

# Oil, Contact, and Conservation in the Amazon: Indigenous Huaorani, Chevron, and Yasuni

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## I. INTRODUCTION

The Huaorani (Waorani) are hunters and gatherers who have lived in the Amazon Rainforest since before written history. Their ancestral lands span some 20,000 square kilometers and include the area now known as Yasuni National Park and Biosphere Reserve in the Republic of Ecuador. 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>1</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* (humans, or people). They refer to outsiders as *cowode*, which means *desconocidos* (strangers). For centuries, Huaorani warriors defended their territory from intrusions by *cowode* who 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." 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>2</sup> who were trying to make "contact" with them.<sup>3</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,

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1. 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 Huaorani who live in Yasuni, and say that their rainforest territory *Ome* "gives us everything" and "gives us life and our way of life."

2. 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).

3. See, e.g., "Go Ye and Preach the Gospel": Five Do and Die, LIFE MAG., Jan. 30, 1956; ELISABETH ELLIOT, *THROUGH GATES OF SPLENDOR* (1957) (account of SIL/WBT's "Operation Auca," written by the widow of one of the slain missionaries).

teach them to live as Christians, and translate the Bible into their native tongue.<sup>4</sup>

In 1967, a consortium of foreign companies—wholly-owned subsidiaries of Texaco and Gulf, both now part of Chevron—struck oil in Ecuador’s Amazon region, 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>5</sup>

Oil exports began in 1972, after Texaco Petroleum, the operator of the consortium, completed construction of a 313-mile pipeline to transport crude oil out of the remote Amazon region across the Andes Mountains to the Pacific coast. 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>6</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 destruction rather than progress. Their homelands were invaded and degraded by outsiders with unrelenting technological, military, and economic power. The first outsiders came from the sky; over time, they dramatically transformed natural and social environments. Their territory reduced and world changed forever, the Huaorani have borne the costs of oil development without sharing in its benefits or participating in a meaningful way in political and environmental decisions that affect them. Today, Huaorani who still live in their ancestral lands in Yasuni are organizing to defend their remaining lands, way of life, and self-determination. In addition to encroachments by oil companies and settlers, they face a new threat:

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4. See ETHEL EMILY WALLIS, *THE DAYUMA STORY: LIFE UNDER THE AUCA SPEARS* (1971); ELISABETH ELLIOT, *THE SAVAGE MY KINSMAN* (1996); STOLL, *supra* note 2; Judith Kimerling, *Dislocation, Evangelization, and Contamination: Amazon Crude and the Huaorani People*, in *ETHNIC CONFLICT AND GOVERNANCE IN COMPARATIVE PERSPECTIVE* 70 (Woodrow Wilson Int’l Ctr. for Scholars, Working Paper Series, No. 215, 1995).

5. The other principal exports were cocoa and coffee. JOHN D. MARTZ, *POLITICS AND PETROLEUM IN ECUADOR* 122, 157 (1987).

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

conservation organizations and bureaucracies that seek to manage Yasuni and govern the Huaorani.

## II. OIL BOOM<sup>7</sup>

Texaco's discovery of commercially valuable oil sparked an oil rush and petroleum quickly came to dominate Ecuador's economy. The company named the first commercial field Lago Agrio, after an early Texaco gusher in Sour Lake, Texas; erected a one-thousand barrel per day refinery that had been prefabricated in the United States; and expanded exploration and production deeper into the rainforest.<sup>8</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>9</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, 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

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7. For citations and a fuller discussion, see 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 (2006); see also MARTZ, *supra* note 5.

8. JUDITH KIMERLING, *AMAZON CRUDE* (1991).

9. MARTZ, *supra* note 5, at 4.

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 and the rights of the Huaorani and other affected Indigenous peoples.

The initial bonanza and easy money from Texaco's early finds were relatively short-lived, and just five years after production began, "a flood of foreign borrowing" was needed to sustain economic growth.<sup>10</sup> Ecuador has been able to secure large loans for its size because of its oil reserves and has accumulated a staggering foreign debt. At the same time, the benefits of oil development have not been well distributed. Income inequality and the percentage of Ecuadorians living in poverty remains stubbornly high.

### III. NATIONAL INTEGRATION AND LAND RIGHTS

When the oil rush began, Ecuador's institutions had very little influence in the Amazon. 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

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10. *Id.* at 207-08.

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>11</sup> Government officials pledged to civilize the Huaorani and other Amazonian peoples.<sup>12</sup>

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>13</sup> Within ten days, the President's declaration of national ethnic homogeneity was codified by executive decree in the National Law of Culture.<sup>14</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 poverty persist.

Ecuadorian 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>15</sup> but it has nonetheless had an enduring effect on the way Ecuador has defined its 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

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11. KIMERLING, *supra* note 8; 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).

12. For a fuller discussion, see Kimerling, *supra* note 7, at 426–33.

13. NORMAN E. WHITTEN, JR., INT'L WORK GRP. FOR INDIGENOUS AFFAIRS, ECUADORIAN ETHNOCIDE AND INDIGENOUS ETHNOGENESIS: AMAZONIAN RESURGENCE AMIDST ANDEAN COLONIALISM 10–12 (1976).

14. *Id.* at 13.

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

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>16</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>17</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>18</sup> Although Frichner primarily examined the operation of the Doctrine of Discovery and related “framework of dominance”<sup>19</sup> in U.S. federal Indian law, her findings are consistent with the experience of the Huaorani in Ecuador. There, a European colonial power and successor nation state have similarly used the Doctrine of Discovery 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.

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16. For a fuller discussion, see *id.* at 30–42; Special Rapporteur of the U.N. Permanent Forum on Indigenous Issues, *Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery*, U.N. Doc. E/C.19/2010/13 (Feb. 4, 2010), available at <http://www.un.org/esa/socdev/unpfii/documents/E.C.19.2010.13%20EN.pdf> [hereinafter U.N. Permanent Forum on Indigenous Issues, *Preliminary Study*]; STEVEN T. NEWCOMB, *PAGANS IN THE PROMISED LAND: DECODING THE DOCTRINE OF DISCOVERY* (2008).

17. U.N. Permanent Forum on Indigenous Issues, *Preliminary Study*, *supra* note 16; NEWCOMB, *supra* note 16.

18. U.N. Permanent Forum on Indigenous Issues, *Preliminary Study*, *supra* note 16.

19. *Id.*

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 domestic law when the oil boom began.<sup>20</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>21</sup> By then, oil extraction and internal colonization by settlers had displaced the Huaorani from many areas. Moreover, notwithstanding that policy change, the right of the Huaorani to own and control their remaining lands, territory, 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. The Doctrine of 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, Ecuador’s national integration policy meant that their ancestral lands were occupied and degraded by outsiders. 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 the 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

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20. 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, in 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).

21. INTER-AM. COMM’N ON HUMAN RIGHTS, OAS.Ser.L/V/II.96, REPORT ON THE SITUATION OF HUMAN RIGHTS IN ECUADOR 100 (1997), available at <http://www.cidh.org/countryrep/ecuador-eng/index%20-%20ecuador.htm>.



lowered from the air. It was during this period, in the late 1960s and early 1970s, that most Huaorani were “contacted” by *cowode* for the first time.<sup>22</sup>

More than 200 Huaorani were pressured and tricked into leaving their homes, and taken to live in a distant Christian settlement.<sup>23</sup> Other Huaorani, including many in the area now known as Yasuni, refused to be “tamed”<sup>24</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:

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>25</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

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22. For a fuller discussion, see STOLL, *supra* note 2; Kimerling, *supra* note 7, at 460–63; and Kimerling, *supra* note 4, 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 3; ELLIOT, *supra* note 4; WALLIS, *THE DAYUMA STORY*, *supra* note 4; ETHEL EMILY WALLIS, *AUCAS DOWNRIVER: DAYUMA’S STORY TODAY* (1973); and 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).

23. See generally WALLIS, *AUCAS DOWNRIVER*, *supra* note 22.

24. The term “tamed” is borrowed from WALLIS, *AUCAS DOWNRIVER*, *supra* note 22. Wallis wrote “the ‘inside’ Auca story” for SIL/WBT, *id.* at ix, and described the (Yasuni) Huaorani who had not relocated to live with the missionaries as “untamed and untaught,” *id.* at 121. Some of those households were subsequently “contacted” by Catholic missionaries, with support from the national oil company, CEPE, in the late 1970s. See MONS. ALEJANDRO LABACA UGARTE, *CRONICA HUAORANI [HUAORANI CHRONICLE]* (1993).

25. KINGSLAND, *supra* note 22, at 125–26.

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, inequality, 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. 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 damaged by outsiders 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>26</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 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 lands.

The missionaries who worked with Texaco had their own converging interests. SIL/WBT described the “Aucas” as “murderers at

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26. 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.

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>27</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>28</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 on the prejudice of cultural superiority.<sup>29</sup> SIL/WBT was evidently aware of the convergence of interests; in “the ‘inside’ Auca story”<sup>30</sup> written by Ethel Emily Wallis,

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27. See WALLIS, *AUCAS DOWNRIVER*, *supra* note 22, at front flap, ix, 68; see also WALLIS, *supra* note 4, at front flap (describing the “Aucas” as “the world’s most murderous tribe”). Stoll describes SIL/WBT’s activities with the Huaorani as its “most famous mission.” STOLL, *supra* note 2, at vii.

28. The term “ethnocidal policy” is borrowed from WHITTEN, *supra* note 13. 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.” *Id.* 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. For a fuller discussion, see Kimerling, *supra* note 7, at 429–30.

29. The definition of discrimination is based on the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, which was adopted by the UN General Assembly in 1963, G.A. Res. 1904(XVIII), U.N. Doc. A/RES/18/1904, and the International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force in 1969, International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 212.

30. WALLIS, *AUCAS DOWNRIVER*, *supra* note 22, at ix.

another missionary 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>31</sup>

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.<sup>32</sup> In 1990, a much larger area—6,125.6 square kilometers (subsequently increased to 6,137.5 square hectares)—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.<sup>33</sup> In 2001, another 234.89 square kilometers was titled to the Organization of the Huaorani Nationality of the Ecuadorian Amazon (“ONHAE”).<sup>34</sup> The decision to award the 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.<sup>35</sup> The Huaorani refer to the reserve, the park, and some adjacent lands as Huaorani territory, *Ome*.

In 1998, Ecuador formally recognized the multicultural nature of

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31. Catherine Peeke, quoted in *id.* at 76; see also MOREANO, *supra* note 22.

32. Municipal Property Registry of the Canton Pastaza, *Certificada* (July 27, 2012) (certifying title to 66,578 hectares adjudicated on Apr. 12, 1983).

33. 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).

34. Municipal Property Registry of the Canton Pastaza, *Certificada* (July 27, 2012) (certifying title to 23,489 hectares adjudicated on Sept. 24, 2001).

35. ECUADOR MINISTRY OF THE ENV'T, PLAN DE MANEJO DEL PARQUE NACIONAL YASUNI [YASUNI NATIONAL PARK MANAGEMENT PLAN] 1 (2011).

the country and some collective rights of Indigenous peoples when it ratified International Labour Organization Convention 169 and included Indigenous peoples' rights in a new constitution. The constitutional rights echo provisions in the International Labour Organization Convention and include some recognition of collective land rights.<sup>36</sup> 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. Current law also claims state ownership of biodiversity and most protected natural areas, including Yasuni National Park.<sup>37</sup>

These restrictions on the rights of the Huaorani over their lands, territory and resources continue to be a major problem for communities in the Yasuni area, 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 the 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

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36. 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); Republic of Ecuador, *Constitución de 1998* [1998 Constitution], tit. III, ch.5, sec. 1, Aug. 11, 1998. Expanded environmental rights were also included in the new constitution, including provisions that echo rights and duties in international instruments to promote sustainable development. For a fuller discussion, see Judith Kimerling, *International Standards in Ecuador's Amazon Oil Fields: The Privatization of Environmental Law*, 26 COLUM. J. ENVTL. L. 289 (2001) [hereinafter *International Standards in Ecuador's Amazon Oil Fields*]; Judith Kimerling, *Rio + 10: Indigenous Peoples, Transnational Corporations and Sustainable Development in Amazonia*, 27 COLUM. J. ENVTL. L. 523 (2002) [hereinafter *Rio + 10*]; 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) [hereinafter *Uncommon Ground*].

37. See Republic of Ecuador, *Constitución de la Republica del Ecuador 2008* [2008 Constitution of the Republic of Ecuador], arts. 1, 400, 404, 405, Oct. 20, 2008; *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).

on the Rights of Indigenous Peoples, adopted by the General Assembly in 2007;<sup>38</sup> 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;<sup>39</sup> decisions and “concluding observations” by CERD in response to individual complaints and country reports, respectively;<sup>40</sup> 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 and American Declaration on the Rights and Duties of Man 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 norms.<sup>41</sup> The

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38. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

39. U.N. Comm. for the Elimination of Racial Discrimination (“CERD”), General Recommendation No. 23 (Aug. 18, 1997). CERD is the official body of independent experts responsible for monitoring implementation of the Convention on the Elimination of All Forms of Race Discrimination by State parties. Ecuador ratified the convention in 1966; it entered into effect on Jan. 4, 1969.

