGUIN, *ORG. OF AM. STATES, A STATEMENT OF THE LAWS OF ECUADOR IN MATTERS AFFECTING BUSINESS* (3d ed. 1975).

77. INTER-AM. COMM’N ON HUMAN RIGHTS, OAS.Serv.L/V/II.96, REPORT ON THE SITUATION OF HUMAN RIGHTS IN ECUADOR 100 (1997). In 1998, Ecuador formally recognized the multi-cultural nature of the country and some collective rights of Indigenous peoples when it ratified International Labour Organisation Convention 169 and included Indigenous peoples’ rights in a new constitution. The constitutional rights echo provisions in the ILO convention and include some recognition of collective land rights. However, under Ecuadorian law, no land titles are truly secure because all subsurface minerals are claimed as property of the state, and oil extraction is permitted in lands that are titled to Indigenous peoples without their consent. See Int’l Labour Org., Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991). See also 1998 CONST. tit. III, ch. 5, § 1 (Ecuador). The 1998 constitution also included expanded environmental rights, with provisions that echo rights and duties in international instruments to promote sustainable development. For a fuller discussion, see Kimerling, *supra* note 31.

78. In 1969, Ecuador established a “Protectorate” for the Huaorani in the southwestern edge of their ancestral territory, which included the new Christian settlement but only some 3.3 percent of Huaorani ancestral lands (66,578 hectares, or 665.78 square kilometers). In 1983, the area was titled to the Huaorani. Municipal Property Registry of the Canton Pastaza, *Certificada* (July 27, 2012) (certifying title to 66,578 hectares adjudicated on Apr. 12, 1983). In 1990, a much larger area—6,125.6 square kilometers (subsequently increased

policy change, the right of the Huaorani to own and control their remaining lands, territories, and resources has continued to be limited by laws and policies that control the characterization and granting of title and by laws and policies associated with development and conservation activities.<sup>79</sup> The Doctrine of

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to 6,137.5 square kilometers)—was titled to the Huaorani, but with the provision that legal title could be revoked if the Huaorani “impede or obstruct” oil or mining activities. Ecuadorian Institute for Agrarian Reform and Colonization (“IERAC”), Providencia No. 900001772 (Apr. 3, 1990) (adjudicating 612,560 hectares); National Institute for Agrarian Reform (“INDA”), *Resuelve* (Apr. 7, 1998) (clarifying and rectifying boundaries of title to 613,750 hectares); Municipal Property Registry of the Canton Pastaza, *Certificada* (July 27, 2012) (certifying title to 613,750 hectares adjudicated on Apr. 3, 1990 and rectified on Apr. 7, 1998). In 2001, another 234.89 square kilometers was titled to the Organization of the Huaorani Nationality of the Ecuadorian Amazon (ONHAE, now the Waorani Nationality of Ecuador (NAWE)). Municipal Property Registry of the Canton Pastaza, *Certificada* (July 27, 2012) (certifying title to 23,489 hectares adjudicated on Sept. 24, 2001). The decision to award that land title to ONHAE instead of the Huaorani people is curious, and was evidently made without the knowledge or consent of the grassroots Huaorani communities. Together, the titled lands are referred to (by *cowode*) as the Waorani Ethnic Reserve and include some 7,038 square kilometers, roughly one-third of traditional Huaorani territory. Other Huaorani lands have been titled to settlers and an even greater area—some 10,123 square kilometers—is located in Yasuni National Park and claimed as State land. See ECUADOR MINISTRY OF THE ENVIRONMENT, PLAN DE MANEJO DEL PARQUE NACIONAL YASUNI [YASUNI NATIONAL PARK MANAGEMENT PLAN] 1 (2011). The Huaorani refer to the reserve, the park, and some adjacent lands as Huaorani territory, *Ome*.

79. For example, Ecuador’s current law claims state ownership of subsurface oil and mineral resources in titled lands, of “biodiversity,” and of most protected natural areas, including Yasuni National Park. See, 2008 CONSTITUTION, Arts. 1, 400, 404, 405; *Ley Forestal y de Conservación de Áreas Naturales y Vida Silvestre* [Forestry and Conservation of Natural Areas and Wildlife Law], R.O. No. 418 (Sept. 10, 2004). Those and other restrictions on the rights of the Huaorani over their lands, territories and resources continue to be a major problem for Huaorani communities, notwithstanding the proliferation of laws and policies at the national and international levels that recognize and guarantee rights of Indigenous peoples. Those developments include a new Constitution (adopted in 2008) that arguably strengthens land and self-determination rights of Indigenous peoples in Ecuador, a new government that acknowledges that previous governments have violated the rights of Indigenous peoples and claims to be implementing transcendent changes, and a growing body of international norms and jurisprudence. The international law developments recognize that Indigenous peoples’ rights over their lands, territories, and resources are necessary for their survival, and include: the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in 2007; a General Recommendation by the United Nations Committee on the Elimination of Racial Discrimination (CERD) calling on States to recognize and protect the rights of Indigenous peoples, including rights over lands, territories and resources, in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination; decisions and “concluding observations” by CERD in response to individual complaints and country reports, respectively; and decisions and reports by the Inter-American Court and Inter-American Commission on Human Rights, respectively, interpreting and applying the right to property enshrined in the American Convention on Human Rights (which entered into force in 1978) and American Declaration on the Rights and Duties of Man (adopted in 1948) to protect the special relationship between Indigenous peoples and their territory, and recognizing rights of property over traditional lands and resources based on that relationship and customary

Discovery and framework of dominance continue to serve as the foundation of human rights violations in Ecuador and undermine the land and self-determination rights of the Huaorani.

For the Huaorani, then, Ecuador's national integration policy meant that their ancestral lands were invaded and degraded by outsiders with unrelenting technological, military, and economic power. As Texaco expanded its operations and advanced into Huaorani territory, Huaorani warriors tried to drive off the oil invaders with hardwood spears. In response, Ecuador, Texaco, and missionaries from Summer Institute of Linguistics and Wycliffe Bible Translators ("SIL/WBT") collaborated to pacify the Huaorani and end their way of life. Using aircraft supplied by Texaco, SIL/WBT intensified and expanded its program to contact, settle, and convert the Huaorani. Missionaries cruised the skies searching for Huaorani homes, dropping "gifts" and calling out to people through radio transmitters hidden in baskets lowered from the air. It was during this period, in the late 1960s and early 1970s, that most Huaorani were "contacted" by outsiders ("cowode") for the first time.<sup>80</sup>

More than 200 Huaorani were pressured and tricked into leaving their homes, and taken to live in a distant Christian settlement.<sup>81</sup> Other Huaorani, including many in the area now known as Yasuni, refused to be "tamed"<sup>82</sup> but were displaced from large areas of their traditional territory. At least one family group, the Tagaeri-Taromenane, has continued to resist contact with outsiders and lives in voluntary isolation in the forest. Rosemary Kingsland, a journalist who wrote about the evangelization of the Huaorani with the missionaries' cooperation, described the mood of the time:

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(Indigenous) norms. For citations and a fuller discussion, see Kimerling, *supra* note 53, at 54-57. The enormous gap between what some Huaorani call the "pretty words" in the law and the reality on the ground reflects the chasm between legal ideals and political realities and the enduring legacy of the Doctrine of Discovery, framework of dominance, and legal fiction of *terra nullius*.

80. For a fuller discussion, see STOLL, *supra* note 58; Kimerling, *supra* note 6, at 460-63; and Kimerling, *supra* note 60, at 75-84. For accounts of SIL/WBT's operations to contact and convert the Huaorani from the SIL/WBT missionaries' perspective, see ELLIOT, *supra* note 59; ELLIOT, *supra* note 60; WALLIS, *supra* note 60; ETHEL EMILY WALLIS, AUCAS DOWNRIVER: DAYUMA'S STORY TODAY (1973); ROSEMARY KINGSLAND, A SAINT AMONG SAVAGES (1980). For a report on collaboration by missionaries and the international oil industry to pacify Indigenous peoples in Ecuador, see J.F. Sandoval Moreano, CEPE, Pueblos Indígenas y Petróleo en la Amazonía Ecuatoriana [Indigenous Peoples and Petroleum in the Ecuadorian Amazon] (1988) (unpublished report).

81. See generally WALLIS, *supra* note 80.

82. The term "tamed" is borrowed from Ethel Emily Wallis, who wrote "the 'inside' Auca story" for SIL/WBT, and described the (Yasuni) Huaorani who had not relocated to live with the missionaries as "untamed and untaught." *Id.* at ix, 121. Some of those households were subsequently "contacted" by Catholic missionaries, with support from CEPE (now Petroecuador), in the late 1970s. See MONS. ALEJANDRO LABACA, CRONICA HUAORANI [HUAORANI CHRONICLE] (1993).

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The northern [oil] strike was enormous . . . . Nothing would stop them from going in [to Huaorani territory] now and there was talk of using guns, bombs, flame-throwers. Most of the talk was wild, but the result would be the same: a war between the oil men and the Aucas; a handful of naked savages standing squarely in the middle of fields of black gold, blocking the progress of the machine age. If it was to be a question of no oil or no Aucas, there was only one answer.<sup>83</sup>

The Huaorani who went to live with the missionaries were told that Huaorani culture is sinful and savage and were pressured to change, become “civilized,” and adopt the Christian way of life. Among other hardships, there were epidemics of new diseases (including a polio epidemic); important rainforest products were depleted; and the Huaorani, whose culture values personal autonomy, sharing and egalitarianism, had to rely on imported foods and medicines obtained by the missionaries. The new foods, medicines, and gifts of consumer items that the Huaorani could not themselves produce or obtain from their “giving” rainforest territory created relationships of dependency, inequalities, and new needs for trading relationships with *cowode*.

Many elders recall the time “when the civilization arrived” as a period of great suffering, when new diseases sickened and killed many people, and when large areas of the rainforest that had been their home were first occupied and damaged by outsiders. When some families returned to the land of their ancestors years later, it was not the same as before. The forest that was their home and source of life had been invaded and degraded by *cowode* while they were away. In addition to wells, pipelines and production stations, Texaco built a 100-kilometer road into Huaorani territory—which it named “*Via Auca*” (Auca Road)—and settlers used the new road to colonize Huaorani lands.<sup>84</sup>

As a result of Texaco’s operations, the Huaorani lost their political sovereignty and sovereignty over their natural resources, and their territory, lands and resources were significantly reduced. Many remaining lands and resources have been degraded, and pollution is a continuing problem and growing threat for a number of communities. These changes, in turn, have produced a host of new problems and challenges for the Huaorani, including the erosion of food security and self-reliance in meeting basic needs. Moreover, because Huaorani culture co-evolved with the Huaorani’s rainforest ecosystem, there is an inextricable relationship between Huaorani culture and the Huaorani’s ecosystem. As a result, the environmental injuries and displacement from ancestral lands have not only harmed the means of subsistence of the Huaorani, but also undermined their ability to conduct certain cultural practices and transmit their culture to future generations. As a group, the Huaorani have

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83. KINGSLAND, *supra* note 80, at 125-26.

84. In addition to *campesino* settlers from Ecuador’s highland and coastal regions, the Huaorani also lost lands to Shuar and Kiwcha (Quichua), who are indigenous to the Amazon but moved into Huaorani territory during this period.

been thrust into a process of rapid change, external pressures, and loss of territory and access to natural resources that endangers their survival as a people. Texaco no longer operates in Ecuador, but its tragic legacy remains, and a growing number of other oil companies and settlers continue to push deeper into Huaorani ancestral lands.