40. *See, e.g.*, CERD, Early Warning and Urgent Action Procedure, Decision 1(68), United States of America, U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006) (Western Shoshone case); CERD, Concluding Observations of the Comm. on the Elimination of Racial Discrimination: Ethiopia, U.N. Doc. CERD/C/ETH/CO/15, (June 20, 2007); CERD, Concluding Observations of the Comm. on the Elimination of Racial Discrimination: Botswana, U.N. Doc. A/57/18 (Aug. 23, 2002).

41. *See, e.g.*, *Mayana (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, Inter-Am. Ct. H.R., (Aug. 31, 2001); *Saramaka People v. Suriname*, Judgment, Inter-Am. Ct. H.R., (Nov. 28, 2007); *Saramaka People v. Suriname*, Interpretation Judgment, Inter-Am. Ct. H.R. (Aug. 12, 2008); *Yakye Axa Indigenous Community v. Paraguay*, Judgment, Inter-Am. Ct. H.R., (June 17, 2005); *Moiwana Community v. Suriname*, Judgment, Inter-Am. Ct. H.R. (June 15, 2005); *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (Mar. 29, 2006); *Pueblo Indígena Kichwa de Sarayacu vs. Ecuador* [Sarayacu Indigenous People v. Ecuador], Judgment, Inter-Am. Ct. H.R., (June 27, 2012); *Indigenous Mayan Communities of Toledo District v. Belize*, Case 12.053, Inter-Am. Comm'n H.R. Report No.40/04 (2004); *Kaliña and Lokono Peoples v. Suriname*, Pet. 198-07, Inter-Am. Comm'n H.R., Report No.76/07 (2007); Inter-Am. Comm'n H.R. Resolution on “Special protection for indigenous populations, Action to combat racism and racial discrimination,” cited in *Yanomani Case*, Inter-Am. Comm'n H.R. Report 12/85, 1985-85, ¶ 8; Inter-Am. Comm'n H.R., Report on the Situation of Human Rights in Ecuador, OAS.Ser.L/V/II.96 (1997). The American Declaration of the Rights and Duties of Man was adopted in 1948 and the American Convention on Human Rights entered into force in 1978; both instruments may also apply to hold states liable

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*.

#### IV. ENVIRONMENTAL PROTECTION IN THE OIL PATCH<sup>42</sup>

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. 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.

When Texaco began its operations, there was little public awareness

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for human rights violations that originated prior to accession, but continue thereafter. Although it is fair to say that there has been a legal revolution in the human rights norms of the Inter-American system, which began with the 2001 landmark decision in *Awas Tingni* and continues to evolve, those norms are still problematic for Indigenous communities whose lands are slated for oil extraction because to date, the rights of Indigenous populations to own and manage natural resources are limited to resources that have been used traditionally by the community. In addition, states may restrict the property rights of Indigenous peoples in certain, exceptional circumstances and permit developments or investments within (or affecting) their territories, although specific safeguards are required in order to minimize the environmental and social impacts of those operations and the free, prior, and informed consent of affected communities must be obtained for some projects. For a discussion of those safeguards and the landmark *Saramaka People v. Suriname* case, see *FOREST PEOPLES PROGRAMME, INDIGENOUS PEOPLES’ RIGHTS AND REDUCED EMISSIONS FROM REDUCED DEFORESTATION AND FOREST DEGRADATION: THE CASE OF THE SARAMAKA PEOPLE V. SURIMANE* (2009).

42. For citations and a fuller discussion, see Kimerling, *supra* note 7.

or political interest in environmental issues. Environmental protection in the oil patch is expensive and requires a lot of work. Moreover, it depends on the use of technology, and Ecuador relied on Texaco as the operator of the first commercial fields 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 “modern and efficient” equipment, train Ecuadorian students, and turn over the operations to Petroecuador when the contract ended in 1992.<sup>43</sup>

In the environmental law vacuum, Texaco set its own environmental standards and policed itself. As Petroecuador’s “professor,” Texaco also set 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. After applying the crude oil, they sat in the sun or covered their hair with plastic caps overnight. To remove the crude oil, they washed their hair with diesel. The rumors attributing medicinal qualities to Amazon crude are not entirely surprising, considering its status as the harbinger of a great future for the nation and Texaco’s neglect of environmental and human health concerns.

In 1990, when government officials were confronted with a study (subsequently published as *Amazon Crude*) by an environmental lawyer from the United States (the author) that documented shocking pollution and other impacts from operations by Texaco and other companies, they professed ignorance. Texaco was their “professor,” they explained; the company taught them how to produce oil, but did not teach environmental protection.<sup>44</sup>

That basic view, that public officials did not realize that industry

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43. Texaco Inc. operated in Ecuador through a wholly-owned subsidiary, Texaco Petroleum Company (“TexPet”). In 1974, two years after commercial production began, Petroecuador (then CEPE) acquired a 25% participating interest in the Texaco-Gulf consortium. In 1977, Petroecuador purchased Gulf’s remaining interests and became the majority shareholder in the new CEPE-Texaco consortium. Texaco retained ownership of 37.5% of the stock, and continued to be the operator of the consortium’s exploration and production assets until 1990, when Petroecuador became the operator.

44. KIMERLING, *supra* note 8, at ix, xxvi.



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>45</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 office had a full-time employee to microfilm all reports and other written materials to send to Coral Gables in a daily mail pouch.

Texaco's international prestige and day-to-day control as the

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45. 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).

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 asked 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* (gives the orders). Everyone works for them."<sup>46</sup>

The consortium led by Texaco extracted nearly 1.5 billion barrels of Amazon crude over a period of twenty-eight years (1964-1992).<sup>47</sup> The operations expanded incrementally and by the time Texaco handed over operational responsibility to Petroecuador in 1990, it had drilled 339 wells in an area that spans roughly one million acres. The facilities were producing some 213,840 barrels of oil daily from more than 200 wells. They also generated more than 3.2 million gallons of toxic wastewater (oil field brine, also known as produced water) every day, virtually all of which was dumped into the environment via unlined, open-air earthen waste pits, without treatment or monitoring—a practice that has been generally banned in the United States by federal law since 1979. In addition, they generated more than 49 million cubic feet of natural gas every day. 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 contaminating the air with greenhouse gases, precursors of acid rain and ground level ozone, soot, and other contaminants.<sup>48</sup>

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46. The exchange (with the author) took place on the Texaco road (Coca-Shiripuno) on Sept. 26, 1993.

47. The dates include exploration and production; commercial production began in 1972. In 1990, Texaco transferred operational responsibility for exploration and production to a subsidiary of Petroecuador, and retained a minority ownership interest in the consortium until its contract with Ecuador expired in 1992.

48. Produced water and natural gas are extracted with the oil and separated at production stations in the field. Produced water wastes typically contain hydrocarbons,

In addition to routine willful discharges and emissions, Texaco spilled nearly twice as much oil as the Exxon *Valdez* from the main pipeline alone, mostly in the Amazon basin.<sup>49</sup> Spills from secondary pipelines, flow lines, tanks, production stations, and other facilities were also frequent and continue to this day.<sup>50</sup> In contrast to the oil 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 no assistance or compensation was provided to affected communities. 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 of downstream communities 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

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which include benzene and polycyclic aromatic hydrocarbons (PAHs), as well as heavy metals, toxic levels of salts, and other contaminants. At some locations, they can also contain naturally occurring radioactive material (NORM). Using government figures, the author estimated that Texaco's total produced water discharge was 19.3 billion gallons, and some 1,600–16,000 gallons of crude oil were discharged into the environment every day as part of that waste stream. Additional sources of pollution included the application of untreated oil to roads, and wastes from drilling and maintenance activities (including well testing and stimulation activities), among others. Most wastes were dumped into open, unlined pits (large holes in the ground), hundreds of which continue to contaminate the region. For a fuller discussion of the operations, impacts, and affected groups, see Kimerling, *supra* note 7, at 449–68; KIMERLING, *supra* note 8, at 31–98.

49. The Exxon Valdez spilled an estimated 10.8 million gallons of oil into the Prince William Sound. According to figures recorded by Ecuador's government, Texaco spilled an estimated 16.8 million gallons from the trans-Ecuadorian Pipeline alone, in thirty major spills, during its tenure as the pipeline's operator. When adjusted using figures from the World Bank for one of the spills, the total increases to 19.23 million gallons.

50. A 1972 directive with instructions for reporting spills, sent from Coral Gables 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 Bd., and signed by R. M. Bischoff, to M. E. Crawford, Acting Manager, Texaco Petroleum Co. in Quito, Ecuador (July 17, 1972) (on file with the author).

or years. The damages caused by Texaco are so serious and widespread that other oil companies now go to great lengths to try to distinguish their operations, and the following has become a common refrain: "We are not like Texaco, we use cutting edge technology and international standards to protect the environment."

As oil extraction facilities age, they generate less oil and more produced water. They also require more costly maintenance to maximize production and prevent spills and other accidental releases. Basic oil field economics, then, do not favor environmental protection because the cost of protection typically increases as the income stream from facilities decreases. Petroecuador has continued to expand operations in the fields developed by Texaco; in addition, exploration and production by Petroecuador and other companies has expanded in new areas.

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 field has lagged, despite both public pledges by a growing number of companies to voluntarily raise environmental standards, and a clear 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 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.<sup>51</sup>

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51. For a study of a corporate initiative claiming to apply best practice and international standards in Ecuador, see *Rio + 10*, *supra* note 36 (environmental and community relations standards and practices); *International Standards in Ecuador's Amazon Oil Fields*, *supra* note 36 (environmental standards and practices); *Uncommon Ground*, *supra* note 36 (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,

## V. LITIGATION IN TEXACO'S HOMELAND<sup>52</sup>

In 1993, a class action lawsuit was filed against Texaco in federal court in New York on behalf of Indigenous and settler residents who have been harmed by pollution from the company's Ecuador operations. The suit, *Aguinda v. Texaco, Inc.*, was filed by U.S.-based attorneys after an Ecuadorian-born lawyer, Cristobal Bonifaz, read about the *Amazon Crude* study.<sup>53</sup>

Class action law permits a group of named plaintiffs to sue as representatives of a plaintiff class, on behalf of a large group of similarly situated individuals. The complaint named some seventy-four plaintiffs, none of them Huaorani. The putative class was estimated to include at least 30,000 persons. The suit was based on common law claims of negligence, nuisance, trespass, civil conspiracy, and medical monitoring. It also included an international law claim, based on the Alien Tort Claims Act, and a claim for equitable relief to remedy the contamination. Until its merger with Chevron in 2001, Texaco's corporate headquarters was in White Plains, New York, and the complaint alleged that decisions directing the harmful operations were made there.

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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.

52. For citations and a detailed discussion of the *Aguinda v. Texaco* litigation, see Kimerling, *supra* note 7.

53. Letter from Cristobal Bonifaz, to author (Oct. 20, 1992) (on file with author); *see also* letter from Cristobal Bonifaz, to author (Nov. 16, 1992) (on file with author). Bonifaz was a co-lead counsel for the plaintiffs until March 2006.

The complaint did not identify all of the affected Indigenous groups or distinguish their claims and injuries from those of the settlers, known locally as “*colonos*” (colonists), who have also been adversely affected by the pollution and included among the named plaintiffs and putative class. Similarly, it did not include claims based on the specific rights of Indigenous peoples. However, in press releases and other public relations and advocacy activities related to the case, the plaintiffs’ lawyers and nongovernmental organizations (“NGOs”) that support the litigation often give the impression that all of the plaintiffs are Indigenous Amazonian peoples. As a result, confusion about the plaintiffs and origins of the litigation have characterized much of the extensive media reporting about the case, and it has commonly been described as a lawsuit brought by “Indians” or “indigenous people from the rainforest.”

In response to the lawsuit, Texaco denied any wrongdoing and vigorously fought the legal action. In submissions to the court and in the media, Texaco alleged that the operations had complied with Ecuadorian law and then-prevailing industry practices. Moreover, the company argued, its subsidiary (Texaco Petroleum) had not operated in Ecuador since 1990, and any legal claims should be pursued there instead of the United States. It touted the ability of Ecuadorian courts to provide a fair and alternative forum to administer justice.

In submissions to the court, Texaco also denied parent-company control over the operations.<sup>54</sup> This effort to distance the parent company from the Ecuador operations and assert that it had no role in environmental management there contradicted both the image that Texaco Petroleum had cultivated in Ecuador, of a leading international company based in the United States, and the image commonly promoted by Texaco in public relations materials and responses to concerned consumers and NGOs before it was sued, of an industry leader engaged in worldwide operations that is committed to environmentally responsible practices wherever it operates. Texaco’s legal submissions further contended that Petroecuador and Ecuador heavily regulated Texaco Petroleum’s environmental practices.

Outside court, Texaco and Ecuador moved quickly to negotiate issues raised by the lawsuit, in what *ABC News Nightline* later called an “exit agreement.”<sup>55</sup> They signed a series of agreements in 1994-1995.

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54. As noted above, Texaco’s Ecuador operations were carried out by a wholly-owned subsidiary, Texaco Petroleum Company, in a consortium, initially with Gulf and subsequently with Petroecuador.

55. *Nightline: Texaco in the Amazon* (ABC television broadcast Oct. 21, 1988). The correspondent, Dave Marash, also described the affected area, which he visited after the

The agreements did not mention the *Aguinda* lawsuit, but purported to address how Texaco Petroleum would remedy the contamination at issue in the litigation.<sup>56</sup> Publicly, Texaco and Ecuador vowed that the company would clean up damaged areas and compensate affected communities.

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remediation, as follows: “This Amazon paradise is as pocked and chipped and scratched as dinnerware at a greasy spoon.” *Id.*

56. The agreements are: REPUBLIC OF ECUADOR, MINISTRY OF ENERGY AND MINES, MEMORANDO DE ENTENDIMIENTO ENTRE EL ESTADO ECUATORIANO, PETROECUADOR Y TEXACO PETROLEUM COMPANY (TEXPET) [MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF ECUADOR, PETROECUADOR AND TEXACO PETROLEUM COMPANY] (Dec. 14, 1994); REPUBLIC OF ECUADOR, MINISTRY OF ENERGY AND MINES, ALCANCE DEL TRABAJO DE REPARACIÓN AMBIENTAL [SCOPE OF THE ENVIRONMENTAL REMEDIAL WORK] (Mar. 23, 1995); CONTRATO PARA LA EJECUCION DE TRABAJOS DE REPARACION MEDIOAMBIENTAL Y LIBERACION 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]. Each agreement is more detailed than the previous one, and the Remediation Contract “substitutes and voids” the memorandum of understanding and incorporates the scope of the remedial work as an annex. *Id.* ¶ 9.6; Annex A. Upon signing the Remediation Contract and “in consideration for [Texaco Petroleum’s] agreement to perform” the work outlined in the accord, Ecuador and Petroecuador committed to “release, acquit and forever discharge” Texaco Petroleum and Texaco Inc. from all claims to Ecuador and Petroecuador for “Environmental Impact arising from the Operations of the Consortium, except for those related to the obligations contracted,” thereby limiting Texaco’s liabilities to the state and its former partner to the relatively narrow scope of work set forth in the agreement. REMEDIATION CONTRACT, art. V. “Environmental Impact” is defined as the presence or release of any solid, liquid, or gaseous substance into the environment, “which causes, or has potential to cause harm to human health or the environment.” *Id.*, art. 1, ¶ 3. In 1998, Ecuador quietly signed off on the Texaco “remediation.” In a document called “The Final Act,” the government certified that Texaco Petroleum had fully performed its obligations under the remedial contract and “released, absolved and discharged forever” Texaco and its affiliates and principals from any claim or complaint by Ecuador and Petroecuador “for reasons related to the obligations acquired” by Texaco Petroleum in the contract. REPUBLIC OF ECUADOR, ACTA FINAL [FINAL ACT], art. IV (Sept. 30, 1998). 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 7, at 493–514, 523. Although the Remediation Contract clearly states that the Release of Claims provisions apply to present and future claims by the government and Petroecuador, and the accord does not include a hold harmless provision, as discussed *infra* in Part VI, Chevron now argues that the Remediation Contract and Final Act granted the company a complete release from any and all liability derived from environmental impacts of the operations and the remedial program, 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 the government instead of Chevron.

Under the accord, Texaco agreed to implement limited environmental 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 around the company's operations and, in the wake of *Aguinda v. Texaco*, sued Texaco Petroleum in Ecuador.<sup>57</sup> In exchange, the government and Petroecuador agreed to release and liberate Texaco Petroleum and Texaco—and their subsidiaries and successors—from all claims, obligations, and liability to the Ecuadorian State and national oil company related to contamination from the operations. The agreements did not include a price tag, but Texaco subsequently reported that it spent \$40 million on the remediation program.

The “remedial work” undertaken by the company, however, was limited in scope and largely cosmetic. It 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 final release of Texaco and its corporate family reflected the enduring political and economic power of the company 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.

In court, after nine years of litigation, Texaco's efforts to dismiss the case were successful, and the *Aguinda* plaintiffs were essentially told to go home and sue in Ecuador. The lawsuit was dismissed on the ground of *forum non conveniens*, a doctrine that allows a court to dismiss a case that could be tried in a different court, in the interest of justice or for the convenience of the parties. Dismissal was conditioned on Texaco's agreement to submit to the jurisdiction of Ecuador's courts.<sup>58</sup>

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57. The (four) lawsuits were filed in local courts in 1994 by the municipal governments of Lago Agrio, Francisco de Orellana (Coca), Joya de las Sachas, and Shushufindi, and sought compensation and cleanup. For citations and a fuller discussion of the lawsuits and subsequent settlements, see Kimerling, *supra* note 7, at 511–14, 537. The settlements were negotiated with local politicians behind closed doors and, like the negotiations with Ecuador's central government, excluded the *Aguinda* plaintiffs and the affected communities, and caused considerable controversy and concern in the oil patch.

58. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd*, 303 F.3d



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 which forum is more convenient. In *Aguinda*, the district court ruled that Ecuador's courts provide an alternative forum, and that the balance of private and public interest factors "tips overwhelmingly in favor of dismissal."<sup>59</sup> Despite the fact that Texaco's headquarters was just a few miles from the courthouse where the case was filed, the judge, Jed Rakoff, concluded that the case has "everything to do with Ecuador and nothing to do with the United States."<sup>60</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

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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." *Id.* 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 plaintiffs' then-pending motion for reconsideration. On appeal, the Second Circuit held that the district court 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 v. Texaco, Inc.*, 157 F.3d 153, 159–63 (2d Cir. 1998). On remand, Texaco "unambiguously agreed in writing to be[] sued on these claims . . . 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, 396 (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 7, at 487–90 (early opposition to the *Aguinda* lawsuit by Ecuador's government), 514–26 (the first dismissal and political instability in Ecuador), and 650–52 (subsequent political turmoil and changing positions in submissions by Ecuador to the *Aguinda* court).

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

60. *Id.* at 537.

United States; Texaco's wholly-owned subsidiary 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 related to control of the operations. While not determinative of the legal questions by itself, 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, 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, was 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 was also at odds with the portrait cultivated by Texaco prior to the litigation, 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 was clearly incongruous with the 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>61</sup>

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61. See, e.g., *Texaco, 25 años preparando manos Ecuatorianas 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" has "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 [emphasis supplied]; 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"); *Texaco, Artículo de Fondo* [*Leading Article*],

The *Aguinda* court's determination that an adequate alternative forum exists 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>62</sup> a finding that was clearly erroneous.<sup>63</sup>

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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 portrait of 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 7, at 613–20. For a fuller discussion of the evidence in the *Aguinda* record and the 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 528–32, 571–625.

62. *Aguinda*, 142 F. Supp. 2d at 539–40 (rejecting plaintiffs' argument that Ecuador's courts do not provide an adequate alternative forum because they are unreceptive to tort claims).

63. 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*

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 is largely limited to cases involving confrontations between political protestors and the police, was also erroneous and 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>64</sup>

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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 los 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 the four lawsuits filed by municipal governments against Texaco Petroleum, discussed above. Those cases were settled and withdrawn prior to adjudication, in the wake of the remedial accord negotiated by Texaco and Ecuador. 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 7, at 534–45.

64. U.S. DEP'T OF STATE, ECUADOR COUNTRY REPORT FOR PRACTICES IN 1999, at 1–2 (2000); U.S. DEP'T OF STATE, ECUADOR COUNTRY REPORT FOR PRACTICES IN 1998, at 1 (1999). For a fuller discussion, see Kimerling, *supra* note 7.

However, the latter report was 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>65</sup> The misquotation was especially troubling because the same statement was quoted correctly by Judge Rakoff on two prior occasions and the litigation record suggested that the court allotted appreciable attention to considering its proper meaning.<sup>66</sup>

The *Aguinda* plaintiffs appealed to the 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 this case, the Second Circuit found no abuse of discretion.<sup>67</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>68</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>69</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>70</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, that “[y]ou can’t try . . . [this case] without having Petroecuador present,” and that “[i]t just is almost a matter of fundamental fairness,”<sup>71</sup> ChevronTexaco (now Chevron)<sup>72</sup> did

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

66. For a fuller discussion, see Kimerling, *supra* note 7, at 552–62.

67. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480 (2d Cir. 2002). As noted above, 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.

68. *Id.* at 476–78 (quoting *Aguinda*, 142 F. Supp. 2d at 537).

69. *Id.* at 479.

70. *Aguinda*, 142 F. Supp. 2d at 550–51.

71. Transcript of Argument on Renewed Motion to Dismiss at 23–24, *Aguinda v. Texaco*, Nos. 93 Civ. 7527, 94 Civ. 9266 (S.D.N.Y. Feb. 1, 1999); *see also, e.g.*, *Texaco*

not seek to implead Petroecuador in the lawsuit filed in Ecuador by a group of *Aguinda* plaintiffs after their New York case was dismissed. Instead, as discussed below, ChevronTexaco and Texaco Petroleum 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>73</sup>

## VI. THE LAGO AGRIO LITIGATION

After *Aguinda v. Texaco* was dismissed in favor of litigation in

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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*, Nos. 93 Civ. 7527, 94 Civ. 9266 (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. . .”).

72. In 2001, Chevron acquired Texaco for \$39 billion and adopted the name ChevronTexaco. In 2005, ChevronTexaco changed its name to Chevron, “to reduce the confusion caused by the combined name.” *ChevronTexaco Drops Half its Corporate Name*, N.Y. TIMES, May 10, 2005, at C4.

73. Am. Arbitration Assn., Demand for Arbitration and Statement of Claim, Chevrontexaco Corporation and Texaco Petroleum Company against Empresa Estatal Petroleos del Ecuador, A/S/A/ Petroecuador (June 11, 2004) [hereinafter AAA Arbitration Statement of Claim]. 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 Ecuador litigation (discussed below) 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*, No. 11-CV-0691 (LAK), 2012 WL 3538749 (S.D.N.Y. July 31, 2012) (opinion on 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). Both the Ecuador litigation and *Chevron v. Donziger* are discussed *infra* in Part VI.

Ecuador, the plaintiffs' lawyers filed a new lawsuit against ChevronTexaco (now Chevron) in Lago Agrio, the boom town that sprang up around Texaco's first commercial field.<sup>74</sup> The complaint names forty-eight plaintiffs from two colonist and two Indigenous communities, and asserts claims on behalf of the Huaorani and other "Afectados," local residents who have been harmed by the company's operations. The *Afectados* include four Indigenous peoples (the Huaorani, Cofan, Secoya and Siona), members of the Kichwa people, and colonists.<sup>75</sup> However, the Huaorani were not consulted about the litigation or included among the plaintiffs, and no relief was requested directly for the affected communities (or community members) or even for the plaintiffs. Instead, the complaint seeks a judicial determination of

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74. Plaintiffs Complaint to the President of the Superior Court of Justice of Nueva Loja (Lago Agrio) at III, VI, Maria Aguinda Salazar v. ChevronTexaco Corp. (May 7, 2003) [hereinafter Lago Agrio Complaint]. The Ecuadorian lawyers who represent the plaintiffs in the Lago Agrio case were initially retained by the *Aguinda v. Texaco* plaintiffs' attorneys, but now appear to work for Amazon Defense Front. The court in Lago Agrio, the Provincial Court of Justice of Sucumbios, is the appellate court for Sucumbios province, where Lago Agrio is located. Additionally, in *acción popular* (popular action) lawsuits based on violations of environmental norms, the president of the provincial court with jurisdiction in any location where the damage occurs is competent to exercise original jurisdiction. *Ley de Gestión Ambiental* [Environmental Management Law], R.O. No. 245 (July 30, 1999) (Ecuador) [hereinafter 1999 Environmental Management Law], arts. 41–43. The plenary of the court (*Sala Unica*, or Sole Court) has (intermediate) appellate jurisdiction. Decisions by provincial courts can be appealed to a national court. Ecuador's courts have been repeatedly reorganized since the oil rush began. For a fuller discussion, see Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador's Amazon Oil Fields*, 2 Sw. J.L. & TRADE AMERICAS 293, 298–306 (1995) [hereinafter *Rights, Responsibilities, and Realities*]; Kimerling, *supra* note 7, at 547–48, 650–52. Currently, Ecuador's highest court is the National Court of Justice.