The missionaries who worked with Texaco had their own converging interests. SIL/WBT described the “Aucas” as “murderers at heart” and its operation to convert them as “one of the most extraordinary missionary endeavors” of the twentieth century, “living proof of miracles brought to pass through God’s word.”<sup>85</sup> Nonetheless, the forced contact and relocation of the Huaorani was a systemic, ethnocidal public policy and campaign, promoted and aided by Ecuador and Texaco in order to open Huaorani territory to oil extraction and sever the Huaorani’s connection with their ancestral lands in areas where the company wanted to operate.<sup>86</sup> In addition to ignoring the basic human rights of the Huaorani, it was a form of discrimination that denied cultural, political, and property rights to them based the prejudice of cultural superiority.<sup>87</sup> SIL/WBT was evidently aware of the convergence of interests; in “the ‘inside’ Auca story”<sup>88</sup> written by Ethel Emily Wallis, another missionary

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85. WALLIS, *supra* note 80, at front flap, ix, 68; *see also* WALLIS, *supra* note 60, at front flap (describing the “Aucas” as “the worlds’ most murderous tribe”). Stoll describes SIL/WBT’s activities with the Huaorani as its “most famous mission.” STOLL, *supra* note 58, at vii.

86. The term “ethnocidal policy” is borrowed from Norman Whitten, Jr. An anthropologist, Whitten explains: “The concept of ethnocide is taken from genocide, and refers to the process of exterminating the total lifeway of a people or nation, but in the ethnocidal process many of the peoples themselves are allowed to continue living.” WHITTEN, *supra* note 69, at 24. Whitten was conducting field research with another Amazonian people, the Canelos Quichua, when the oil rush began. He described the “attempts of ethnocide aimed at indigenous people” generally in Ecuador’s Amazon region as “systemic, large scale, and planned, as well as random, local and unintended.” *Id.* “Illustrations” of ethnocidal policies cited by Whitten included “monolingual education in Spanish, proselytization by Catholics and Protestants, courses in social organization aimed at altering family, kinship, and other bases of social cooperation and competition launched by government, church, and Peace Corp Volunteers, and the steady encapsulation of natives on eroding territories” *Id.* In essence, those national policies were “aimed at cultural obliteration and assimilation into a lower class serf-like existence.” *Id.* at 3-4. Whitten also wrote about internal colonialism and described “the ordinary colonist” (settler) in the Amazon region as “bluntly racist,” reporting that it was “common to hear ‘the Indian is more backward than the animals’, ‘the Indian is lower than the animals’, and ‘the Indian is not a person because he is lower than the animals.’” *Id.* at 26. Today, those kinds of comments are no longer common in ordinary conversation; however, racism against both Indigenous peoples generally, and the Huaorani in particular, persists.

87. The definition of discrimination is based on the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly in 1963, and the International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force in 1969.

88. WALLIS, *supra* note 80, at ix.

describes one of many helicopter operations supported by “the oil people” and comments on the expense:

This thing costs \$200-300 an hour to run; and it was a three-hour operation— besides the four high-priced employees! The oil people, in turn, are more than willing to do what they can for our operation, since we have almost cleared their whole concession of Aucas. They assure us that they aren't just being generous!<sup>89</sup>

### III. THE LAGO AGRIO LAWSUIT AND RELATED LITIGATION

The complaint in the Lago Agrio lawsuit asserts claims on behalf of the Huaorani and other so-called “*Afectados*,” local residents who have been harmed by Chevron’s operations. The *Afectados* include four indigenous peoples (the Huaorani, Cofan, Secoya and Siona), members of the Kichwa people, and colonists (settlers, known locally as “*colonos*”). However, the Huaorani were not consulted about the litigation or included among the plaintiffs, and no relief was requested directly for the affected communities and community members (or even for the plaintiffs).<sup>90</sup> Instead, the complaint seeks a judicial determination of the costs of a comprehensive environmental remediation and an order directing Chevron to pay the full amount to a local nongovernmental organization (NGO), Amazon Defense Front (*Frente de Defensa de la Amazonia*), which would then “apply” the funds to the ends determined in the judgment. The complaint also claims a ten percent share of the remedial monies for the plaintiffs, but requests that those funds also be paid to Amazon Defense Front.<sup>91</sup>

Amazon Defense Front was founded in 1994 by a group of colonists in Lago Agrio who heard about the *Aguinda v. Texaco* lawsuit on the radio and decided to establish a local institution to administer monies that they expected to be forthcoming from the case. The group has developed close ties with the plaintiffs’ lawyers and some external NGOs, but is controlled by colonists and is not regarded by the affected Indigenous peoples as their legitimate representative.<sup>92</sup> Moreover, its efforts to claim a monopoly of representation of all people affected by Texaco and manage local politics in an undemocratic fashion have alienated many people in the affected communities. In addition to issues related to representation, another recurring concern involves possible

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89. *Id.* at 76 (quoting Catherine Peeke).

90. See Plaintiffs’ Complaint to the President of the Superior Court of Justice of Nueva Loja (Lago Agrio) [now the Provincial Court of Justice of Sucumbios] at III, VI, Maria Aguinda Salazar and Others v. ChevronTexaco Corp. (May 7, 2003).

91. *Id.*

92. Although Amazon Defense Front has developed alliances with a handful of Cofan, Secoya, Siona and, more recently, Kichwa, community involvement in those alliances appears to be limited, at most, and the organization is dominated by colonists.

remedies. Efforts by local residents, at different junctures over the years, to demand “clarity and transparency in the process,” obtain information from Amazon Defense Front and its lawyers, and engage them in a dialogue about remedial plans—in the event of a victory in court or out-of-court settlement—have been rebuffed.<sup>93</sup> The decision to designate Amazon Defense Front, which is not a plaintiff, as the trustee in charge of administering any judgment was evidently made by the plaintiffs’ lawyers and Amazon Defense Front without consulting or informing the affected communities.

In February 2011, the court in Lago Agrio ruled that Chevron is responsible for widespread pollution that has harmed, and continues to threaten, the environment, public health, and Indigenous cultures.<sup>94</sup> In a 188-page opinion, the court ordered Chevron to pay \$8,646,160,000 for remedial measures,<sup>95</sup> and another \$8,646,160,000 in punitive damages if the company did not apologize to the affected communities within fifteen days.<sup>96</sup> The court also awarded an additional ten percent of the “amount sentenced” to Amazon Defense Front.<sup>97</sup> Chevron has not apologized (and has publicly vowed not to apologize),<sup>98</sup> so the award to Amazon Defense Front is now worth \$1.729232 billion<sup>99</sup> and the total value of the judgment is more than \$19 billion. The Lago Agrio judgment further directs the parties to set up a trust fund to administer the remedial monies, and provides that the sole beneficiary of the trust, and its board of directors, shall be Amazon Defense Front or the person or persons it

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93. For a fuller discussion, see Kimerling, *supra* note 6, at 632-42, 647-650; Judith Kimerling, *The Story From the Oil Patch: The Under-Represented in Aguinda v. Texaco*, HUMAN RIGHTS DIALOGUE, Spring 2000, at 6-7.

94. Lago Agrio Judgment, *supra* note 46; *see also* Provincial Court of Justice of Sucumbios, Case No. 2003-0002, In the suit of Maria Aguinda and others against Chevron Corporation (Judge Nicolas Zambrano, Mar. 4, 2011) (trial court decision on motions for amplification and clarification of the Lago Agrio Judgment) [hereinafter Lago Agrio Judgment Clarifications].

95. Lago Agrio Judgment, *supra* note 46, at 176-84.

96. *Id.* at 184-86.

97. *Id.* at 187.

98. *See, e.g., Ecuador: Chevron Will Not Apologize for Pollution, Even to Save \$8.5 Billion*, N.Y. TIMES, Feb. 3, 2012, at A7.

99. Presidency of the Provincial Court of Sucumbios, Case No. 21100-2003-0002, In the suit of Maria Aguinda and others against Dr. Adolfo Callejas Rivadeneira (Judge Lilia Marlene Ortiz Vasquez, July 30, 2012) (affirming the award of an additional ten percent of the value of the judgment to Amazon Defense Front and explaining that (i) the monies are based on a provision in Ecuador’s Environmental Management Law that awards ten percent of the value of the judgment to plaintiffs who successfully assert group rights in a popular action; (ii) the proper basis for calculating the ten percent is \$17,292,320,000 because Chevron did not apologize within the time allowed by the judgment for that “symbolic measure of moral reparation” and thus is now liable for the punitive damages; and (iii) the ten percent award is additional to the damages awards).



designates.<sup>100</sup>

The purpose of the remedial measures is “to return things to their natural state” and restore natural resources and environmental conditions to the way they were before Chevron caused the damage that gave rise to the litigation. The court recognized, however, that it will be impossible to achieve that objective in many cases and, for that reason, included three types of remedies in the judgment:<sup>101</sup> “principal” measures to remediate contaminated soils and ground waters<sup>102</sup>; “complementary” measures to compensate for the inability to fully restore natural resources<sup>103</sup>; and “mitigation” measures to address the impacts on human health and Indigenous cultures that cannot be reversed or fully repaired.<sup>104</sup> The objective of the punitive damages is to compensate the affected communities for their pain and suffering, and punish Chevron for unreasonable and malicious conduct in the litigation which prolonged the suffering of the victims.<sup>105</sup>

The Lago Agrio judgment has been affirmed in all material respects by the appellate division of the Lago Agrio court (the “Sole Division,” or plenary of that court), and is now enforceable under Ecuadorian law. The appellate division also ordered Chevron to pay an additional 0.1 percent of the value of the judgment as legal fees and directed the parties to establish a second trust fund to administer the punitive damages monies, to be managed by the same board of directors as the trust with the environmental remediation, compensation, and mitigation monies.<sup>106</sup>

Chevron appealed the judgment to Ecuador’s National Court of Justice,

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100. Lago Agrio Judgment, *supra* note 46, at 186-87.

101. *Id.* at 177. *See also* Lago Agrio Judgment Clarifications, *supra* note 94, at 23.

102. The damage awards for principal remedial measures include nearly \$5.4 billion to remediate contaminated soils and \$600 million to remediate ground waters. Lago Agrio Judgment, *supra* note 46, at 177-81.

103. The damage awards for complementary remedial measures include \$200 million to restore native flora and fauna and help remedy the impact on the affected Indigenous peoples’ food supply, and \$150 million to deliver potable water supplies. *Id.* at 181-83.

104. The damage awards for mitigation measures include \$800 million to develop and implement a health plan that includes treatment for people with cancer, \$1.4 billion to implement and maintain a permanent healthcare system to serve the affected populations, and \$100 million to mitigate the unique harms to the affected Indigenous communities, which include displacement from their ancestral territories and other cultural impacts. *Id.* at 183-84.

105. Provincial Court of Justice of Sucumbios, Case No. 2011-0106, In the suit of Maria Aguinda and others against Chevron Corporation (Sole Division, Jan. 13, 2012), at 23 (decision on motions for amplification and clarification of Jan. 3, 2012 appellate chamber decision upholding the Lago Agrio Judgment) [hereinafter Lago Agrio Appellate Court Clarifications]; *see also* Lago Agrio Judgment, *supra* note 46, at 184-86.