75. In Ecuador, the news that the *Aguinda* lawsuit in Texaco's homeland had ended disappointed many people. But in a new spin, the plaintiffs' lawyers declared victory, calling the outcome a landmark decision that, for the first time, ordered a giant oil company to submit to the authority of national courts in a developing country. However, despite an explicit ruling by the *Aguinda v. Texaco* court that the conditions of dismissal applied to all members of the putative class, plaintiffs' counsel spread the word in Ecuador that only named plaintiffs from *Aguinda* could avail themselves of the ruling by the U.S. court and be named in the Lago Agrio complaint. *See Aguinda*, 142 F. Supp. 2d at 539. The Lago Agrio complaint names 46 (out of 74) of the *Aguinda v. Texaco* plaintiffs and 2 additional plaintiffs. The allegations of injury extend far beyond the plaintiffs and their (four) communities to include all affected areas in two provinces, "the five indigenous peoples of the area," and colonists. *See Lago Agrio Complaint, supra* note 74, at III.

the costs of a comprehensive environmental remediation and an order directing Chevron to pay the full amount to a local 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>76</sup>

Amazon Defense Front—known locally as “*Frente*”—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>77</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.<sup>78</sup> In addition to issues related to representation, another recurring concern involves possible remedies. Efforts by local residents, at different junctures over the years, to demand “clarity and transparency in the process,” obtain information from *Frente* 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>79</sup> The decision to designate *Frente*, which is not a plaintiff, as the trustee in charge of administering any judgment was evidently made by the plaintiffs’ lawyers and *Frente* 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>80</sup> In a

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76. *Id.*

77. Although *Frente* 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.

78. For a fuller discussion, see Kimerling, *supra* note 7, at 632–42.

79. *See, e.g., id.* at 633–42.

80. Provincial Court of Justice of Sucumbios, Case No. 2003-0002, In the suit of Maria Aguinda and others against Chevron Corp. (Judge Nicolas Zambrano, Feb. 14, 2011) [hereinafter Lago Agrio Judgment]; *see also*, Provincial Court of Justice of Sucumbios, Case No. 2003-0002, In the suit of Maria Aguinda and others against Chevron Corp. (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].



188-page opinion, the court ordered Chevron to pay \$8,646,160,000 for remedial measures,<sup>81</sup> and another \$8,646,160,000 in punitive damages if the company did not publicly apologize to the affected communities within fifteen days.<sup>82</sup> The court also awarded an additional ten percent of the value of the “amount sentenced” to *Frente*.<sup>83</sup> Chevron has not apologized (and has publicly vowed not to apologize),<sup>84</sup> so the award to *Frente* is now worth \$1.729232 billion<sup>85</sup> and the judgment totals more than \$19 billion. The Lago Agrio judgment also directs the plaintiffs 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 *Frente* or the person or persons it designates.<sup>86</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>87</sup> “principal” measures to remediate contaminated soils and ground waters,<sup>88</sup> “complementary” measures to compensate for the inability to fully restore natural resources,<sup>89</sup> and

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81. Lago Agrio Judgment, *supra* note 80, at 176–84.

82. *Id.* at 184–86.

83. *Id.* at 187.

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

85. 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 to *Frente* of an additional amount equal to ten percent of the value of the damages and explaining that: (i) the monies are based on a provision in Ecuador’s 1999 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).

86. Lago Agrio Judgment, *supra* note 80, at 186–87.

87. *Id.* at 177. See also, Lago Agrio Judgment Clarifications, *supra* note 80, at 23.

88. The damage awards for principal remedial measures include nearly \$5.4 billion to remediate contaminated soils and \$600 million to remediate ground waters. *Id.* at 177–81.

89. 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.

“mitigation” measures to address the impacts on human health and Indigenous cultures that cannot be reversed or fully repaired.<sup>90</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>91</sup>

Both the plaintiffs and Chevron appealed. The plaintiffs sought additional damages and Chevron sought to have the judgment reversed or declared null. In January 2012, the appellate (sole) division of the Lago Agrio court<sup>92</sup> affirmed the judgment in all material respects. 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 plaintiffs 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>93</sup>

Chevron appealed to Ecuador’s highest court, the National Court of Justice, 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.<sup>94</sup> 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 two

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90. 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, including displacement from their ancestral territories and other cultural impacts. *Id.* at 183–84.

91. Provincial Court of Justice of Sucumbios, Case No. 2011-0106, In the suit of Maria Aguinda and others against Chevron Corp. (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 80, at 184–86.

92. *See supra* note 74.

93. Provincial Court of Justice of Sucumbios, Case No. 2011-0106, In the suit of Maria Aguinda and others against Chevron Corp. (Sole Division, Jan. 3, 2012); *see also* Lago Agrio Appellate Court Clarifications, *supra* note 91.

94. Chevron no longer operates in Ecuador. *Frente* alleges that Chevron “stripped most of its primary assets—including numerous service stations—from Ecuador . . . in anticipation of losing” the Lago Agrio lawsuit, so that the assets could not be seized in legal actions to satisfy the judgment. Press Release, Amazon Defense Coalition, Chevron Faces New Asset Seizures in Ecuador as Clock Ticks to Midnight Deadline (Aug. 6, 2012).

other fora: a lawsuit against the plaintiffs and their lawyers in federal court in New York, and an arbitration proceeding against Ecuador in The Hague. 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>95</sup>

The proceeding in The Hague is the second arbitration claim pursued by Chevron to try to dodge liability to the *Aguinda* plaintiffs. The first arbitration claim, filed in New York in 2004, sought an order from an American Arbitration Association panel requiring Petroecuador to indemnify Chevron for all costs and liability related to the Lago Agrio litigation.<sup>96</sup> Ecuador and Petroecuador challenged the 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>97</sup>

The current arbitration began in 2009. Chevron's notice of arbitration alleges that Ecuador violated a bilateral investment treaty with

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95. 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. The 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.

96. AAA Arbitration Statement of Claim, *supra* note 73, at VI. The claimants, ChevronTexaco and Texaco Petroleum, also sought damages "in an amount to be determined." *Id.*

97. *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. The JOA contained an agreement to arbitrate and an indemnity provision. Chevron argued that they were binding on Petroecuador and that the Lago Agrio lawsuit, "which, for the most part, seeks environmental remediation, is precisely the type of claim contemplated by the" indemnity clause. AAA Statement of Claim, *supra* note 73, ¶ 54. The *Republic of Ecuador v. ChevronTexaco* 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. 499 F. Supp. 2d at 455.

the United States (“BIT”)<sup>98</sup> by “permitting” the Lago Agrio litigation to proceed despite the settlement accord and remediation discussed above in Part V,<sup>99</sup> and by improperly colluding with the plaintiffs in that litigation and denying due process rights to Chevron. It seeks a declaration that Chevron has no liability or responsibility for the pollution that gave rise to the *Aguinda* litigation; a declaration that Ecuador or Petroecuador is exclusively liable for any judgment rendered in the Lago Agrio lawsuit; an order requiring Ecuador to inform the court in the Lago Agrio litigation that Chevron has been released from all liability for environmental impact and that Ecuador and Petroecuador are responsible for any remaining and future remediation work; indemnification from Ecuador for any costs, fees, or liability Chevron may incur as a result of the Lago Agrio lawsuit; an order requiring Ecuador to protect and defend Chevron in connection with that litigation; and moral damages to compensate Chevron for non-pecuniary harm.<sup>100</sup>

In support of its claims, Chevron maintains that the Lago Agrio plaintiffs’ claims for environmental remediation are barred by the releases granted by Ecuador pursuant to the remedial accord. Although the language in both the remediation agreement and final release from liability explicitly states that the releases apply to claims by Petroecuador

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98. Treaty Between The United States of America and The Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investments, U.S.-Ecuador, Aug. 27, 1993, S. Treaty Doc. No. 103–15 [hereinafter BIT].

99. Specifically, Chevron alleges that Ecuador has “refused to notify the Lago Agrio court that [Texaco Petroleum] and its affiliated companies have been fully released from liability for environmental impact resulting from the former Consortium’s operations (thereby permitting Chevron to be sued for environmental impact that Ecuador assured by binding contract had been discharged), and has refused to indemnify, protect and defend” the companies’ rights “in connection with the Lago Agrio Litigation.” BIT Notice of Arbitration, *supra* note 95, ¶¶ 13, 21.

100. BIT Notice of Arbitration, *supra* note 95, at VI. Both Chevron and Texaco Petroleum are claimants in the arbitration, which now also seeks a declaration that any judgment rendered against Chevron in the Lago Agrio litigation is not final or enforceable, and an order directing Ecuador to enjoin enforcement of any judgment rendered in that case and to make a written representation to any court in which the Lago Agrio plaintiffs seek enforcement, stating that the judgment is not final, enforceable, or conclusive. 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, Signed 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 on Jurisdiction and Admissibility], pt. III, at 39–40.

and the Ecuadorian State<sup>101</sup>—and Ecuador maintains that it did not intend or agree to extinguish any rights or claims by third parties<sup>102</sup>—Chevron contends that the Lago Agrio plaintiffs had no right to sue for environmental remedies when the releases were granted, 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.”<sup>103</sup>

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,<sup>104</sup> Chevron now contends that *Aguinda* was “generally” an action for damages to individuals, unlike the Lago Agrio lawsuit which seeks to vindicate

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101. See *supra* note 56.

102. See, e.g., Petition to Stay Arbitration, ¶ 28, Republic of Ecuador v. Chevron Corp., No. 09-CV-9958 (S.D.N.Y. Dec. 3, 2009).

103. BIT Notice of Arbitration, *supra* note 95, ¶ 21. See also *id.* ¶¶ 13, 26. The proposition that only Ecuador could sue to demand environmental remediation at the time of the 1995 Remediation Contract and 1998 Final Act was apparently first asserted by Chevron in the federal court litigation to stay the AAA Arbitration. In a counterclaim filed in 2005, Chevron alleged that Ecuador “owned all rights to environmental remediation and restoration” by Chevron in the concession area at the time the agreements were signed, and “fully released those rights in exchange for the remediation project performed” under the accord. The company further contended that Ecuador breached the Remediation Contract and Final Act by “allowing the Lago Agrio lawsuit to proceed” without intervening to inform the court that it “owned and released all rights to environmental remediation and restoration” by Chevron, and by refusing to indemnify the company for its costs in that litigation. The counterclaims alleged that Chevron had incurred “millions of dollars in attorneys’ fees, consulting fees, and expenses . . . in connection with defending” the Lago Agrio lawsuit, and asked the court to award damages and declaratory and injunctive relief. Defendants ChevronTexaco Corporation’s & Texaco Petroleum Company’s Answer to Amended Complaint and Counterclaim, ¶¶ 10, 13, 64, Republic of Ecuador v. ChevronTexaco Corp., No. 04 Civ. 8378 (S.D.N.Y. Jan. 10, 2005). After the Supreme Court denied Chevron’s petition for certiorari to review the order staying the AAA Arbitration, Chevron withdrew its opposition to Ecuador’s motion to dismiss all remaining counterclaims in that case and Judge Sand dismissed them. Republic of Ecuador v. ChevronTexaco, Inc., No. 04 Civ. 8378 (S.D.N.Y. July 20, 2009). Two months later, on September 23, 2009, Chevron initiated the BIT Arbitration proceeding, seeking essentially the same result.

104. 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”).

public rights to remediation.<sup>105</sup> The company further alleges that the 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 the improper retroactive application of that law.<sup>106</sup>

Chevron has also asserted that argument as a 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 against retroactive application of the law.<sup>107</sup> The substantive right of the 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. 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.<sup>108</sup> The Lago Agrio court further ruled that the release

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105. See, e.g., BIT Notice of Arbitration, *supra* note 95, ¶¶ 25, 30, 34.

106. *Id.* ¶¶ 28, 32.

107. Lago Agrio Judgment, *supra* note 80, at 27–28. 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. *Id.*; Environmental Management Law, *supra* note 74, arts. 41–43.

108. Lago Agrio Judgment, *supra* note 80, at 28, 74–90. 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. *Rights, Responsibilities, and Realities*, *supra* note 74, at 293, 323–24, 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 JUDITH KIMERLING, *EL DERECHO DEL TAMBOR: DERECHOS HUMANOS Y AMBIENTALES EN LOS CAMPOS PETROLEROS DE LA AMAZONA ECUATORIANA* [THE LAW OF THE DRUM: HUMAN AND ENVIRONMENTAL RIGHTS IN THE OIL FIELDS OF THE

of liability granted to Chevron pursuant to the remedial accord applies only to claims by Ecuador and Petroecuador.<sup>109</sup>

Chevron, however, rejects the legitimacy of the Lago Agrio judgment. In its notice of arbitration, the company alleges that Ecuador “has engaged in a pattern of improper and fundamentally unfair conduct” that “breaches and effectively seeks to repudiate” the settlement accord and improperly assist and collude with the Lago Agrio plaintiffs and their lawyers, in an effort to shift the state’s environmental obligations to Chevron “through the Lago Agrio litigation” and “improperly influence the courts.”<sup>110</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 further contends that the rule of law has deteriorated in Ecuador since the U.S. lawsuit was dismissed, and that in view of the current judicial reforms and public support expressed by the President Rafael Correa for the Lago Agrio plaintiffs, the “judiciary now lacks the necessary independence and institutional stability to adequately adjudicate highly politicized cases.”<sup>111</sup>

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ECUADORIAN AMAZON] (1996). 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 harms to third parties; and that the company’s contamination violated Ecuadorian law. Lago Agrio Judgment, *supra* note 80, 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 *Rights, Responsibilities, and Realities*, *supra* note 74.