106. Provincial Court of Justice of Sucumbios, Case No. 2011-0106, In the suit of Maria Aguinda and others against Chevron Corporation (Sole Division, Jan. 3, 2012); *see also* Lago Agrio Appellate Court Clarifications, *supra* note 105.

and that appeal is pending. However, Chevron evidently does not expect to prevail in Ecuador's courts—at least while the current President, Rafael Correa, is in power—and the company has limited assets in Ecuador. Consequently, Chevron has been preparing to defend itself against possible enforcement actions in the United States and around the world by challenging the legitimacy of the judgment in the BIT Arbitration, discussed above, and the *Chevron v. Donziger* lawsuit. Both cases are based on allegations of fraud and other misconduct by the Lago Agrio plaintiffs' legal team, improper collusion with Ecuador's government, and systemic failures in the administration of justice.<sup>107</sup> In an effort to reconcile its current allegations with Texaco's spirited defense of Ecuador's legal and judicial system in the *Aguinda v. Texaco* litigation, Chevron contends that the rule of law has deteriorated in Ecuador since the U.S. lawsuit was dismissed, and that in view of current judicial reforms and the public support expressed by President Correa for the Lago Agrio plaintiffs, the "judiciary now lacks the necessary independence and institutional stability to adequately adjudicate highly politicized cases."<sup>108</sup>

*Chevron v. Donziger* followed extensive discovery proceedings in the United States,<sup>109</sup> which gained force after the release of a documentary film about the Lago Agrio case in 2009. The film, *Crude*, was solicited by the New York lawyer who manages the case for the plaintiffs, Steven Donziger. The film crew shadowed the plaintiffs' lawyers for three years, shooting some 600 hours of footage. An early version of the film showed an expert who contributed to what was supposed to be an independent, comprehensive assessment of the alleged damages for the Lago Agrio Court meeting with plaintiffs' counsel. The images of the expert were subsequently edited out, but not before Chevron saw them.<sup>110</sup>

Chevron used that scene, and others, to get a discovery order compelling

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107. See generally *Chevron Corp. v. Donziger* Complaint, *supra* note 14; BIT Notice of Arbitration, *supra* note 14. For a fuller discussion of the claims and proceedings in *Chevron v. Donziger* and the BIT Arbitration, see Kimerling, *supra* note 53, at 77-93.

108. BIT Notice of Arbitration, *supra* note 14, at ¶ 42 (emphasis added). This argument, however, is problematic. For a fuller discussion of the administration of justice in Ecuador, see Kimerling, *supra* note 6; Kimerling, *supra* note 26. Although the political landscape in Ecuador has indisputably changed in some pertinent respects since the Lago Agrio lawsuit was filed, institutional instability, political interference, corruption, and other systemic shortcomings in the rule of law and administration of justice in Ecuador are longstanding problems that were also apparent (but evidently overlooked) when the *Aguinda v. Texaco* Court applied the forum non conveniens doctrine to dismiss the New York action.

109. Section 1782 of the Judicial Code allows a party to a foreign or international litigation to compel a person in the United States to give testimony or produce documents or other evidence in the federal judicial district where that person resides or is found, for use in the foreign or international proceeding. 28 U.S.C. §. 1782(a) (2006).

110. *In re Chevron Corp.*, 709 F. Supp. 2d 283, 296 (S.D.N.Y. 2010), *aff'd sub nom.*, *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011).

the filmmaker, Joseph Berlinger, to produce all of the outtakes (raw footage that does not appear in the film).<sup>111</sup> The company argued that the outtakes were “more than likely relevant” to Chevron’s claims and defenses in the Lago Agrio lawsuit and BIT arbitration, and that they would likely depict the Lago Agrio plaintiffs’ counsel’s “interaction with at least one supposedly neutral expert;” the “plaintiffs’ improper influence on the Ecuadorian judicial system;” and “plaintiffs attempts to ‘curry favor’ with [the government of Ecuador].”<sup>112</sup> Chevron also subpoenaed environmental consultants, and even lawyers, who were involved in the case to give deposition testimony and turn over documents. The discovery proceedings are ongoing, but already number in the dozens.<sup>113</sup> They have resulted in at least fifty orders and opinions from federal courts across the country, and have been described by the Third and Second Circuits as “unique in the annals of American judicial history.”<sup>114</sup>

As a result of the discovery, Chevron gained access to an extraordinary

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111. *Berlinger*, 629 F.3d at 304-11. Chevron highlighted two additional scenes in support of its subpoena application. In one scene, Donziger pressures a judge to block the judicial inspection of a laboratory allegedly being used by the Lago Agrio plaintiffs to test samples for contamination. Donziger describes his use of “pressure tactics” and explains, “[t]his is something you would never do in the United States, but Ecuador, you know, this is how the game is played, it’s dirty.” In another scene, a representative of the plaintiffs informs Donziger that he left the office of President “after coordinating everything.” Donziger then declares that “[w]e’ve achieved something very important in this case . . . . Now we are friends with the President.” The film then shows President Correa and plaintiffs’ counsel together on a helicopter; later on, President Correa embraces Donziger and says, “Wonderful, keep it up!” *Id.* at 304. Berlinger argued that the outtakes were protected from disclosure by the “Journalist’s Privilege,” a qualified evidentiary privilege for information gathered in a journalistic investigation. *Id.* at 306. However, the Second Circuit held that Berlinger could not invoke the privilege because he failed to show that his research and reporting were done with independence from the subject of the film, the Lago Agrio plaintiffs. The court noted that Donziger had solicited Berlinger to make the documentary from the perspective of his clients, and that Berlinger removed at least one scene from the final version of the film at the direction of the Lago Agrio plaintiffs. *Id.*

112. *In re Chevron*, 709 F. Supp. 2d at 296. Two Chevron attorneys, Ricardo Reis Veiga and Rodrigo Pérez Pallares, also sought to subpoena the outtakes. At the time, Veiga and Pérez Pallares were defendants in criminal proceedings in Ecuador, along with former government officials and employees of Petroecuador, based on allegations that they falsified documents in connection with the remediation agreement and releases discussed above. The proceedings were irregular, and Chevron alleges that they were “the direct result of improper influence from the highest levels of the State” as part of the alleged effort to “support the Lago Agrio plaintiffs” and “nullify” the 1998 Final Act (release). BIT Notice of Arbitration, *supra* note 14, at ¶ 55. Veiga and Pérez Pallares argued that they needed the outtakes to defend themselves in the criminal proceedings. *In re Chevron*, 709 F. Supp. 2d at 297. The criminal charges were dropped in 2011. Lawrence Hurley, *Dropped Charges in Ecuador Could Affect Chevron Racketeering Case*, N.Y. TIMES, June 3, 2011.

113. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 236 (2d Cir. 2012), *cert. denied*, 80 U.S.L.W. 3669 (U.S. Oct. 9, 2012).

114. *Id.*; *In re Chevron Corp.*, 650 F.3d 276, 282 n.7 (3d Cir. 2011).

amount of material, including Donziger's litigation files and hard drive.<sup>115</sup> Chevron argued successfully that the material it sought was not protected by attorney-client privilege because it had not attached or because it was waived.<sup>116</sup> Among other disclosures, the company found evidence that the legal team for the plaintiffs ghostwrote most of the comprehensive damages assessment that had been presented to the Lago Agrio Court as the work of the "independent" court-appointed expert (Richard Cabrera). Chevron also found

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115. *Chevron Corp.*, 667 F.3d at 236-37. Donziger was also required to submit to a deposition.

116. *See In re Chevron*, 650 F.3d at 289; *In re Chevron Corp.*, 633 F.3d 153, 156 (3d Cir. 2011); *Chevron Corp.*, 667 F.3d at 236. Chevron's attorneys, Veiga and Pérez Pallares also sought the discovery for use in the criminal proceedings. Donziger moved to quash his subpoenas on a number of grounds, including attorney-client privilege and work product doctrine. In rejecting the motion to quash, Judge Lewis Kaplan of the Southern District of New York acknowledged the "possibilities for mischief and abuse" when a party to litigation is allowed to take discovery of lawyers on the other side. Nevertheless, he described Donziger as "the field general of the Lago Agrio plaintiffs' efforts in Ecuador," and concluded that many of Donziger's activities "had little to do with the performance of legal services and a great deal to do with political activity, intimidation of the Ecuadorian courts, attempts to procure criminal prosecutions [of two of Chevron's lawyers in Ecuador] for the purpose of extracting a settlement [from Chevron], and presenting a message to the world media." *In re Chevron Corp.*, 749 F. Supp. 2d 141, 144, 157-58 (S.D.N.Y. 2010), *adhered to on reconsideration*, 749 F. Supp. 2d 170 (S.D.N.Y. 2012), *aff'd sub nom.* Lago Agrio Plaintiffs v. Chevron Corp., 409 F. App'x 393 (2010). Judge Kaplan also cited the "extremely great" need for discovery, "in view of the extraordinary evidence already before [the Court]." *Id.* at 168. He described a number of scenes from the *Crude* outtakes and concluded:

To turn a blind eye to evidence suggesting improper influence on and intimidation of the Ecuadorian courts by both Donziger and the [government of Ecuador], improper manipulation of the criminal process in that country [in the cases of Veiga and Pérez Pallares], knowing submission by the Lago Agrio plaintiffs of at least one fraudulent report [to the Lago Agrio Court], and improper collusion with Cabrera, the supposedly neutral court-appointed expert, could defeat the purpose of Section 1782, deprive [Veiga and Pérez Pallares] of evidence needed for their defense in a criminal case, and frustrate the BIT arbitration.

*Id.*; *see also In re Chevron*, 749 F. Supp. 2d 135 (S.D.N.Y. 2010) (summary memorandum and order prior to fuller opinion), *opinion issued*, 749 F. Supp. 2d 141 (S.D.N.Y. 2010), *adhered to on reconsideration*, 749 F. Supp. 2d 170 (S.D.N.Y. 2010), *aff'd sub nom.* Lago Agrio Plaintiffs v. Chevron Corp., 409 F. App'x 393 (2010). Initially, Donziger sought to quash the subpoenas without filing a privilege log, as required by local court rules and the Federal Rules of Civil Procedure. The district court held that Donziger had thus waived his privilege claims, but held open the possibility of exercising the court's discretion to relieve him of the waiver and adjudicate the merits of privilege claims with respect to specific documents. Donziger subsequently claimed privilege as to 8,652 documents, but the court found that "not even one document . . . was written by or addressed to any of the Lago Agrio plaintiffs" and some 2,500 or more documents had been sent or disclosed to a public relations person, the co-founder of Amazon Defense Front (Luis Yanza), the NGO Amazon Watch, the Wall Street Journal, Bloomberg News, Conde Nast, The New York Times and the Los Angeles Times, and adhered to its prior ruling. *In re Chevron*, 749 F. Supp. 2d at 170, 173.

outtakes from *Crude* showing Donziger stating that all Ecuadorian judges are “corrupt” and explaining:

You can solve anything with politics as long as the judges are intelligent enough to understand the politics . . . . [T]hey don't have to be intelligent enough to understand the law, just as long as they understand the politics.<sup>117</sup>

The company also found evidence that Donziger and Amazon Defense Front had made undisclosed agreements with funders and third party investors in exchange for interests in the Lago Agrio judgment.<sup>118</sup>

Chevron's complaint in the New York lawsuit names fifty-five defendants. They include Donziger; Amazon Defense Front and its Ecuadorian lawyer, Pablo Fajardo (who is also counsel of record for the Lago Agrio plaintiffs); Amazon Defense Front's co-founder, Luis Yanza; an environmental consulting firm that worked closely with Donziger (Stratus Consulting) and two of its employees; and the Lago Agrio plaintiffs. The complaint also alleges culpable conduct by a number of non-parties, including Kohn, Swift and Graf, the U.S. law firm that initially financed the Lago Agrio lawsuit and was co-lead counsel for the plaintiffs in *Aguinda v. Texaco*;<sup>119</sup> the California-based NGO Amazon Watch, which works closely with Amazon Defense Front and Donziger;<sup>120</sup> and

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117. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 596, 660 (S.D.N.Y. 2011) (quoting Donziger and discussing “evidence of possible misconduct by Mr. Donziger and others, as well as important evidence regarding the unfairness and inadequacies of the Ecuadorian system and proceedings,” and granting preliminary injunction), *vacated sub nom. Chevron Corp. v. Naranjo*, 2011 WL 4375022 (2d Cir. Sept. 19, 2011), *rev'd and remanded*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 80 U.S.L.W. 3669 (U.S. Oct. 9, 2012).

118. *See, e.g.*, TORVIA LIMITED AND CLAIMANTS, FUNDING AGREEMENT (May 16, 2011); TRECA FINANCIAL SOLUTIONS AND CLAIMANTS, FUNDING AGREEMENT (Oct. 31, 2010); Roger Parloff, *Have You Got a Piece of this Lawsuit?*, FORTUNE, June 23, 2011, available at <http://features.blogs.fortune.cnn.com>; Mary Anastasia O'Grady, *Chevron's Ecuador Morass*, WALL ST. J., May 14, 2012. Chevron alleges that Donziger and Amazon Defense Front have already collected more than ten million dollars by selling shares in the Lago Agrio judgment and that they “admit their intention to continue selling off pieces” of the Lago Agrio judgment. Chevron Corp. Memorandum of Law in Support of Its Renewed Motion by Order to Show Cause for an Order of Attachment and Other Relief at 7, 10, 16, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Mar. 5, 2012).

119. The other co-lead counsel for the *Aguinda v. Texaco* plaintiffs, Cristobal Bonifaz, is also named in Chevron's complaint as a nonparty entity who played a role in the alleged misconduct. Bonifaz was discharged by Amazon Defense Front in 2006 and no longer represents the plaintiffs. Kohn, Swift and Graf was discharged in 2010 and no longer represents the plaintiffs. *See* Letter from Joseph C. Kohn, Kohn, Swift & Graf, P.C., to Pablo Fajardo, Luis Yanza, Humberto Piaguaje, Ermel Chavez, Hugo Payaguaje, and Emergildo Criollo (Aug. 9, 2010) (on file with author).

120. Amazon Watch promotes itself as an organization that works “directly with indigenous communities” in the Amazon to support Indigenous peoples and advance their rights, in addition to protecting the rainforest, but works closely with Amazon Defense Front and Donziger in the name of the affected communities and often appears to act as a megaphone for the lawyers. *See* AMAZON WATCH, 2009 ANNUAL REPORT 6. *See also, e.g., id.* at 5, 7, 16-22; Kimerling, *supra* note 6, at 647-50; CHEVRONTOXICO: THE CAMPAIGN FOR

Patton Boggs, a major U.S. law firm that assumed a leading role in the litigation on behalf of the Lago Agrio plaintiffs in 2010.

The complaint asserts substantive and conspiracy claims under the federal Racketeer Influences and Corrupt Organizations Act (RICO) against all of the defendants except the Lago Agrio plaintiffs, based on allegations that the Lago Agrio case is a “sham” lawsuit and part of an alleged criminal enterprise to obtain a settlement or judgment from Chevron through fraud and extortion. The complaint also includes state law claims for fraud and civil conspiracy against all of the defendants, as well as a claim against Donziger and his law firm for violation of the New York Judiciary Law. In addition to money damages, Chevron sought a judicial declaration that the Lago Agrio judgment is non-recognizable and unenforceable, and an injunction barring any attempt to enforce the judgment in the United States or abroad.<sup>121</sup>

Initially, U.S. District Court Judge Lewis Kaplan issued a preliminary injunction enjoining the defendants from taking any action to enforce the Lago Agrio judgment outside of Ecuador pending a final determination of the New York lawsuit. In a lengthy opinion, Judge Kaplan concluded that Chevron would likely show that the Ecuadorian judiciary is incapable of producing a judgment that New York courts can respect because the courts there do not act impartially, and additionally, that there was “ample evidence of fraud” in the Lago Agrio litigation that had not yet been contradicted or explained.<sup>122</sup>

The Second Circuit Court of Appeals, however, vacated the injunction and dismissed Chevron’s claim for declaratory and injunctive relief.<sup>123</sup> The appellate court did not rule on the merits of Chevron’s allegations, but rather held that the procedural device that the company chose is unavailable because New York’s Uniform Foreign Country Money Judgments Recognition Act

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JUSTICE IN ECUADOR, [www.chevrontoxico.com](http://www.chevrontoxico.com) (last visited June 11, 2013) (website maintained by Amazon Watch and Amazon Defense Front to support the Lago Agrio lawsuit).

121. *Chevron v. Donziger* Complaint, *supra* note 14, ¶ 3.

122. *Chevron Corp.*, 768 F. Supp. 2d at 596, 660. Judge Kaplan emphasized that the purpose of a preliminary injunction is to preserve the relative positions of the parties until a trial on the merits can be held. *Id.* at 596. The Court subsequently bifurcated, and then severed, the claim for a declaration and injunction under the judgment recognition statute, and it proceeded as a separate action (“the Count 9 Action”).

123. In September 2011, the Second Circuit vacated the preliminary injunction and stated that an opinion would follow. *Chevron Corp. v. Naranjo*, No. 11-1150-CV(L), 2011 WL 4375022 (2d Cir. Sept. 19, 2011) (vacating preliminary injunction and denying petition by two Lago Agrio plaintiffs for a writ of mandamus to compel the recusal of Judge Kaplan). In January 2012, the Second Circuit issued an opinion and order reversing the judgment by the lower court, vacating the preliminary injunction, and remanding to the District Court with instructions to dismiss Chevron’s claim for declaratory and injunctive relief under New York’s Uniform Foreign Country Money-Judgments Recognition Act. *Naranjo*, 667 F.3d at 247.

does not grant a cause of action to putative judgment-debtors to challenge foreign judgments before enforcement is sought. The judgment recognition statute allows a party to challenge the validity of a foreign judgment when a judgment creditor seeks to enforce the judgment in New York, but it cannot be used preemptively to declare foreign judgments void and enjoin their enforcement.<sup>124</sup>

The Second Circuit based its holding on statutory interpretation but seemed troubled by the global reach of the injunction and included a discussion of international comity in the opinion. The court found that considerations of comity provide “additional reasons” to conclude that the statute cannot support the injunctive remedy granted by the district court.<sup>125</sup> In enacting the judgment recognition statute, the Second Circuit reasoned, New York meant to “act as a responsible participant in an international system of justice—not to set up its courts as a transnational arbiter to dictate to the entire world which judgments are entitled to respect and which countries’ courts are to be treated as international pariahs.”<sup>126</sup>

Discovery and litigation on the remaining claims are underway.<sup>127</sup> The

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124. The Second Circuit explained that the New York judgment recognition statute was designed to provide a means for foreign judgment creditors to enforce their rights in New York courts, and that the act includes defenses which allow courts to decline to enforce fraudulent judgments from corrupt legal systems. Nonetheless, those defenses are exceptions, and they do not create an affirmative cause of action for disappointed litigants to enjoin enforcement. *Id.* at 240-41.

125. *Id.* at 242.

126. *Id.*

127. For key rulings on motions to dismiss the remaining claims (which seek damages and injunctive relief), see Opinion on Motion to Dismiss Amended Complaint, *Chevron v. Donziger*, 871 F. Supp. 2d 229 (S.D.N.Y. 2012) (denying Donziger Defendants’ motion to dismiss substantive and conspiracy RICO claims, claim for violation of New York Judiciary Law, and claim for civil conspiracy to commit substantive state law violations; dismissing common law fraud claim only to the extent that relief is premised on detrimental reliance by Chevron, rather than by third parties; dismissing claim for unjust enrichment only as premature; and dismissing claims for tortious interference with contract and trespass to chattels); Memorandum and Order on Defendants’ Motion to Dismiss the Amended Complaint, *Chevron v. Donziger*, No. 11-CV-0691 (LAK), 2012 WL 3223671 (S.D.N.Y. May 24, 2012) (granting in part and denying in part the Stratus Defendants’ motion to dismiss, with the same disposition of common claims as the Donziger Defendants’ Motion to Dismiss). For a detailed review of allegations and evidence relating to the enforceability of the Lago Agrio judgment, finding that the Lago Agrio litigation was “unquestionably . . . tainted,” but that triable issues remain as to whether the misconduct “materially affected Chevron’s ability fully to present its defense or corrupted the judicial process so as to warrant such a determination” for the purpose of defeating Defendants’ collateral estoppel defenses, see *Chevron v. Donziger*, 886 F. Supp. 2d 235, 292 (S.D.N.Y. 2012) (denying Chevron’s motion for partial summary judgment dismissing the Donziger Defendants’ and Lago Agrio Plaintiffs’ representatives’ affirmative defenses of collateral estoppel and granting the motion to dismiss affirmative defenses of res judicata). For recent decisions that discuss findings of probable cause to believe that Donziger and other representatives of the

Ecuadorian defendants and Donziger reject the jurisdiction of the U.S. court over the Ecuadorian parties, and only two of the Lago Agrio plaintiffs have appeared to defend the action.<sup>128</sup> Among other defenses, they have also accused Chevron of unclean hands in the Lago Agrio litigation, and in August 2012, Donziger filed a motion for leave to file counterclaims for fraud and civil extortion based on allegations that “Chevron has engaged in a coordinated scheme of intentionally false and misleading statements and extortion intended to harass and intimidate Donziger and eliminate the fruits of Donziger’s and the Ecuadorian Plaintiffs’ now nearly 19 years’ worth of legal efforts in Ecuador.”<sup>129</sup>

Lago Agrio plaintiffs engaged in fraud or other criminal activity in connection with the Lago Agrio litigation and related activities, see *Chevron v. Donziger*, 11-CV-0691 (LAK) (S.D.N.Y. Mar. 15, 2013) (ordering production of documents by Patton Boggs); *Chevron v. Donziger*, 11-CV-0691 (LAK) (S.D.N.Y. Feb. 21, 2013) (findings of fact and conclusions of law underling protective order barring defendants from disclosing two declarations or identifying information about those witnesses to anyone other than counsel of record and the Stratus defendants, and directing counsel to apply to the Court for appropriate relief if they later believe that disclosure to Donziger or the appearing Lago Agrio plaintiffs is necessary).