109. Lago Agrio Judgment, *supra* note 80, at 34–35, 175–76.

110. BIT Notice of Arbitration, *supra* note 95, ¶ 68; *see also id.* ¶ 3. More specifically, Chevron alleges that Ecuador’s exercise of jurisdiction over Chevron in the Lago Agrio lawsuit is improper and that the judicial branch has conducted the litigation “in total disregard of Ecuadorian law, international standards of fairness, and Chevron’s basic due process and natural justice rights, and in apparent coordination with the executive branch and the Lago Agrio plaintiffs.” *Id.* ¶ 4; *see also id.* ¶ 68. In addition, the company alleges that Ecuador’s executive branch, also in “a coordinated strategy with the Lago Agrio plaintiffs,” abused the criminal justice system by indicting two Chevron attorneys (Ricardo Reis Veiga and Rodrigo Pérez Pallares) who were involved in the settlement negotiations “in an attempt to undermine the settlement and release agreements and to interfere with Chevron’s defense in the Lago Agrio litigation.” *Id.*

111. *Id.* ¶ 42. For a fuller discussion of the administration of justice in Ecuador, see Kimerling, *supra* note 7. Although the political landscape in Ecuador has indisputably changed in some pertinent respects since the Lago Agrio lawsuit was filed, institutional instability, political interference, and other systemic shortcomings in the rule of law and administration of justice in Ecuador are longstanding problems.

Both Ecuador and the *Aguinda* plaintiffs 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.<sup>112</sup> The Second Circuit affirmed.<sup>113</sup>

In February 2011, days before the court's decision in Lago Agrio, the arbitration panel in The Hague ordered discretionary interim measures directing Ecuador to "take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within or without Ecuador of any judgment" against Chevron in the Lago Agrio lawsuit, pending further order by the panel.<sup>114</sup> In January 2012, the panel confirmed and re-issued the order as an interim award,<sup>115</sup> and in February 2012, the panel issued a second 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 or without Ecuador of the judgments" by the Lago Agrio court. The arbitral panel's order was made "strictly without prejudice to the merits of the Parties' substantive and procedural

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112. Memorandum & Order, *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).

113. *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011). The Second Circuit rejected Chevron's claim that it was not bound by the promises made by Texaco and ChevronTexaco in the *Aguinda v. Texaco* litigation (to agree to be sued in Ecuador and to satisfy any judgment issued there, subject to the company's rights under New York's Recognition of Foreign Country Money Judgments Act), but concluded that the initiation of the BIT arbitration did not breach those promises, and that the BIT arbitration and the Lago Agrio litigation can coexist without undermining the forum non conveniens dismissal of *Aguinda v. Texaco*. *Id.* at 388.

114. Order for 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. 10, 2011).

115. First 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 (Jan. 25, 2012).



disputes,”<sup>116</sup> notwithstanding the stronger language. Eleven days later, the arbitral panel ruled that it has jurisdiction to hear Chevron’s claims and proceed to the merits phase of the arbitration.<sup>117</sup>

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 arbitral claims as an “attempt to ‘transform what is fundamentally a private environmental dispute into an ‘investment dispute’ against a sovereign.’” In response to the company’s allegations that the Lago Agrio litigation has been tainted by fraud, Ecuador accused Chevron of “attempt[ing] to divert attention from the demerits of [its] case ‘by cobbling together a list of inflammatory allegations’” that relate to the Lago Agrio plaintiffs, rather than Ecuador.<sup>118</sup> Ecuador further maintains that the settlement agreement operated only to release Chevron from claims by Ecuador and Petroecuador, and that Ecuador expressly rejected a suggestion from Texaco during the settlement negotiations that the release be extended to claims by residents of the Amazon region.<sup>119</sup>

In response to Chevron’s allegations of systemic deficiencies in the administration of justice, Ecuador’s Attorney General, in a statement to the arbitration panel, acknowledged that difficult problems exist, but maintained that Ecuador is working to correct the deficiencies and is making progress, and that the judiciary is independent. He accused Chevron of fabricating a crisis in the administration of justice because it

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116. 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).

117. BIT Third Interim Award on Jurisdiction and Admissibility, *supra* note 100. Ecuador contested the arbitral panel’s jurisdiction, arguing, among other things, that there is no investment dispute within the meaning of BIT because the remediation settlement accord and releases are not investment agreements, and Texaco Petroleum’s investment in Ecuador ended in 1992, before the effective date of the treaty. Ecuador also argued that the arbitral tribunal lacks jurisdiction to adjudicate the claims asserted by Chevron because it would be required to determine the rights of third parties, contrary to legal principles. *Id.* pt. III, at 12–23.

118. *Id.* pt. III, at 41, 73–75.

119. *Id.* pt. III, at 12–23. Ecuador also maintains that the settlement agreement does not contain any hold harmless or indemnification obligation in favor of Chevron and that it does not require Ecuador to intervene in private litigation by third parties. *Id.*

does not want to litigate against the Lago Agrio plaintiffs, and argued that 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.” He did not deny that the current government has made public statements in support of “the people of Lago Agrio,” but denied interfering with the judicial process in the litigation. He accused Chevron of attacking the Ecuadorian State, and said that the company’s “offensive without limit” began in 2003—when Ecuador informed Chevron and representatives of the plaintiffs that it would remain neutral in the litigation and “refused to interfere . . . to disqualify” the case—and that it has required Ecuador to respond, with limited resources, to repeated legal cases and a public relations “machine” that “every year work[s] in the corridors of the American Congress and also in the offices of the representatives of commerce of the United States looking to cancel the [trade] preferences that Ecuador enjoys . . . , with the intention of [pressuring] the Government to intervene in the case of Lago Agrio in favour of Chevron.”<sup>120</sup>

In January 2012, Ecuador’s Attorney General forwarded a copy of the BIT panel’s January 2012 interim award on interim measures (ordering Ecuador to “take all measures at its disposal to suspend . . . enforcement or recognition” of any judgment against Chevron) to the Lago Agrio Court. The appellate (sole) division of the court ruled that there is no lawful measure that the court can take to suspend the Lago Agrio judgment, and that it cannot “simply ‘obey’ ” Chevron or the arbitral panel, but rather must act within the parameters of the law. Although the court stated that it had thus complied with the arbitral order (but found itself without any legal instrument to suspend recognition of the Lago Agrio judgment), it also observed that the BIT arbitration presents a potential conflict between international investor arbitration norms and international human rights norms. The court concluded that under both international and domestic law, international norms to protect investments and an arbitral order may not be applied to override human rights norms, and in the case of a conflict, human rights norms must prevail.<sup>121</sup>

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120. *Id.* pt. III, at 73–75.

121. Provincial Court of Justice of Sucumbios, Case No. 21101-2011-0106, In the suit of Maria Aguinda and others against Chevron Corporation (Sole Division, Feb. 17, 2012). The court also granted Chevron’s leave to appeal the Lago Agrio Judgment to the National Court of Justice and ordered the record sent to Quito. The court noted that Ecuadorian law would allow Chevron to suspend enforcement of the judgment during the appeal, upon payment of a bond, but that Chevron had elected not to use that legal means

Chevron moved to revoke and amplify the ruling, but the Lago Agrio court ratified its prior decision and reaffirmed that—under Ecuadorian law, based on international commitments and constitutional law—the obligations of the state pursuant to human rights norms take precedence over international commercial obligations and the authority of an arbitral panel. The court again stressed the need to act in accordance with the rule of law, and concluded that the most recent arbitral order directing the court to take all “necessary measures” to prevent enforcement of the Lago Agrio judgment conflicted with the court’s obligation, as part of the State, to guarantee effective judicial remedies. The obligation to act “outside of the law” to take special measures to achieve a certain outcome in this particular case would discriminate against the Lago Agrio plaintiffs and restrict their rights, in violation of international human rights norms that protect the right to equal protection of the law and the right to judicial protection and remedies. The court thus refused to suspend the Lago Agrio judgment and instead formally declared that the judgment is legally enforceable, and ordered the transfer of the litigation record to the National Court of Justice in Quito, in custody of the National Police.<sup>122</sup>

Chevron’s lawsuit in New York followed extensive discovery proceedings in the United States,<sup>123</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. The initial 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

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to suspend the judgment.

122. Provincial Court of Justice of Sucumbios, Case No. 21101-2011-0106, In the suit of Maria Aguinda and others against Chevron Corporation (Sole Division, Mar. 1, 2012). The court cited Ecuador’s constitution and the following articles of the American Convention on Human Rights: art. 1 (obligation of the state to respect and ensure rights); art. 24 (right to equal protection of the law); art. 25 (right to judicial protection and remedies); and art. 30 (restrictions on rights may not be applied except in accordance with laws enacted for reasons of general interest).

123. 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).

Chevron saw them.<sup>124</sup>

Chevron used that scene, and others, to get a discovery order compelling the filmmaker, Joseph Berlinger, to produce all of the outtakes (raw footage that does not appear in the film).<sup>125</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”, “plaintiffs’ improper influence on the Ecuadorian judicial system,” and “plaintiffs’ attempts to ‘curry favor’ with [the government of Ecuador].”<sup>126</sup> Chevron

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124. *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).

125. *Chevron Corp. v. 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 the President of Ecuador “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.*

126. *In re Chevron Corp.*, 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, along with former Ecuadorian government officials and employees of Petroecuador, based on allegations that they falsified documents in connection with the remediation settlement agreement and releases. 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 95, ¶ 55. Pérez Pallares and Veiga argued that they needed the outtakes to defend themselves in the criminal proceedings and that they were likely to show “efforts ‘to bring unfounded criminal charges,’” a “‘joint strategy’ of plaintiffs’ lawyers and the [Government of Ecuador],” and “‘procedural irregularities in the criminal case.’” *In re Chevron Corp.*, 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),

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>127</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>128</sup>

As a result of the discovery, Chevron gained access to an extraordinary amount of material, including Donziger’s litigation files and hard drive.<sup>129</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>130</sup> Among other disclosures, the company

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<http://www.nytimes.com/gwire/2011/06/03/03greenwire-dropped-charges-in-ecuador-could-affect-chevro-90134.html>.

127. *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).

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

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

130. *See In re Chevron Corp.*, 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 U.S. District Court for 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. 2010), *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 case 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

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 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>131</sup>

The company also found evidence that Donziger and *Frente* had made undisclosed agreements with funders and third party investors in exchange for interests in the Lago Agrio judgment.<sup>132</sup>

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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 Corp.*, 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 the 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 founder of *Frente* (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 Corp.*, 749 F. Supp. 2d 170, 173 (S.D.N.Y. 2010), *aff'd sub nom.* Lago Agrio Plaintiffs v. Chevron Corp., 409 F. App'x. 393 (2d Cir. 2010).

131. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 596, 660 (S.D.N.Y. 2011) (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 sub nom.* *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 80 U.S.L.W. 3669 (U.S. Oct. 9, 2012).

132. See, TRECA FINANCIAL SOLUTIONS AND CLAIMANTS, FUNDING AGREEMENT (Oct. 31, 2010), available at <http://theamazonpost.com/wp-content/uploads/Mastro-declaration-Exs-1-10-05jul11.pdf>; Roger Parloff, *Have You Got a Piece of this Lawsuit?* FORTUNE (June 23, 2011), <http://features.blogs.fortune.cnn.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/>; Mary Anastasia O'Grady, *Chevron's Ecuador Morass*,

Chevron's complaint in the New York lawsuit names fifty-five defendants. They include Donziger; *Frente* and its Ecuadorian lawyer, Pablo Fajardo (who is also counsel of record for the Lago Agrio plaintiffs); *Frente*'s founder, Luis Yanza; an environmental consulting firm that worked closely with Donziger (Stratus Consulting) and two of its managers; 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>133</sup> and the California-based NGO Amazon Watch, which works closely with *Frente* and Donziger.<sup>134</sup>

The complaint asserts substantive and conspiracy claims under the 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 claims for civil conspiracy (under state law) and fraud against all of the defendants, as well as a claim against Donziger and his law firm for violation of the

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WALL ST. J. (May 14, 2012), <http://online.wsj.com/article/SB10001424052702304203604577396022213704272.html>. Chevron alleges that Donziger and *Frente* 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), 2012 WL 1883493 (S.D.N.Y. May 21, 2012).

133. 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 *Frente* in 2006 and no longer represents the plaintiffs. The Kohn, Swift and Graf firm was discharged in 2010 and no longer represents the plaintiffs. *See*, Letter of 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).

134. 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 *Frente* 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 (2009). *See also, e.g., id.* at 5, 7, 16–22; CHEVRONTOXICO: THE CAMPAIGN FOR JUSTICE IN ECUADOR, <http://www.chevrontoxico.com> (last visited Oct. 28, 2012) (website maintained by Amazon Watch and *Frente* to support the Lago Agrio lawsuit); Kimerling, *supra* note 7, at 647–50.

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>135</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>136</sup>

The Second Circuit Court of Appeals, however, vacated the injunction and dismissed Chevron’s claim for declaratory and injunctive relief.<sup>137</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 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

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135. *Chevron v. Donziger* Complaint, *supra* note 95, ¶ 3. *See generally id.*; *Naranjo*, 667 F.3d at 247 (remanding with instruction to dismiss claim for declaratory and injunctive relief); Opinion on Motion to Dismiss Amended Complaint, *Chevron v. Donziger*, No. 11-CV-0691(LAK), 2012 WL 1711521 (S.D.N.Y. May 14, 2012) (opinion on motion by Donziger Defendants to dismiss amended complaint); Memorandum and Order on the 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) (opinion on motion by Stratus Defendants to dismiss amended complaint).

136. *Chevron Corp.*, 768 F. Supp. 2d at 596, 660 (granting preliminary injunction). Judge Kaplan emphasized that “[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Id.* at 596.

137. 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) (also 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.



seeks to enforce the judgment in New York, but it cannot be used preemptively to declare foreign judgments void and enjoin their enforcement. The Second Circuit explained that the 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.<sup>138</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>139</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>140</sup>

Discovery and litigation on the remaining claims are underway.<sup>141</sup> The defendants reject the jurisdiction of the U.S. court over the

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138. *Id.* at 240–41.

139. *Id.* at 242.

140. *Id.*

141. *See, e.g.*, Opinion on Motion to Dismiss Amended Complaint, *Chevron v. Donziger*, No. 11-CV-0691(LAK), 2012 WL 1711521 (S.D.N.Y. May 14, 2012), *Chevron v. Donziger*, No. 11-CV-0691(LAK), 2012 WL 3223671 (S.D.N.Y. May 24, 2012) (Memorandum and Order on the Defendants’ Motion to Dismiss the Amended Complaint); *Chevron v. Donziger*, No. 11-CV-0691(LAK), 2012 WL 3538749 (S.D.N.Y. July 31, 2012) (Opinion on Partial Summary Judgment Motion) [hereinafter *Chevron v. Donziger*, Opinion on Partial Summary Judgment Motion]. 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*, No. 11-CV-0691(LAK), 2012 WL 3538749, at \*36 (S.D.N.Y. July 31, 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).

Ecuadorian parties<sup>142</sup> and are contesting the lawsuit on a number of grounds. 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>143</sup>

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142. Only two of the Ecuadorian defendants—the Lago Agrio plaintiffs Hugo Gerardo Camancho Naranjo and Javier Piaguaje Payaguaje—have filed submissions to oppose Chevron in the New York lawsuit, while reserving their rights “to continue to contest the lawfulness and propriety” of the U.S. court’s assertion of personal jurisdiction over them. Defendants Steven Donziger, The Law Offices of Steven R. Donziger, and Donziger & Associates, Javier Piaguaje Payaguaje, and Hugo Gerardo Camancho Naranjo’s Opposition to Chevron Corporation’s Renewed Motion for an Order of Attachment and Other Relief at 1 n.1, *Chevron Corp. v. Donziger*, No. 11-CV-0691(LAK), 2012 WL 1711521 (S.D.N.Y. Mar. 20, 2012), 2012 WL 1063382.

143. 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*, 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 for leave to amend to withdraw the collateral estoppel defense. 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 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.” *Chevron v. Donziger*, Opinion on Partial Summary Judgment Motion, *supra* note 141, at \*1. The court ruled that Donziger and the LAP Representatives “had not effectively

In November 2012, a group of forty-two Huaorani from five communities moved to intervene in the New York lawsuit 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 *Frente*. The proposed Huaorani intervenors seek to defend the integrity of the Ecuadorian judgment, but not any alleged misconduct by the plaintiffs' legal team (including *Frente*) and their associates.<sup>144</sup>

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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*, Opinion on Partial Summary Judgment Motion, *supra* note 141, at \*36 (denying Chevron's motion for partial summary judgment on the collateral estoppel defense and granting the motion to dismiss the res judicata defense). 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 to Opinion on Partial Summary Judgment Motion 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).

144. 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

The [Proposed] Answer and Cross-Complaint in Intervention alleges—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>145</sup> The cross claims against Donziger and *Frente* seek a declaratory judgment,<sup>146</sup> the imposition of a constructive trust,<sup>147</sup> and an accounting<sup>148</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 [l]itigation.”<sup>149</sup>

The proposed Huaorani intervenors dispute the claims by Donziger and *Frente* to represent them,<sup>150</sup> but allege that, as a result of the

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unlawful acts or misconduct alleged by Chevron against Donziger and *Frente* 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 Crawford Boyd and Schwarcz, Rimberg, Boyd & Rader.

145. [Proposed] Answer and Cross-Complaint in Intervention, *supra* note 144, ¶ 2, at 90-91.

146. 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 *Frente* 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.* ¶ 1, at 129-30.

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

148. 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 *Frente*] 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 *Frente*] and/or their associates by virtue of any settlement talks, discussions or negotiations.” *Id.* ¶ 4, at 130.

149. *Id.* ¶ 2, at 91.

150. The proposed Huaorani intervenors also dispute the claim by *Frente's Asamblea de Afectados y Afectadas por Texaco* (Assembly of Persons Affected by Texaco) (“ADAT”) to represent the Huaorani. ADAT was created by *Frente* in 2001, in response to a resurgence of local organizing in the affected communities in the wake of

defendants' actions in connection with the Lago Agrio litigation and of the judgment consequently entered and affirmed on appeal, Donziger and *Frente* 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>151</sup> The proposed cross-complaint in intervention further alleges that Donziger and *Frente* have a conflict of interest with the Huaorani; that the decision to award control over the judgment monies to *Frente* was made without consulting the Huaorani; and that *Frente* 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 about their plans to use monies from the judgment to remedy harms suffered by the Huaorani.<sup>152</sup> The proposed cross-

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disquieting news that the plaintiffs' lawyers in the *Aguinda v. Texaco* lawsuit were secretly negotiating a possible settlement agreement with Texaco. Through ADAT, *Frente* 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 *Frente* 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 *Frente*. For a fuller discussion of ADAT and *Frente*'s early efforts to speak for the affected communities, see Kimerling, *supra* note 7, at 632-41 (*Frente* and ADAT); see also Judith Kimerling, *The Story From the Oil Patch: The Under-Represented in Aguinda v. Texaco*, HUMAN RIGHTS DIALOGUE, Spring 2000, at 6-7 (*Frente*).

151. [Proposed] Answer and Cross-Complaint in Intervention, *supra* note 144, ¶ 16, at 97-98, ¶ 69, 118-19, ¶ 1, at 129-30.

152. *Id.* ¶¶ 15-22, at 96-100, ¶¶ 57-68, at 113-18. In January 2012, representatives of the proposed Huaorani intervenors sent a letter to *Frente*, stating that they had learned about the Lago Agrio lawsuit and judgment—and claims by *Frente* 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 *Frente* would repair and compensate the damages the Huaorani have sustained. In addition, the letter asked *Frente* 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 *Frente* to provide the

complaint also includes a claim for unjust enrichment. That motion is pending.

After nineteen years of litigation, the impact of *Aguinda* remains to be seen. If the Lago Agrio judgment is not overturned by Ecuador's National Court of Justice, the question of whether it can be enforced remains. The likelihood of enforcing the judgment in a U.S. court is uncertain, but does not look promising at this time. The likelihood of collecting the judgment (or portions of it) in other countries where Chevron has assets is impossible to predict, as is the question of whether the parties will settle the case instead of litigating in courtrooms around the world. In May 2012, the Lago Agrio plaintiffs filed an enforcement

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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 *Frente* to tell them if those reports are 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 C, 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 *Frente* 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 *Frente* 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 Persons] and Pablo Fajardo, Attorney, to *Compañeros* and *Compañeras* of the Huaorani Nationality (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 proposed Huaorani intervenors sent another letter to Yanza and Fajardo, stating that the proposed intervenors would welcome a meeting with *Frente*, but that in order to have a "serious meeting" and not simply talk "in the air," *Frente* 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 *Frente* 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, Bamen 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 any of the requested information.

action against subsidiaries of Chevron in Canada,<sup>153</sup> and the following month, they filed a second enforcement action in Brazil.<sup>154</sup> In November 2012, they filed an enforcement action in Argentina, and a judge for the city of Buenos Aires ordered the immediate freeze of “nearly all” of the assets of a local Chevron subsidiary “until the court rules on whether it will enforce [the Lago Agrio] judgment.”<sup>155</sup>

It also remains to be seen whether a victory in court—or settlement through the Lago Agrio plaintiffs’ lawyers—will obtain meaningful remedies for the Huaorani and other affected groups, or simply empower and enrich a new layer of elites and set back local struggles for environmental justice by promoting conflict, corruption, and cynicism. The decision to allow *Frente* 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.

For now, this new chapter in the litigation appears to be shifting much of 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>156</sup> The alleged misconduct not only has prolonged the litigation, but also seems to have tainted the credibility of the victims’ claims outside of Ecuador and may have jeopardized their right to a remedy. Moreover, it has eclipsed the situation on the ground—where environmental conditions continue to deteriorate, people’s rights are still being violated, and no

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153. Plaintiffs’ Statement of Claim, *Yaiguaje v. Chevron* (May 30, 2012) No. CV-12-454778 (Can. Ont. Super. Ct. J.).

154. Petition to Brazilian Courts to Recognize Ecuadorean Judgment, S.T.J., 06.27.2012, *Yaiguaje v. Chevron*, (Braz).

155. Emily Schmall, *Argentina: Chevron’s Assets Are Frozen*, N.Y. TIMES, Nov. 8, 2012, at A9.

156. 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.”)

one is accepting responsibility.

## VII. THE INTANGIBLE ZONE AND CONSERVATION IN YASUNI

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.

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 of ancestral Huaorani lands and has been designated as a conservation area since 1999.<sup>157</sup> The Intangible Zone is part of the Yasuni Biosphere Reserve and includes both the southern half of Yasuni National Park and a portion of Huaorani titled lands. 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 result in their extermination. Although The Intangible Zone does not include all of the territory of the Tagaeri-Taromenane<sup>158</sup> and reportedly overlaps with parts of five oil concessions,

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157. 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.

158. The boundaries of The Intangible Zone were reportedly negotiated with the oil industry. One region of concern is the edge of the oil frontier, where oil extraction and internal colonization by settlers began along the road that Texaco built into Huaorani territory—and continue to expand deeper into ancestral Huaorani lands. A portion of Tagaeri-Taromenane territory lies outside of the protected area and overlaps with the oil “blocks” known as Block 17 and Campo Armadillo. In August 2009, the Tagaeri-Taromenane fatally speared three colonists who were walking on a trail in Block 17, where a new road was being built (by the municipal government of Coca) into the forest behind an oil well. *Organización de Nacionalidad Waorani de Orellana* [Waorani Organization of Orellana Province] “O.N.W.O.” and *Ome Gompote Kiwigimoni Huaorani* [We Defend Our Huaorani Territory], *Comunicado Sobre el Contacto Violento*



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 five 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” and protect their culture and way of life. They see the area, and some adjacent lands that have not yet been occupied by oil companies or settlers, as their last refuge. For the Huaorani who live on the land, conservation is about much more than environmental protection and physical survival; it is also intimately related to the survival of the Huaorani people and their culture and identity.

The importance of the area to the local communities was described by Kemperi, a Huaorani elder and shaman, in a “message to 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 in the low areas have problems. We respect the environment where we live. We like 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

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*con los Tagaeri-Taromenane del 10 de Agosto 2009* [Communication About the Violent Contact with the Tagaeri-Taromenane on August 10, 2009] (Oct. 17, 2009) (on file with author). In March 2008, the Tagaeri-Taromenane fatally speared a logger in the Campo Armadillo area.

want others to respect our culture.<sup>159</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 continue to live in 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.<sup>160</sup> They also oppose new oil operations and roads, and see community-managed and operated tourism as a better economic alternative that does not harm the forest or disrespect their culture and way of life.<sup>161</sup> They call

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159. Message from Kemperi Baihua, Bameno Huaorani Community, Cononaco River (translated from Huaorani to Spanish by Penti Baihua) (related to the author on August 8, 2005), first published in 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]*, Preface (2006). Kemperi is the lead proposed Huaorani intervenor in the motion to intervene in the *Chevron v. Donziger* litigation, discussed above.

160. The loggers used the road built by Texaco to reach the rivers that lead into The Intangible Zone. As they penetrated deeper into the area, they had a number of violent encounters with the Tagaeri-Taromenane, who were defending the forest in the traditional Huaorani way: with hardwood spears. The wood trade also reportedly contributed to intra-tribal conflict. In a particularly bloody incident, in May 2003, 26 members of the Tagaeri-Taromenane band were massacred when their longhouse was attacked by a group of nine contacted Huaorani. The attackers came from communities that are located outside of The Intangible Zone (on roads), and were reportedly supplied and incited, in part, by outsiders who controlled the wood trade and wanted to exterminate the isolated band. The attack was condemned by many contacted Huaorani, including the Huaorani who live in The Intangible Zone—who were further stirred to concern themselves about the fate of their isolated neighbors and subsequently came together, as *Ome Gompote Kiwigimoni Huaorani*, to remove the loggers from The Intangible Zone and defend the area and the right of the uncontacted Huaorani family groups(s) to live in voluntary isolation in the forest.