128. The Lago Agrio plaintiffs Hugo Gerardo Camancho Naranjo and Javier Piaguaje Payaguaje are opposing Chevron in the New York lawsuit, while attempting to reserve their rights “to continue to contest the lawfulness and propriety” of the U.S. court’s assertion of personal jurisdiction over them. Defendant Steven Donziger, et. al, Opposition to Chevron Corporation’s Renewed Motion for an Order of Attachment and Other Relief, at 1 n.1, *Chevron v. Donziger*, 11-CV-0691 (LAK) (S.D.N.Y. Mar. 20, 2012), 2012 WL 1063382. The other Ecuadorian defendants have defaulted.

129. Steven Donziger, The Law Offices of Steven R. Donziger, and Donziger & Associates, PLLC’s Memorandum in Support of Their Motion for Leave to File (1) Amended Answer and (2) Counterclaims at 1, *Chevron Corp. v. Donziger*, No. 11-CV-0691 (LAK) (Aug. 15, 2012). More specifically, Donziger alleges that Chevron has made “false and misleading statements regarding: the plot by Diego Borja and Wayne Hanson to bribe and discredit” one of the judges who has presided over the Lago Agrio litigation; “the evidentiary record in the Lago Agrio litigation, including the specific scientific evidence supporting the judgment against Chevron; the statements and opinions of the Ecuadorian [Lago Agrio] Plaintiffs’ experts and counsel concerning the evidentiary record; Donziger’s statements and conduct during the Lago Agrio litigation; and Donziger’s knowledge of and participation in the alleged ghostwriting of the Lago Agrio judgment.” *Id.* at 1-2. Donziger further alleges that “Chevron’s efforts are calculated to coerce Donziger into abandoning or unjustly compromising his efforts to hold Chevron accountable for the environmental devastation caused by its predecessor in the Ecuadorian Amazon, thereby depriving him of his rights and interests to advise the Ecuadorian Plaintiffs free from fear and intimidation, and his lawful interest in the multi-billion dollar judgment rendered against Chevron.” *Id.* at 2. Both Donziger and the Lago Agrio plaintiffs Camancho and Piaguaje (“the LAP Representatives”) also moved for leave to amend their answers to withdraw the affirmative defense of collateral estoppel. In November 2012, the Court granted Donziger’s motion for leave to amend to assert counterclaims, but denied the motions to withdraw the collateral estoppel defenses. Donziger and the LAP Representatives had previously attempted to withdraw their collateral estoppel defenses—by stipulation, in response to Chevron’s motion for partial summary judgment dismissing the defenses (and their *res judicata* defenses) “to the extent that they are based on the [Lago Agrio] Judgment on the theory that the Judgment



A full discussion of the litigation is beyond the scope of this Article. The bottom line, however, is that after nearly two decades of litigation, there is a judgment in favor of the plaintiffs but the viability of that judgment is in question. Litigation is now underway in six countries on three continents, with no end in sight.<sup>130</sup> There is considerable uncertainty about how decisions by those different legal regimes will intersect, and there is no single, controlling

is not entitled to recognition or enforcement and therefore would not be entitled to preclusive effect even if the other bases for preclusion were satisfied.” *Donziger*, 886 F. Supp. 2d at 240. The Court ruled that Donziger and the LAP Representatives “had not effectively withdrawn the collateral estoppel defense through a stipulation” and further found that “even if the stipulation were treated as a motion for leave to amend, such motion would be denied, as it was made in bad faith and would cause undue delay and prejudice to plaintiff [Chevron],” *Chevron v. Donziger*, No. 11-CV-0691 (LAK) (S.D.N.Y. Nov. 27, 2012), ECF 637 (summary of prior ruling in order denying motion by LAP Representatives for leave to amend their answer to withdraw the defense of collateral estoppel). In its ruling on Chevron’s motion for partial summary judgment, the Court found that the proceedings in Lago Agrio had been “tainted,” but held that Chevron was not “entitled [at this stage] to a determination in its favor as to the recognizability and enforceability of the Judgment or the collateral estoppel defense in view of the [triable] issues as to whether any of this materially affected Chevron’s ability fully to present its defense or corrupted the judicial process so as to warrant such a determination.” *Chevron v. Donziger*, 886 F. Supp. 2d at 292. In the November 2012 orders, the Court declined to disturb its prior ruling. The Court found that the fact that Donziger and the LAP Representatives “now seek to amend their answer through a properly filed motion does not render an amendment any less prejudicial to plaintiff [Chevron], which has expended enormous resources and conducted extensive discovery on the issue of the Judgment’s enforceability . . . . Moreover, the LAPs’ [and Donziger’s] ‘tactical effort to avoid litigating the recognizability of the Judgment in this action while saving that issue for use in other *fora*,’ [citation omitted], amounts to bad faith forum shopping, especially in light of the fact that they elected to inject that defense into this case, which is itself a reason to deny leave to amend.” *Chevron v. Donziger*, No. 11-CV-0691 (LAK) (S.D.N.Y. Nov. 27, 2012), ECF 637 (denying motion of LAP Representatives for leave to amend); *see also* *Chevron v. Donziger*, No. 11-CV-0691 (LAK) (S.D.N.Y. Nov. 27, 2012), ECF 638 (granting Donziger’s motion for leave to amend his answer insofar as it seeks to assert counterclaims, without prejudice to a motion to dismiss the newly-added counterclaims, and otherwise denying the motion to amend for the reasons set forth in the order denying the LAP Representatives’ motion for leave to amend their answer to withdraw the collateral estoppel defense). Notwithstanding those orders, Donziger and the LAP Representatives filed amended answers in January 2013. Chevron moved to strike, and the Court found that the “principal purpose of the purported amendments . . . was an attempt to drop their contention that the Ecuadorian judgment that is at the heart of this dispute has res judicata and/or collateral estoppel effect in this case—precisely the attempted amendment that this Court’s November 27, 2012 orders declined—for the second time—to permit,” and granted the motion to strike. Memorandum and Order, *Chevron v. Donziger*, No. 11-CV-0691 (LAK) (S.D.N.Y. Feb. 20, 2012) (further finding that the defendants’ action in filing the amended answers was a forum shopping tactic that “at least borders on being—and may well be— indefensible”).

130. In addition to the Lago Agrio lawsuit, *Chevron v. Donziger*, the BIT Arbitration, and some pending discovery proceedings, Patton Boggs has sued Chevron in federal court for malicious prosecution, and enforcement actions (filed by representatives of the Lago Agrio plaintiffs) are underway in Canada, Brazil, and Argentina.

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supranational authority to adjudicate those potential disputes. Moreover, even if the Lago Agrio judgment is upheld on appeal, and the plaintiffs' lawyers succeed in collecting it (or portions of it)—or if the parties decide to settle the case instead of litigating in courtrooms around the world—the impact of *Aguinda* on the Huaorani and other *Afectados* will still be uncertain.

For now, sadly, this new chapter in the litigation appears to be shifting the focus of the legal and political contest from allegations about Texaco's misconduct to allegations of misconduct by the lawyers and activists who manage the Lago Agrio case, and from concern about the rights of the affected communities to the rights of Chevron.<sup>131</sup> The alleged misconduct has prolonged the litigation, and Chevron is using it to try to also taint the credibility of the victims' claims and jeopardize their rights to remedies. Those developments have eclipsed the situation on the ground—where environmental conditions continue to deteriorate, people's rights are still being violated, and no one is accepting responsibility.

So as we continue this symposium, I think it is important to keep in mind that although the doctrinal issues we are examining are very interesting and significant, at the end of the day this case is supposed to be about justice for the Huaorani and other affected groups. The representatives of the Lago Agrio plaintiffs often say, in their narrative about the case, that the affected Indigenous peoples were “decimated” by Texaco.<sup>132</sup> However, the Huaorani, want people to know that they are still there. They have suffered serious injuries, and in the language of tort law and human rights law, they are victims. But they are also survivors.

In accounts of the litigation, the people whose rights are being defended often appear as backdrops to a distant drama, in which the key protagonists are outsiders. So it might surprise a lot of people who have been following the litigation to hear that many Huaorani are taking a proactive approach to the need to remedy problems and threats that began with Texaco and continue to this day. They understand that, for the Huaorani people to survive, they must protect what remains of their ancestral territory. And they are engaged in

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131. *See, e.g.*, *Chevron Corp. v. Champ*, No. 1:10-mc-0027 (GCM-DHL) [DI 12] (W.D.N.C. Aug. 30, 2010) (“While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill.”).

132. *See, e.g.*, Press Release, Amazon Defense Coalition [Amazon Defense Front], Ecuadorians Hit Chevron with \$18 Billion Enforcement Action in Canada (May 30, 2012); Press Release, Amazon Defense Coalition, For Second Time, Ecuador Appellate Panel Rejects Chevron Attempt to Block \$18 Billion Judgment for Dumping Toxic Waste (March 2, 2012); Press Release, Amazon Defense Coalition, Ecuador Court Rejects Latest Chevron Attempt to Block Enforcement of \$18 Billion Judgment, Says Amazon Defense Coalition (Feb. 20, 2012).

activities to do that.

Since the arrival of Texaco and “the civilization,” much has changed for the Huaorani, and many people now live in cities outside of Huaorani territory or near roads built by oil companies in their ancestral lands. However, other Huaorani families still live in the forest, in harmony with the “giving” rainforest, and at least one family group, the Tagaeri-Taromenane, lives in voluntary isolation in the forest.

The Tagaeri-Taromenane and the most traditional of the “contacted” Huaorani live in an area known as The Intangible Zone, a spectacular rainforest refuge that spans more than 7,580 square kilometers and has been designated as a conservation area since 1999.<sup>133</sup> It is off-limits to oil extraction, mining, and logging—at least for now—because those operations could be expected to generate violent encounters with the Tagaeri-Taromenane and likely lead to their extermination. Although The Intangible Zone does not include all of the territory of the Tagaeri-Taromenane and reportedly overlaps with parts of five oil concessions, the designation as “intangible” is nonetheless important because Ecuador allows oil development in other areas of Yasuni National Park and in lands that are titled to Indigenous peoples without their consent. The entire northern half of Yasuni National Park overlaps with oil concessions and at least eight oil concessions include some titled Huaorani lands.

The contacted Huaorani who live in The Intangible Zone understand that they need to preserve and defend the forest in order to survive “as Huaorani.” They see the area, and some adjacent lands that have not yet been occupied by oil companies or colonists, as their last refuge. The importance of the area to the local communities was described by Kemperi, a Huaorani elder and shaman, in a “message to the people who live where the oil companies come from”:

My message is that we are living here. We are living in a good way. No more oil companies should come because already there are enough. They [the people who live where the oil companies come from] need to know that we have problems. I want them to comprehend what we are living. Many companies want to enter, everywhere. But they do not help; they have come to damage the forest. Instead of going hunting, they cut down trees to make paths. Instead of caring for [the forest], they destroy. Where the company lives, it smells nasty, the animals hide, and when the river rises the manioc and plantain have problems. We respect the environment where we live. We like

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133. See Constitutional President of the Republic, *Decreto Ejecutivo* No. 552 [Executive Decree No. 552], R.O. No. 121 (Feb. 2, 1999) (declaring an “intangible zone” of approximately 700,000 hectares in Huaorani titled lands and Yasuni National Park, to be delimited within 120 days); Constitutional President of the Republic, *Decreto Ejecutivo* No. 2187 [Executive Decree No. 2187] (Jan. 3, 2007) (defining boundaries, spanning 758,051 hectares, of the intangible zone decreed in 1999 to protect the Tagaeri, Taromenane, and other uncontacted groups of Huaorani). The 2007 decree also designates a buffer zone.

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the tourists because they come, and go away. When the company comes, it does not want to leave. Now the company is in the habit of offering many things, it says that it comes to do business, but then it makes itself the owner. Where the company has left its environment, we cannot return. It stays bad. Something must remain for us. Without territory, we cannot live. If they destroy everything, where will we live? We do not want more companies to enter, or more roads. We want to live as Huaorani, we want others to respect our culture.<sup>134</sup>

Kemperi's community, Bameno, is located in the heart of The Intangible Zone. Since 2007, Bameno has been leading efforts to organize the contacted communities in The Intangible Zone to work together to defend what remains of their territory and sovereignty, including the right of community members to live and peace and freedom, as Huaorani, in their ancestral lands, and the right of their "uncontacted" neighbors to be left alone. The communities first came together to remove illegal loggers from The Intangible Zone, and also oppose new oil operations and roads in the forest, and see community managed and operated tourism as a better economic activity that does not harm the forest or disrespect their culture and way of life. They call themselves *Ome Gompote Kiwigimoni Huaorani* (We Defend Our Huaorani Territory); for short, they say Ome Yasuni.<sup>135</sup>

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134. Message from Kemperi Baihua, Huaorani Community Bameno, Preface, JUDITH KIMERLING, *¿MODELO O MITO? TECNOLOGÍA DE PUNTA Y NORMAS INTERNACIONALES EN LOS CAMPOS PETROLEROS DE LA OCCIDENTAL [MODEL OR MYTH? CUTTING EDGE TECHNOLOGY AND INTERNATIONAL STANDARDS IN OCCIDENTAL'S OIL FIELDS]* (2006) (translated from Huaorani to Spanish by Penti Baihua. Related to the author on August 8, 2005). Kemperi is the lead plaintiff in the new lawsuit by a group of Huaorani against Steven Donziger and Amazon Defense Front, discussed below.

135. In the process of organizing themselves and seeking to engage in a dialogue with the *cowode*, the Ome Yasuni communities are learning about new threats to their territory and self-determination. Much has been written about violations of Indigenous peoples' rights by harmful "development" in Amazonia, and the Huaorani still face that threat. But the Huaorani who live in and around The Intangible Zone and Yasuni National Park also face a new threat: conservation NGOs and bureaucracies. Although Yasuni National Park and Yasuni Biosphere Reserve have existed on paper since 1979 and 1989, respectively, for years, the government and international conservationists paid relatively little attention to the area. Most Huaorani did not know that a park and reserve had been superimposed on their lands. More recently, however, as international financial support for conservation has surged, there has been growing interest in both the biologically-diverse, carbon-rich forests of Yasuni and the Huaorani family group(s) who live in voluntary isolation. The Ome Yasuni Huaorani appreciate that a lot of people want to protect the rainforest that is their home. However, they are concerned because so many outsiders from public institutions and NGOs want to direct programs and projects that make decisions about Yasuni without taking them or their rights into account. Despite international recognition of the value to conservation of the traditional knowledge of Indigenous peoples like the Huaorani—and significant commitments by governments and conservation organizations to respect the rights of Indigenous peoples in protected area policies and activities around the world—the new projects and programs that purport to protect biological and cultural diversity in Yasuni still follow a technocratic, expert-dominated paradigm that empowers outside professionals

For the Huaorani, a healthy environment is about much more than cleaning up pollution and protecting natural resources. It is also intimately related to the survival of the Huaorani people and their culture and identity. *Ome* is the Huaorani word for territory (and rainforest). For the Huaorani who still live in the forest, *Ome* is a “giving” environment, and a space where they can exercise genuine political self-determination, maintain their culture and identity, and live as Huaorani—without outsiders spoiling the forest or trying to dominate the People (*Huaorani*) and tell them how to live.<sup>136</sup>

and excludes local communities from decision-making processes. This approach not only ignores the rights and interests of community members, but also fails to appreciate that the vital link between the continued existence of the Huaorani, their culture, and the “giving” ecosystem that is their home represents a tremendous, and irreplaceable, opportunity for sustainable conservation in Yasuni. At the same time, there are signs of paternalism and belief in robust state intervention in Ecuador’s current government. For example, one high-level official explained to me that “the problem in the Amazon is the absence of the State, so the solution lies there; we need to *reconquistar* (re-conquer) the Amazon.” It is not surprising, then, that there has been considerable resistance to efforts by the communities to gain access to information, make themselves understood, and engage conservation project managers and public officials in a constructive dialogue. This is true even as those managers and officials claim to consult with local communities and decorate posters and brochures with pictures of community members. For a fuller discussion, see Kimerling, *supra* note 53, at 98-113; see also *Comunicado de las Comunidades Waorani (Huaorani) de Yasuni sobre la Iniciativa Yasuni-ITT y Conservación de Yasuni* [Communication from the Waorani (Huaorani) Communities of Yasuni About the Yasuni-ITT Initiative and Conservation of Yasuni], Oct. 25, 2010.

136. The aspirations of Ome Yasuni are summarized in an online petition to the President of Ecuador:

This is our petition: Something of this great rainforest territory must remain for us, the Huaorani, where we can continue to live freely and in accordance with our culture, without oil companies, settlers, roads, military and security forces, loggers, bureaucrats, or other outsiders damaging the forest or telling us how to live. We need a legal title to our territory, and reforms to the laws of Ecuador to protect *Ome* and our right to live as we wish, as Huaorani.

Our fate and the fate of Yasuni are one. Without territory and self-determination, we cannot survive. Without the Huaorani to defend and care for her, the Yasuni Rainforest cannot survive.

Ome Gompote Kiwigimoni Huaorani, *Presidente de la Republica de Ecuador: Stop Destroying Yasuni Rainforest—“Something Must Remain for the Huaorani,”* available at [www.change.org/OmeYasuni](http://www.change.org/OmeYasuni). The petition letter has two basic parts: “*Algo tiene que quedar* [Something Must Remain]” and “*Deje Vivir* [Let Us Live].” See also Ome Yasuni, *Message from Huaorani of Yasuni Part 1: Ahua*, YOUTUBE (Oct. 18, 2011), [http://www.youtube.com/watch?v=kMSCJTdr\\_Z0](http://www.youtube.com/watch?v=kMSCJTdr_Z0); Ome Yasuni, *Message from Huaorani of Yasuni Part 2: Kemperi*, YOUTUBE (Oct. 18, 2011), <http://www.youtube.com/watch?v=nCUXyzk863A>; Ome Yasuni, *Message from Huaorani of Yasuni Part 3: Pentí*, YOUTUBE (Oct. 18, 2011), <http://www.youtube.com/watch?v=MyjsS1Sm65M> (video messages from Bameno community members). A related challenge that Ome Yasuni is also working to resolve involves controversial efforts to create a supreme tribal authority that could speak for all Huaorani—and if needed, legally represent the Huaorani and sign agreements with outsiders who seek to manage or extract their natural resources. Those efforts began with the post-

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When it comes to remedies, then, cases like *Aguinda* pose complex but not necessarily insurmountable challenges. That said, it remains to be seen whether the victory in the Lago Agrio court—or a possible settlement through the plaintiffs’ lawyers or Ecuador’s government—will obtain meaningful remedies for the Huaorani and other affected groups, or simply empower and enrich a new layer of elites, and perpetuate the injustices and injuries. The big question is: how can we translate these grand ideas and complex litigation into meaningful remedies for the Huaorani and other *Afectados*?

The decision to allow Amazon Defense Front to essentially control the monies awarded by the Lago Agrio Court reflects and reinforces the failure of the *Aguinda* litigation elites to allow meaningful participation by the affected Indigenous communities in decision-making processes, and their apparent determination to, in the words of Huaorani critics, “speak for all but work only with a few.” The Huaorani and other Indigenous peoples who have suffered most from Texaco’s operations risk becoming symbols of justice without getting justice or adequate remedies.

The Huaorani are also responding to those challenges. In November 2012, a group of forty-two Huaorani from five communities moved to intervene in *Chevron v. Donziger*, in order to defend the Lago Agrio judgment and the rights and interests of the Huaorani in the judgment by (1) opposing Chevron’s challenges to the validity of the judgment, and (2) asserting cross claims against Donziger and Amazon Defense Front. The proposed Huaorani intervenors sought to defend the integrity of the Ecuadorian judgment, but not any alleged misconduct by the plaintiffs’ legal team (including Amazon

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Texaco generation of oil companies and USAID, working with the Huaorani organization Waorani Nationality of Ecuador (NAWE, formerly Organization of the Huaorani Nationality of the Ecuadorian Amazon (ONHAE)), but now appear to also be gaining support from Ecuador, UN agencies involved in conservation projects in Yasuni, and some NGOs. Increasingly, those outsiders need new intermediaries (other than missionaries) to legitimize their activities and deal, in their way, with the Huaorani. The effort to impose a chief legal and political representative on the Huaorani thus appears, at least in part, to be a response to the mounting recognition of Indigenous peoples’ rights in national and international law and policy—which seeks to vest the rights of the Huaorani over their lands, territory and resources, and their right to participate in decision-making that affects them, in a legal body that is controlled by a small circle or even one person. The Ome Yasuni communities regard NAWE as “a social organization that should help the communities,” and not as a tribal authority or legal representative of the communities or their members. A fundamental and deeply held norm of Huaorani culture is that “no one goes to the home of another to *obligar*” (oblige them, or tell them what to do). In addition, although the Huaorani people have a sense of shared identity and territory, there are distinct kinship groups who have ties with clearly defined areas of traditional Huaorani territory, and according to customary law, local communities have the right to manage and control the territory they inhabit and defend. It is not surprising, then, that the effort to transform NAWE into a tribal government and authority pursuant to *cowode* law is a stealthy, and mysterious, external process that does not have the free, prior and informed consent of the Huaorani people.

Defense Front) and their associates.<sup>137</sup>

The [Proposed] Answer and Cross-Complaint in Intervention alleged—on behalf of the proposed intervenors' communities and family groups and the Huaorani people—that the judgment in the Lago Agrio lawsuit is based “in significant part” on injuries suffered by the proposed intervenors and other Huaorani, and that it “recognizes their right to benefit from the judgment.”<sup>138</sup> The cross claims against Donziger and Amazon Defense Front sought a declaratory judgment,<sup>139</sup> the imposition of a constructive trust,<sup>140</sup> and an accounting<sup>141</sup> to protect the Huaorani's “significantly protectable interest in the Lago Agrio Judgment and their right to remedies as alleged and adjudged in the Lago Agrio [I]itigation.”<sup>142</sup>

The proposed Huaorani intervenors disputed the claims by Donziger and Amazon Defense Front to represent them<sup>143</sup> but alleged that, as a result of the

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137. Proposed Intervenors' Memorandum of Law in Support of Motion to Intervene at 1-3, 27, *Chevron Corp. v. Donziger*, No. 11-CV-0691 (LAK) (S.D.N.Y. Nov. 30, 2012); *see also generally* [Proposed] Answer and Cross-Complaint in Intervention, *Chevron Corp. v. Donziger*, No. 11-CV-0691 (LAK) (S.D.N.Y. Nov. 30, 2012) (denying that the proposed Huaorani Intervenors engaged in, or had any knowledge of, any unlawful acts or misconduct alleged by Chevron against Donziger and Amazon Defense Front and their associates, and denying that the Lago Agrio judgment is unenforceable or non-recognizable). The author is co-counsel for the proposed intervenors, with Lee Boyd Crawford and Schwarcz, Rimberg, Boyd & Rader.