161. In the past, some tour operators abused the Huaorani and tourism was a controversial activity. For a fuller discussion, see RANDY SMITH, *CRISIS UNDER THE CANOPY* (1993). However, Bameno and other communities in the area have gained control over tourism in their communities and learned how to operate tours themselves. See HUAORANI COMMUNITY TOURS, <http://www.huaoranicommunitytours.wordpress.com> (last visited Oct. 19, 2012); see also OTOBO'S AMAZON SAFARI, <http://www.rainforestcamping.com> (last visited Oct. 19, 2012). Currently, tourism is an important (albeit irregular) economic activity for the Huaorani in The Intangible Zone, which supplements the predominantly subsistence economy and is seen by community members as the only means to gain access to cash income and trade goods that does not

themselves *Ome Gompote Kiwigimoni Huaorani* (We Defend Our Huaorani Territory); for short, they say “*Ome Yasuni*.”<sup>162</sup>

In the process of organizing themselves and seeking to engage in a dialogue with the *cowode*, the communities in the *Ome Yasuni* alliance are learning about new threats to their territory and self-determination. Much has been written about violations of Indigenous peoples’ rights by environmentally 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<sup>163</sup> and the Huaorani family group(s) who live in

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harm the environment, disturb the Tagaeri-Taromenane, or threaten the autonomy of community members—unlike logging, oil extraction, and dependence on the government.

162. *Ome* is the Huaorani word for territory and rainforest. The coordinator of *Ome Yasuni*, Penti, explained to the author: “My father is Ahua. He is a great warrior, he defended our Huaorani territory with hardwood spears. Now I must defend our territory and *Ome*, the rainforest, with documents and law, speaking Spanish, and traveling far away like the harpy eagle.”

163. The increase in international funding and interest in Yasuni is part of a broader trend. See Mark Dowie, *Conservation Refugees*, ORION MAGAZINE, Nov./Dec. 2005, available at <http://www.orionmagazine.org/index.php/articles/article/161/>. According to Dowie, most of the monies for international conservation go to five big NGOs, “nicknamed by indigenous leaders, the BINGOs:” Wildlife Conservation Society, Conservation International, The Nature Conservancy, World Wildlife Fund, and World Conservation Union (which includes public and NGO members). Dowie calls the BINGOs “culture-wrecking institutions,” which together with the governments they help fund, have been responsible for impoverishing and/or displacing millions of Indigenous people on every continent except Antarctica, for the cause of land and wildlife conservation. To date, no Huaorani have been displaced for conservation, but the Huaorani in Yasuni now confront many of the same dynamics and challenges that Dowie describes, and are in danger of losing control over their lands and way of life in the name of conservation. Like the tribal peoples described by Dowie, many Huaorani “regard conservationists as just another colonizer.” In addition, a similar dynamic is emerging for a related human rights cause: to protect the Huaorani family group(s) who live in voluntary isolation in Yasuni. A recent study by an Ecuadorian environmentalist for the Catholic mission in Coca, which purports to collect the views and oral reports of the

voluntary isolation.

The contacted 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 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 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 the author 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 a lot of 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, as in the poster for Yasuni National Park shown below.

Figure 1: Photograph, taken in 2010 by the author, of a poster for Yasuni National Park in an exhibition by Ecuador's Ministry of Environment at a street fair in Coca, using (unauthorized) images of members of the Huaorani community, Bamenó.

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Huaorani and other local actors, proposes government relocation of some Huaorani communities (and colonists and oil companies). JOSÉ PROAÑO, *VOCES DE LA SELVA [VOICES FROM THE JUNGLE]* (2010). During a recent visit to Yasuni, a Huaorani leader asked the author to read the book and discuss it with community members. During those discussions, they first learned about the proposal by the mission and found a number of errors in the study. Funding for the study included monies from the European Union.



For example, in March 2011, the (then) Ministry of Environment (“MAE”) official charged with managing Yasuni National Park, Santiago Bonilla, invited some Huaorani from Yasuni to a meeting in the provincial capital, Coca. A group from Bameno travelled for three days to reach Coca and was joined by people from other Huaorani communities along the way; the meeting sounded important. They hoped to listen to presentations that would inform them about what the government and others are doing in their programs and projects for Yasuni, and then have an opportunity to explain their thinking and concerns and engage in a dialogue about “what is going to happen and how we will live.” But when they arrived, Bonilla told the meeting that he was working with professionals from the United Nations to update the management plan for Yasuni National Park, and divided the participants into groups—two for Huaorani who live on oil company roads and another for Huaorani who live in the forest. Two facilitators from UN agencies led each group. When asked for a copy of the current management plan for Yasuni, Bonilla said he did not have a copy and that it “is not pertinent”—the Huaorani do not need to know what it says in order to participate in the meeting, and if they want to know, they can find it on the internet, even though there is no internet service in the communities. He instructed the Huaorani to answer questions presented by the group leaders and said that their answers would be written on

large sheets of paper taped to the wall. This methodology offended the group from the forest, who subsequently said they felt “shoved into the groups” without any opportunity to listen or speak about what was on their minds.

Bonillo described the approach to the author, who accompanied *Ome Yasuni* to the meeting, in order to explain “the methodological reasons” why she should not make any comments during the meeting. The methodology for the group with the Huaorani from *Ome Yasuni*, he explained, was being managed by high-level officials from the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the United Nations World Tourism Organization; they will ask the Huaorani “extremely simple questions” in order to facilitate “comprehension of the problem,” and “it would be harmful to the Huaorani people” if the author spoke “since they [the Huaorani] have never been taken into account,” but now will be “taken into account.”

After the meeting, the Huaorani in the *Ome Yasuni* alliance felt “sad and concerned” because, as they explained in a formal communication to UN Special Rapporteur on the Rights of Indigenous People James Anaya (reporting and protesting violations of their rights by Ecuador and the UN agencies):

[I]t was clear to us that the government and United Nations system want to meddle in Yasuni, but they do not understand our culture, thinking, concerns or priorities, and what is more, *they do not want to understand*. They do not want to engage in a serious dialogue with our communities, instead they seem to think that we are children or animals to manage (and adorn their posters), and they want to impose authorities on us and make us live like children of the government. But we are humans and Yasuni is our home, it is our territory. We have rights and we want to live in freedom, as Huaorani, in our ancestral territory.<sup>164</sup>

The communication—from twenty-three Huaorani from five communities and *Ome Gompote Kiwigimoni Huaorani*—also said that the people who managed the meeting “seemed confused about who lives in the park and who lives far away or in the city,” and protested that “they did not inform us about what a management plan is and what their process is to write it and make decisions,” and “they did not want to let

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164. *Ome Gompote Kiwigimoni Huaorani, Comunicación Relativa a Violaciones de los Derechos Humanos de Miembros del Pueblo Indígena Huaorani (Waorani) en Ecuador* [Communication of Violations of the Human Rights of Members of the Indigenous Huaorani (Waorani) People in Ecuador] (May 18, 2011).

us talk about territory, only about the park and their questions.”<sup>165</sup> In addition, “the papers they wrote (on the wall) were badly done because they wrote things that changed our words, they did not write other important things that we said, and they made it look like we all agree with everything the papers say even though that is not true.” For example, when Penti, a Bamenó community member and coordinator of *Ome Gompote Kiwigimóni Huaorani*, said “we want title to our ancestral territory,” the UN facilitator said, “they want demarcation of the park” and began to write that on the paper on the wall.<sup>166</sup>

After the author tried to clarify, saying “it is not the same thing,” Bonilla approached her and said in a private conversation that “everyone knows” that Ecuador’s Constitution prohibits land titles in national parks because park lands must be the property of the State. She asked him to explain that to the Huaorani, but he refused—until finally, the author told Penti about the discussion and he told the Huaorani. When Bonilla at last addressed the group, “he spoke as if there is nothing to dialogue about, as if we have no rights” because the Constitution is the highest law of the land. He did not mention that the same Constitution, and international law, also recognize rights of the Huaorani over their lands, territory, and natural resources. Both Bonilla and his UN advisors were silent about the rights of Indigenous peoples, prompting the Huaorani to complain in their communication that they “only informed us about the law that favors their programs,” and “it seems that they do not know” that the UN Declaration on the Rights of Indigenous Peoples, and other constitutional and international law that “recognize our rights, exist, or they wanted to hide and disregard our rights and misinform us.”<sup>167</sup>

The Huaorani communication also protested the lack of information and discussion about future oil development in Yasuni, and underscored their opposition to new operations:

We have asked the government to inform us about its plans and proposals for oil company activities that could affect us and our territory. But it does not tell us anything. The government needs to understand that something of our territory must remain for us, where we can live in tranquility in the way we want to live. Without

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165. The questions are: What benefits do you have from the park? What problems exist? What solutions do you propose? What economic activities do you want to carry out?

166. *Ome Gompote Kiwigimóni Huaorani*, *supra* note 164.

167. *Id.*

territory we cannot live.<sup>168</sup>

They concluded by saying that “instead of dialoguing with us with dignity, [MAE and the UN agencies] tried to manipulate and use us so that afterwards they can say that we grassroots Huaorani who live in Yasuni are participating in their process and Yasuni Program, something that is not true.”<sup>169</sup>

A brochure that was given to some people at the meeting indicates that the activities were part of a larger project by MAE and six UN agencies, called the Program for Conservation and Sustainable Management of the Natural and Cultural Patrimony of the Yasuni Biosphere Reserve (Program Yasuni). The project was funded by Spain, through the UN Millennium Development Goals (MDGs) Achievement Fund,<sup>170</sup> ostensibly to advance MDG 7 (ensure environmental sustainability), by contributing to conservation of one of the most biologically and culturally diverse regions in the world; MDG 1 (eradicate extreme poverty and hunger), by “promoting community management of biodiversity and natural resources with the objective of generating sustainable means of livelihood”; and additionally, to “contribute to the protection of the fundamental rights of the indigenous peoples who live in isolation” in Yasuni.<sup>171</sup>

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168. *Id.*

169. *Id.* Indeed, on its website, MAE described the process to update the management plan for Yasuni National Park as “part of a new planning and management process for the Yasuni Biosphere Reserve, that takes into account the inter-relation between Yasuni National Park (core zone of the Yasuni Biosphere Reserve) and the surrounding territory,” and “involves the participation and efforts of multiple local, national, and international actors.” The agency further claimed that the new process and plan “will be the result of a process of broad citizen participation that permits the configuration of a new shared vision of the Protected Area, with citizens being the key actors in this process...” *Id.*; Ecuador Ministry of Environment, *Actualización del Plan de Manejo del Parque Nacional Yasuní* [Updating the Yasuni National Park Management Plan], <http://www.ambiente.gob.ec/?=node/873> (last visited Apr. 11, 2011).

170. The MDGs were first agreed to in 2000 in the United Nations Millennium Declaration. They are eight goals, with a target date of 2015. According to the official UN website, they have been agreed to “by all the world’s countries and all the world’s leading development institutions” and have “galvanized unprecedented efforts to meet the needs of the world’s poorest.” United Nations Millennium Development Goals, Background, UNITED NATIONS, <http://www.un.org/millenniumgoals/bkgd.shtml> (last visited Oct. 28, 2012).

171. Ecuador Ministry of Environment, *Programa para la Conservación y Manejo Sostenible del Patrimonio Natural y Cultural de la Reserva de la Biosfera Yasuni* [Program for the Conservation and Sustainable Management of the Natural and Cultural Patrimony of the Yasuni Biosphere Reserve] (Program Yasuni brochure).



It remains to be seen whether, and how, Program Yasuni and other conservation projects will lead to new law in Huaorani territory—and control over the Huaorani and their lands, territory, and resources—and whether any changes will be sustained, because so many important details and decision-making processes are murky and because historically, law and politics in Ecuador have been unstable.<sup>172</sup> In addition, the Huaorani in the *Ome* Yasuni alliance are learning about the new colonizers and have vowed to defend their territory and inherent self-determination rights.

Nevertheless, there is no question that this surge in outside interest, and funding, is fueling decision-making processes that affect the rights and interests of the Huaorani. Those processes, in turn, are creating a climate of insecurity in which community members now worry not only about protecting their territory from oil companies, settlers, and loggers, but also fear for their right to continue to live in freedom as Huaorani in what remains of their ancestral lands. As Daboto, a Huaorani woman and Bamenó community member, explained:

This is our territory. We live here, our parents and grandparents lived here; this has always been our territory. But now *cowode* (strangers) call it Yasuni and say it is not our land. We want to live here, like our ancestors, in this territory; we want our children to live here. We want to live free, we do not want strangers to compel us and tell us how to live.

Those “strangers” include a growing number of Ecuadorian government agencies, international public institutions, and NGOs. The public international actors—involved in multi-million dollar-projects—include the United States Agency for International Development (“USAID”) and at least six UN agencies. In addition to the burgeoning conservation bureaucracy, the Huaorani must now also contend with a rising national human rights regime and military presence in Yasuni, propelled by a legal proceeding at the Inter-American Commission on Human Rights. That proceeding was initiated by four environmentalists in Quito on behalf of the Tagaeri-Taromenane and prompted the Commission to ask Ecuador to implement “precautionary measures” to protect the right to life and physical integrity of the isolated group.<sup>173</sup> The

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172. Even constitutional law has been relatively easy to disregard, manipulate, and supplant. Ecuador has had twenty-one constitutions since becoming a republic in 1870. For further discussion, see Kimerling, *supra* note 7.