138. [Proposed] Answer and Cross-Complaint in Intervention *supra* note 137, ¶ 2, at 90-91.

139. Specifically, the proposed Huaorani intervenors seek a declaration that they, and every Huaorani and Huaorani community and family group, are entitled to recover their share of the proceeds of the Lago Agrio judgment, and that Donziger and Amazon Defense Front owe the proposed Huaorani intervenors fiduciary duties, including a duty to protect their interests in the Lago Agrio judgment and their right to remedies, a duty to notify them of any arrangements with third parties (including investors, funders, and/or the Republic of Ecuador) to receive or administer any proceeds of the judgment, a duty to notify them of the status of any enforcement proceedings, a duty to notify them of and include them in any settlement talks related to the judgment or underlying claims, a duty to provide an accounting of any proceeds received from the judgment, and a duty to remit to the proposed intervenors and to other Huaorani (and their communities) their rightful portion of the judgment or any settlement. *Id.* ¶ 99.1, at 129-30.

140. *See id.* ¶¶ 70-83, at 119-24 (Breach of Fiduciary Duty/Constructive Trust claim).

141. Specifically, the proposed intervenors seek an accounting of “any interests in the Lago Agrio Judgment purportedly sold, of any monies received thereby, of any interests in the Lago Agrio Judgment otherwise encumbered, of any arrangements with the Republic of Ecuador to receive or administer any proceeds of the judgment, of any judgment proceeds paid to or collected by [Donziger and/or Amazon Defense Front] and/or their associates in connection with the Lago Agrio Judgment, and of any proceeds anticipated or paid to or collected by [Donziger and/or Amazon Defense Front] and/or their associates by virtue of any settlement talks, discussions or negotiations.” *Id.* ¶ 99.4, at 130.

142. *Id.* ¶ 2 at 91.

143. The proposed Huaorani Intervenors also dispute the claim by Amazon Defense Front's *Asamblea de Afectados y Afectadas por Texaco* (Assembly of Persons Affected by

defendants' actions in connection with the Lago Agrio litigation and of the judgment consequently entered and affirmed on appeal, Donziger and Amazon Defense Front now owe a fiduciary duty to them, including, among other things, a duty to protect their interests in the Lago Agrio judgment and their right to remedies, a duty to notify the proposed Huaorani intervenors of the status of any enforcement proceedings and of any arrangements with third parties (including investors, funders, and/or the government of Ecuador) to receive or administer any proceeds from the Lago Agrio litigation, and a duty to remit to the Huaorani intervenors and other Huaorani (and their communities) their rightful portion of the judgment.<sup>144</sup> The proposed cross-complaint in intervention further alleged that Donziger and Amazon Defense Front have breached their fiduciary duties and have a conflict of interest with the Huaorani; that the decision to award control over the judgment monies to Amazon Defense Front was made without consulting the Huaorani; and that Amazon Defense Front and its lawyer, Pablo Fajardo (who also represents the Lago Agrio plaintiffs), have refused to provide the proposed Huaorani intervenors with meaningful information about the basis of their purported representation of the Huaorani and their plans to use monies from the judgment to remedy harms suffered by the Huaorani.<sup>145</sup> The proposed cross-complaint

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Texaco) ("ADAT"), to represent the Huaorani. ADAT was created by Amazon Defense Front in 2001, in response to a resurgence of local organizing in the affected communities in the wake of disquieting news that the plaintiffs' lawyers in the *Aguinda v. Texaco* lawsuit were secretly negotiating a possible settlement agreement with Texaco. Through ADAT, Amazon Defense Front and the plaintiffs' lawyers sought to create the appearance of a democratic body that could claim to represent the affected communities, and be used to buttress efforts by Amazon Defense Front to build support for a settlement proposal, legitimize decisions made by the plaintiffs' lawyers, speak in the name of all affected groups, administer monies from the litigation, and act as an intermediary and gatekeeper between the affected communities and external stakeholders. Despite its impressive name, ADAT has limited participation and is evidently dominated by Amazon Defense Front. For a fuller discussion of ADAT and Amazon Defense Front's early efforts to speak for the affected communities, see Kimerling, *supra* note 6, at 632-41 (Amazon Defense Front and ADAT); *see also* Kimerling, *supra* note 93, at 6-7 (Amazon Defense Front).

144. [Proposed] Answer and Cross-Complaint in Intervention, *supra* note 137, at 97-98 ¶ 16, 118-19 ¶ 69, 129-130 ¶ 99.1.

145. *Id.* 96-100 ¶¶ 15-22, 113-18 ¶¶ 57-68. In January 2012, representatives of the proposed Huaorani intervenors sent a letter to Amazon Defense Front, stating that they had learned about the Lago Agrio lawsuit and judgment—and claims by Amazon Defense Front that the litigation would remedy harms suffered by the Huaorani—from other sources. The letter requested information about the portion of the Lago Agrio judgment that corresponds to the Huaorani, and about how and when Amazon Defense Front would repair and compensate the damages the Huaorani had sustained. In addition, the letter asked Amazon Defense Front to clarify and explain the basis for its claim, and the claim of its lawyers, to represent the Huaorani. The letter also questioned ADAT's claim to represent the Huaorani, and asked Amazon Defense Front to provide the names of the members of ADAT. The letter further inquired about reports that the plaintiffs and lawyers had made an agreement with Ecuador for the government to administer proceeds of the litigation, and asked Amazon



also included a claim for unjust enrichment.

Chevron, Donziger, and the representatives of the Lago Agrio plaintiffs (LAPs) opposed the motion to intervene. In January 2013, the motion was denied—as untimely, and additionally, because the district court ruled that the existing parties would protect the Huaorani’s interests in that case. Insofar as the proposed intervenors sought to protect the Lago Agrio judgment, the Court stated that the Huaorani’s objectives are aligned with the LAPs, so *their* defense of the judgment will protect any interests the Huaorani may have. As for the cross-claims, the court acknowledged that Donziger and the LAPs will not represent those interests or objectives, but ruled that “Chevron can be relied upon to do so” because (1) the claim that Donziger and Amazon Defense Front “made the decision . . . to award control over any recoveries to a trust run by the ADF [Amazon Defense Front] falls well within Chevron’s contention that the Judgment was ghost written by the LAPs;” and (2) “Chevron has asserted vocally that Donziger and the other lawyers have schemed to ensure that any recovery that may be obtained be placed in a trust outside of Ecuador for the

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Defense Front to tell them if those reports were true. The letter was directed to Luis Yanza and Pablo Fajardo, and asked them to provide the requested information in writing within fifteen days. Letter from Kemperi Baihua Huani and others, to Luis Yanza and Pablo Fajardo, *Frente de Defensa de la Amazonia* [Amazon Defense Front] (Jan. 18, 2012), available at Declaration of Judith Kimerling in Support of Motion to Intervene, Exhibit B, *Chevron Corp. v. Donziger*, No. 11-CV-0691 (LAK) (S.D.N.Y. Nov. 30, 2012). In response, Yanza and Fajardo wrote a letter stating that they had tried to speak with the Huaorani “since a long time ago,” but that it had not been possible to do so—thereby acknowledging that Amazon Defense Front and the Lago Agrio plaintiffs’ lawyers had never informed or consulted with the Huaorani, or included them in decision-making processes. The response letter also acknowledged that the Huaorani people should benefit from the Lago Agrio litigation, and said that Amazon Defense Front hoped to establish a relationship with the Huaorani. It suggested that the Huaorani representatives organize a meeting for Yanza and Fajardo to attend, to give them the information they need, but did not provide any of the requested information. Letter from Luis Yanza, Coordinator, *Asamblea de Afectados* [Assembly of the Affected People] and Pablo Fajardo, Attorney, to *Compañeros* and *Compañeras* of the Huaorani Nation (Jan. 26, 2012), available at Declaration of Judith Kimerling in Support of Motion to Intervene, Exhibit C, *Chevron Corp. v. Donziger*, No. 11-CV-0691 (LAK) (S.D.N.Y. Nov. 30, 2012). In February 2012, a Huaorani leader and representative of the plaintiffs sent another letter to Yanza and Fajardo, stating that the plaintiffs would welcome a meeting with Amazon Defense Front, but that in order to have a “serious meeting” and not simply talk “in the air,” Amazon Defense Front would first need to provide the information requested in the previous letter. After learning about said information, the Huaorani representatives would be able to engage in a meaningful dialogue with Amazon Defense Front and, the letter continued, would then like to organize a meeting “in order to talk and find a solution.” Letter from Pentibo Nagiape Baihua Miipo, Coordinator, Bamenno Huaorani Community and General Coordinator, *Ome Gompote Kiwigimoni Huaorani* [We Defend Our Huaorani Territory], to Luis Yanza and Pablo Fajardo, *Frente de Defensa de la Amazonia* (Feb. 10, 2012), available at Declaration of Judith Kimerling in Support of Motion to Intervene, Exhibit D, *Chevron Corp. v. Donziger*, No. 11-CV-0691 (LAK) (S.D.N.Y. Nov. 30, 2012). To date, Yanza and Fajardo have not responded to the February letter or provided the requested information.

purpose of cutting up the pie among the lawyers and their financiers in a jurisdiction outside of Ecuadorian control, and then passing the residue to the Ecuadorian trusts which they control through ADF.”<sup>146</sup>

The court further reasoned that the proposed Huaorani intervenors could pursue their cross-claims in independent legal actions in New York State and “other courts,” and that their presence in the *Chevron v. Donziger* case would “delay and complicate” an already complicated lawsuit that “is well along the path” to a trial in the fall of 2013.<sup>147</sup> In February 2013, the Huaorani representatives filed a new lawsuit against Donziger and Amazon Defense Front in New York State Supreme Court, to assert their claims for declaratory judgment, breach of fiduciary duty/constructive trust, unjust enrichment and an accounting arising out of Donziger and Amazon Defense Front’s actions in connection with the Lago Agrio case and related activities and litigation.<sup>148</sup> And that is where things stand now.<sup>149</sup>

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146. *Chevron v. Donziger*, No. 11-CV-0691 (LAK), 2013 WL 150006 (S.D.N.Y. Jan. 14, 2013).

147. *Id.*

148. Plaintiffs Summons and Complaint, *Kemper Baihua Huani v. Donziger*, No. 151372/2013 (N.Y. Sup. Ct. Feb. 13, 2013).

149. Since the attempt to intervene, developments in *Chevron v. Donziger* have cast an even greater pall on the conduct by the LAPs’ legal team—and the judgment. On January 28, 2013, *Chevron* submitted a declaration by Alberto Guerra, a former judge of the Lago Agrio court, stating that he had worked as a ghostwriter for the judge who signed the Lago Agrio judgment (Nicolas Zambrano); taken money from the LAPs’ legal team to write court rulings in their favor; and participated in a bribery scheme in connection with the verdict, whereby Judge Zambrano (allegedly) allowed the LAPs’ legal team to write the Lago Agrio judgment, which was then “fine-tune[d] and polish[ed]” by Guerra and signed by Judge Zambrano, in exchange for a promise by the LAPs’ representatives to pay the judge \$500,000 from the proceeds of the judgment. Declaration of Alberto Guerra Bastidas, ¶ 25, *Chevron Corp. v. Donziger*, 11-CV-0691 (LAK) (S.D.N.Y. Jan. 28, 2013), EFC 746-3. In February and March, in a pair of rulings on discovery disputes, Judge Kaplan reviewed the evidence in the record and found that *Chevron* had established “at least probable cause to believe that there was fraud or other criminal activity in the procurement of the [Lago Agrio] Judgment and in other respects relating to the Lago Agrio litigation” and “in certain litigation in the United States.” *Chevron v. Donziger*, 11-CV-0691 (LAK), 2013 WL 1087236, at \*2 (S.D.N.Y. Mar. 15, 2013) (ordering Patton Boggs to produce documents to *Chevron* pertaining to subjects for which there is probable cause to suspect fraud or criminal activity); see also *Chevron v. Donziger*, 11-CV-0691 (LAK), 2013 WL 646399, at \*3, 12-13 (S.D.N.Y. Feb. 21, 2013) (findings underlying protective order barring defendants from disclosing declarations by two witnesses in Ecuador to anyone other than counsel of record and the Stratus defendants, which include: “substantial evidence of fraud” by the LAPs’ legal team; “good cause” for preventing disclosure of the witnesses’ identities to Donziger and the LAPs and “their counsel and allies in Ecuador, including the Ecuadorian government, [because it] is substantially likely to result in reprisals against [the witnesses] as well as efforts to intimidate them . . . to alter their testimony;” and that the privacy interests of the witnesses, “the need to safeguard them from intimidation and economic and physical reprisals,” and the public and private interests in obtaining their cooperation “outweigh the private interests of the defendants and overcome the presumption of public access to judicial

## CONCLUSION AND LESSONS LEARNED

There are a number of important lessons here—lessons *not* learned. I refer

documents”). More specifically, Judge Kaplan found that:

[T]here is probable cause to suspect, and often stronger evidence [footnote omitted], that:

- Representatives of the LAPs bribed the Ecuadorian judge to obtain the result they wanted and, as part of the deal, wrote the Judgment to which the judge put his name . . . .
- At an earlier stage of the Lago Agrio litigation, representatives of the LAPs coerced the then-presiding Ecuadorian judge to terminate judicial inspections of the alleged pollution sites, to replace that process with a global expert charged with making an independent evaluation, and to appoint the LAPs' candidate . . . (“Cabrera”) to that position . . . by threatening him with a judicial misconduct complaint if he did not accede to their wishes.
- The report that Cabrera ultimately submitted was in fact planned and written, at least in major part and quite possibly entirely, by lawyers and consultants retained on behalf of the LAPs though it was signed by Cabrera and filed as if it were his independent work. LAP representatives, moreover, took a number of steps to create or reinforce the entirely inaccurate contention that the Cabrera report was the unbiased work of an independent expert . . . .
- Once the improprieties surrounding Cabrera began to come to light, the LAPs or their representatives then obstructed justice and committed fraud in at least one Section 1782 proceeding in the United States by submitting to a court in Colorado a deceptive account of the LAPs' relationship with Cabrera [in a declaration signed by Pablo Fajardo].
- At a still earlier stage of the lawsuit in Ecuador, the LAPs filed two site inspection reports with the trial court over the signature of one of their experts . . . . The evidence readily gives rise to the inference that the LAP lawyers wrote the reports, affixed the expert's signature to them in the knowledge that they did not reflect his views, and filed them.

*Donziger*, 2013 WL 1087236, at \*2. On March 22, Chevron entered into a settlement agreement with the Stratus defendants (Stratus Consulting and employees Douglas Beltman and Ann Maest). A few weeks later, Chevron filed Witness Statements by Beltman and Maest, which admitted that Stratus and its contractors ghostwrote most of the report that was submitted by Cabrera to the Lago Agrio court; described the damages assessment in the report as “tainted” by Donziger and the LAPs' representatives and not supported by “reliable” science; and “diavow[ed]” the Cabrera report and “all findings and conclusions” in all of their reports and testimony related to case. Witness Statement of Douglas Beltman, ¶¶ 20-31, 47, 60, 76, *Chevron Corp. v. Donziger*, 11-CV-0691 (LAK) (S.D.N.Y. Apr. 12, 2013), EFC 1007-1, at 18-45 [hereinafter Beltman Statement]; Witness Statement of Ann Maest, ¶¶ 26-31, 38, 43-44, 50, *Chevron Corp. v. Donziger*, 11-CV-0691 (LAK) (S.D.N.Y. Apr. 12, 2013), EFC 1007-1, at 47-62 [hereinafter Maest Statement]. The statement by Beltman, who was the “Stratus officer in charge” of the work for the LAPs' legal team, also described how Stratus helped the LAP representatives write comments on the Cabrera report, to submit to the court, which generally approved (their own) report but also claimed that certain “omissions” favored Chevron and understated remediation costs; then helped the LAP team draft Cabrera's responses to the LAP comments (and increase the damages assessment by billions of dollars); and finally, prepared comments in Stratus' name to endorse the Cabrera report. Beltman Statement at ¶¶ 38-46, 58-61. The Stratus comments were edited by Donziger, who, according to Beltman, added language “describing Cabrera as a ‘neutral expert’ equivalent to that of a United States ‘Special Master.’” *Id.* at ¶ 59. The statements by Beltman and Maest further commented that Cabrera “lacked” the “qualifications and experience” to prepare a multi-disciplinary damages assessment; explained that Stratus had been formally retained and paid by Kohn, Swift & Graf but worked under Donziger's direction and control; and observed that the LAP team in Quito also looked to Donziger for direction. *Id.* at ¶¶ 2-5, 15; Maest Statement, at ¶¶ 3, 18-24, 27. A full discussion of these developments is beyond the scope of this Article.

to them as “lessons *not* learned” is because they reflect long-standing patterns of exclusion and inequities.

First, the dispute with Amazon Defense Front is unfortunate. However, it is not entirely surprising because it is not uncommon for conflicts of interest to arise between Indigenous peoples and external NGOs. In those situations, the NGOs claim to represent and speak for Indigenous peoples. But when local communities and community members try to speak for themselves, and participate directly in processes that affect their rights and interests, all too often, the NGOs and their associates perceive a threat to their own interests and marginalize the grassroots actors.

This is a widely-recognized pattern that I believe has repeated itself in this case. Indigenous communities around the world are working to rectify this recurring challenge, and these same fundamental concerns and aspirations are a major factor that is driving the decision by the Huaorani representatives to seek to participate in the litigation. A lesson we need to learn, then, is that inclusion and participation do not come about because an outsider claims to represent a group like the Huaorani, or even chooses a member (or a few members) of a group to represent them. Inclusion and participation need to be experienced as inclusive and respectful by the members of the group, and that means allowing them to choose their own representatives and be engaged in a meaningful way, if that is what they want.

Another long-standing pattern that is reflected and reinforced in this case is the failure to recognize the culture clash between our legal system and Huaorani culture and law. The Huaorani have been subjected to an external legal regime without their consent, and excluded from decision-making processes that affect them. We see the culture clash in the decision by the *Chevron v. Donziger* Court to deny the Huaorani representatives’ motion to intervene, because it holds them to our standards of timeliness; chides them for not jumping into the case fast enough; complains that their participation will delay and complicate the proceedings; and contends that excluding the Huaorani will not be prejudicial because any concerns or legal interests they might have will be protected by other parties.

Of course, there is a certain logic to this reasoning in our legal culture. But there is another dimension that we need to think about, as well: the perspective and experience of the Huaorani with our law, and the concerns and aspirations that led them to decide to try to engage with our legal system in order to protect their interests in the litigation.

It began when a BBC film and radio crew visited one of the Huaorani communities in the Ome Yasuni alliance, Bameno, a couple of days after the Lago Agrio judgment was issued, to interview community members for news reports about another topic (oil development and conservation in Yasuni National Park). I was visiting Bameno at the time, and one of the producers asked what we thought about the judgment. The news of the judgment sparked a conversation among community members, and I was asked to investigate.

One of the principles that guides my work in the Amazon is to help grassroots communities and community members educate and empower themselves, so that they can bring their voices to the table as direct participants in processes that affect their rights and interests. I agreed to find more information, and that led to a process of reflection and decision-making in that, and neighboring, communities which, in turn, led to a decision to work together—with forty-two representatives from five communities—to better understand and participate in the litigation.

Initially, the Huaorani representatives tried to have a dialogue with Amazon Defense Front. But the organization refused to give them information about the basis of its (and its lawyers') purported representation of the Huaorani and its plans to use monies from the Lago Agrio judgment to remedy their injuries. It even refused to disclose whether rumors that it had made a deal with Ecuador's government, for the government to administer monies from the litigation, are true or not.

So now the Huaorani representatives want to use our legal system. Nevertheless, they still see it as our law, not theirs. To understand the Huaorani claimants' perspective, we need to remember that before Texaco arrived, their family groups were free and sovereign. Their rainforest territory gave them life and their way of life, and they lived in accordance with their own culture—and law.

After Chevron and Ecuador decided to extract oil from Huaorani territory, the *cowode* (strangers) used *their* law, to impose, override, and violate Huaorani law. The *cowode* law denigrated Huaorani culture and asserted an overriding right to colonize Huaorani territory, to extract oil and damage the forest, and to dominate and govern the People (*Huaorani*). Of course, we all know some version of this history, but most people think it ended hundreds of years ago. For the Huaorani, however, the history of conquest and domination began just a few decades ago. And with it came a process of loss of territory and natural resources, rapid change, and external pressures that now threatens their survival as a people.

The Huaorani claimants understand that, but they are determined to survive and, as they say, “leave [their] own history” and pass on their culture and territory to their grandchildren. They have not given up their own “Huaorani law” and sovereign responsibility for their lives and rainforest territory. And although they are beginning to see tools in our legal system that can help them co-exist, in peace, with the *cowode*, they also feel endangered by our law because it—we—have not yet learned how to take into account Huaorani culture and the very real differences between their culture and ours. In addition, we have not yet learned how to remedy long-standing injustices and the roots of human rights violations against Indigenous peoples. From the Huaorani's point of view, our law is a powerful and mysterious process that attacks their law and erodes their rights, and seeks to dominate and impose.

Thus, another lesson we need to learn is how to better respond when the

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Huaorani—and other Indigenous peoples—seek to engage in new and constructive ways with our legal and political processes, whether to remedy violations of their rights or address the root causes of those violations. This is important not only for the Huaorani but also for us, because the way our legal system is perceived by people who are affected by it matters. Lack of meaningful participation and failures in the administration of justice hurt us, because they erode the legitimacy of our legal system in the eyes, and experience, of people who are affected by it. They also beg the question: what kind of society are we?

I understand that this is idealistic but I will say it anyway. If disputes are simply resolved by power, why do we need law? Law should be about justice, and the administration of justice and effective remedies, even in the most complex litigation. With that in mind, I want to end by posing what I believe is the obvious and most important question in this case: What are the true victims—who include the Huaorani and other *Afectados* with real injuries, rights and claims—left with, by way of legal remedies, now that the Lago Agrio judgment is in question through no fault of their own?