173. See *Petición de Medidas Cautelares a favor de los pueblos indígenas Tagaeri y Taromenani* [Petition for Precautionary Measures in Favor of the Tagaeri and

communities in the *Ome* Yasuni alliance agree with the objectives of the precautionary measures—to respect the right of the Tagaeri-Taromenane to live in isolation and protect their territory—and welcome external help from the Commission to achieve them. Nonetheless, they want the government (and petitioners) to recognize and respect their rights too, including their land rights, and reach agreements with them on how to implement the measures instead of making unilateral decisions and imposing them on community members. Major concerns include the growing presence of the Ecuadorian State, and further encroachments by oil companies and settlers in areas that lie outside of The Intangible Zone, but within the territory of the Tagaeri-Taromenane. Those areas include the oil block known as Armadillo, which reportedly is slated for development despite the likelihood of violent encounters with the Tagaeri-Taromenane and the threat to the survival of the uncontacted group.<sup>174</sup>

Even greater sums of money for conservation and human rights programs for Yasuni are possible in the future from a government proposal to combat climate change, called The Yasuni-ITT Initiative. Under the proposal, Ecuador would “leave the oil in the ground” in one oil block in Yasuni National Park—known as ITT (Ishpingo-Tiputini-Tambococha)—if the international community provides it with some \$3.6 billion over thirteen years, through donations and/or trading in carbon credit markets.<sup>175</sup> Although it remains to be seen whether those monies will be forthcoming, international funding for conservation is also expected to increase dramatically as a result of other emerging market-based mechanisms to combat climate change, including the Reduced Emissions from Reduced Deforestation and Forest Degradation (“REDD”) schemes that are being developed by the United Nations and

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Taromenani indigenous peoples] (May 1, 2006), *available at* <http://ciudadanosporlademocracia.org>; *Medidas cautelares MC-91/06* [Precautionary Measures MC-91/06], Inter-Am. Comm'n on H.R., Ecuador (May 1, 2006).

174. *See supra* note 158. Campo Armadillo is located in the ancestral territory of the Tagaeri and, as noted above, is still being defended by the Tagaeri-Taromenane.

175. In addition to uncertainty about funding, some people in Ecuador question whether there is sufficient political will to leave the oil in the ground. For official information about the Yasuni-ITT Initiative, *see* Yasuni ITT, *Inicio* [Home], <http://www.yasuni-itt.gob.ec/inicio.aspx> (last visited Oct. 28, 2012). Ecuador's government claims that another objective of the initiative is to protect Yasuni and the Indigenous people who live in voluntary isolation. However, the ITT oil block includes just a fraction of Yasuni, and oil operations continue to expand in other (larger) areas, including parklands. In addition, there are plans for new operations in Tagaeri-Taromenane territory.

World Bank to maintain carbon storage in forests by reducing deforestation and forest degradation rates.<sup>176</sup>

In addition to seeking to manage Huaorani territory, lands, and resources, and govern the Huaorani, the conservation project managers also seem to be trying to decide who should represent the Huaorani, by supporting 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 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, the UN agencies, 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.

ONHAE was founded in 1991 by a group of young Huaorani men who had attended secondary school together—and learned some Spanish—in an effort to engage with the outside world on new terms and enable the Huaorani to speak for themselves. In 1993, the president of the organization signed a “friendship agreement” with the oil company Maxus (now part of Repsol-YPF)<sup>177</sup> and opened an office in a city, outside of Huaorani ancestral lands. The officers of ONHAE began to leave their communities to work in the city, and both the organization and its directors became dependent on funding from the oil company and

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176. Those programs are the UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD Programme) and the World Bank’s Forest Carbon Partnership Facility (FCPF).

177. Repsol-YPF operates the oil concession known as Block 16, which includes parts of Yasuni National Park and Huaorani titled lands. For a first-hand account of the founding of ONHAE and its early relations with the former operators of Block 16, Conoco and Maxus, see JOE KANE, *SAVAGES* (1995). At the time the agreement with Maxus was signed, it was poorly understood by the Huaorani; one woman who attended the signing ceremony subsequently described it to the author as an agreement “for t-shirts.”

increasingly disconnected from the Huaorani communities. In 2007, the directors changed the name of the organization to NAWE, reportedly because ONHAE had a bad reputation and was widely regarded by Huaorani and *cowode* as notoriously corrupt.

NAWE's bylaws have never been approved by the Huaorani people, but the Huaorani generally 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 extended kinship groups within the tribe (and Yasuni) 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. As a general matter, the attempt to attribute political and legal "authority" to NAWE in Yasuni is generating considerable concern in the communities, and growing conflict within the tribe between grassroots Huaorani who want to live in peace in the forest, and an emerging urban political elite who want a piece of the action and see Huaorani lands and resources, and conservation and development projects by *cowode*, as a source of income.

In August 2010, the press reported that Ecuador had signed a "historic"<sup>178</sup> agreement with the United Nations Development Programme ("UNDP") to set up a trust fund to receive contributions for the Yasuni-ITT Initiative. In response to that news—and another report, in the government newspaper *El Ciudadano*, that the then-President of NAWE and his brother met with officials in the Presidential Palace in Quito to present a proposal for an indigenous oil company<sup>179</sup>—*Ome* Yasuni organized a gathering where community members agreed to

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178. Press Release, United Nations Development Programme, UNDP, Ecuador sign deal to protect Amazon from oil drill (Aug. 3, 2010), *available at* <http://content.undp.org/go/newsroom/2010/july/PNUdyEcuadorsuscribenacuerdoparalainiciativaYasuni.en>.

179. *Dirigentes waorani y kichwa destacaron ayuda del Gobierno en sus comunidades* [*Waorani and Kichwa Officials Emphasize Help from the Government in Their Communities*], *EL CIUDADANO*, June 14, 2010.

produce a written document to communicate their views about the ITT proposal and conservation and oil development in Yasuni. The communication began by explaining that the Huaorani communities in Yasuni are concerned about the future of the area and have “2 very important things to say.”<sup>180</sup> The first is that the oil in the ITT concession, and other parts of Yasuni where the forest has not yet been destroyed, “must stay in the ground,” regardless of whether the government gets the monies it is seeking, “because it is our home.”

The “second thing” is that:

[W]e want everyone to understand . . . that the forest in Yasuni is our home, it is our territory, and we, the Waorani [Huaorani] families of Yasuni, are working to defend the forest and our human rights, including the right of the Tagaeri-Taromenane Waorani family to live free in the forest without contact. We demand that the government and everyone with interest in Yasuni recognize and respect our rights, including our right to manage our territory and continue to live our culture in freedom in our ancestral lands. Do not come to bother us or impose projects and programs that have not been agreed to by the Waorani communities who live in Yasuni.<sup>181</sup>

The document explains that the communities appreciate that “many people want to protect the forest” and that the government now says “it wants to change the history of the Ecuadorian state in order to respect the rights of indigenous peoples and conserve the forest,” and continues:

But we are also concerned because so many outsiders want to manage Yasuni and negotiate [programs and projects] in the name of Yasuni and our Tagaeri and Taromenane neighbors without taking us into account and without respecting our rights. They work in government agencies, NGOs, companies, and other public and private organizations, and are national and international. They say they want to conserve the forest and defend the rights of the indigenous communities who live in her, but they are working in a paternalistic way, without informing, consulting, or reaching agreements with the communities of contacted Waorani who live in

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180. *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), available at <http://huaoraniintangiblezone.files.wordpress.com/2011/12/comunicado-yasuni-itt-25-octubre-2010.pdf>.

181. *Id.*

Yasuni, and without understanding our reality and what territory means for us . . . .<sup>182</sup>

The communication calls on the government to

listen to the voices of the Waorani communities who still live in our ancestral lands in Yasuni, change your history and policy regarding the Waorani people, and dialogue and work with us to reach written agreements with the communities to protect . . . Yasuni and make the rights of the Waorani people, including our territorial rights, a reality.

It demands that the government “leave the oil in the ground” in the ITT concession and other areas of Yasuni, and “correct” the Yasuni-ITT Initiative and other programs and projects “in order to recognize and respect the rights of the Waorani communities who live in Yasuni...” The communication also demands that other groups, including UNDP, UNESCO, USAID, NAWE, and the national indigenous organization Confederation of Indigenous Nationalities of Ecuador (“CONAIE”), inform the communities about their activities related to Yasuni or the Tagaeri-Taromenane, respect the rights of community members, and reach agreements with the communities “before continuing your projects and processes.”<sup>183</sup>

In 2011, after learning that the government of Ecuador was using images of Bameno community members in a video on YouTube to promote the Yasuni-ITT Initiative, *Ome* Yasuni posted a series of (three) video messages from Bameno on YouTube.<sup>184</sup> In May 2012, the group posted an online petition to the President of Ecuador on the social action platform Change.org, to reach out to viewers and apply international pressure on Ecuador to “Stop Destroying [the] Yasuni Rainforest” and work *with* the grassroots Huaorani communities to make human rights and conservation a reality in Yasuni. The introduction by *Ome Gompote Kiwigimoni Huaorani* to the petition letter closes by explaining: “Our fate and the fate of Yasuni are one. Without territory and self-determination, we cannot survive. Without the Huaorani to defend and

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182. *Id.*

183. *Id.*

184. *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); *Message from Huaorani of Yasuni Part 2: Kemperi*, YOUTUBE (Oct. 18, 2011), <http://www.youtube.com/watch?v=nCUXyzk863A>; *Message from Huaorani of Yasuni Part 3: Pentti*, YOUTUBE (Oct. 19, 2011), <http://www.youtube.com/watch?v=MyjsS1Sm65M>.

care for her, the Yasuni Rainforest cannot survive.”<sup>185</sup>

## VIII. CONCLUSION

Texaco’s discovery of commercially valuable oil in the Amazon Rainforest in Ecuador was heralded as the salvation of Ecuador’s economy, the product that would pull the nation out of chronic poverty and “underdevelopment.” The discovery ignited an oil rush that made the conquest of Amazonia and pacification of the Huaorani a national policy imperative, and petroleum quickly came to dominate Ecuador’s economy and quest for progress.

But the reality of oil extraction has been far more complex than its triumphalist launch. For the Huaorani who have lived in the Amazon Rainforest since time immemorial, the arrival of Texaco and “the civilization” meant destruction and ethnocide rather than development and progress. Their ancestral homelands were invaded and degraded by outsiders who also sought to force them to live in contact with “strangers” (*cowode*) and end their way of life. The strangers used their legal fiction to assert a supreme, overriding title to Huaorani lands, territory, and resources, and a paramount right to subjugate and govern “the People” (*Huaorani*). With their world changed forever and their territory reduced, the Huaorani have borne the costs of oil extraction without sharing in its benefits and without participating in decision-making by outsiders that affects them.

Notwithstanding those changes and challenges, many Huaorani who live in the area now known as Yasuni have maintained their culture and relationship with their “giving” rainforest territory, and want to “leave [their] own history” for their children. In The Intangible Zone, uncontacted and contacted Huaorani family groups are actively defending their way of life and what remains of their territory against further intrusions by *cowode*, each in their own way—but both nonetheless impelled by their shared interest in protecting as much forest as possible for future generations and their right to continue to live as they wish in their ancestral lands. For the Huaorani who still live on the

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185. *Ome Gompote Kiwigimoni Huaorani, Presidente de la Republica de Ecuador: Stop Destroying Yasuni Rainforest—“Something Must Remain for the Huaorani,”* CHANGE.ORG, <http://www.change.org/petitions/presidente-de-la-republica-de-ecuador-stop-destroying-yasuni-rainforest-something-must-remain-for-the-huaorani> (last visited Oct. 28, 2012) (also available at [www.change.org/OmeYasuni](http://www.change.org/OmeYasuni)).

land, territory is much more than a physical place and healthy environment. It is a space in which they can exercise genuine political self-determination, maintain their culture and identity, and live as Huaorani, without strangers spoiling the forest or trying to dominate the People and tell them how to live.

Despite significant changes in *cowode* law, at the national and international levels, that recognize rights of the Huaorani over their lands, territory, resources, culture, and development, an enormous gap remains between the promises in the law and the reality on the ground. Moreover, the arrival of new law and politics in the name of conservation and Indigenous peoples' rights in Yasuni is fueling, and funding, the "*reconquista*" of Huaorani territory and the People. This distressing distortion of well-intentioned—and essential—legal ideals reflects and reinforces gross inequities in law and governance and the enduring legacy of the Doctrine of Discovery and legal fiction of *terra nullius*. It also shows the wisdom of the conclusion, and response, by the Huaorani of *Ome* Yasuni, as explained (to the author) by Penti:

Before, our territory was big, big. Now we have less but the government wants more oil companies to enter, and many *cowode* want to impose their projects and law and tell us how to live. The *cowode* law has pretty words but does not respect the Huaorani or protect our territory *Ome*. Yasuni is here today because we [the Huaorani] defended this territory.

They all need to understand that something of this rainforest territory must remain for 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, *ministerios* (bureaucrats), or other outsiders damaging the forest or telling us how to live. Without territory, we cannot live.

For the rule of law to serve as an instrument of justice, the rules must be fair. When rules and rule-making processes are inequitable, the rule of law can be an instrument of aggression and destruction, rather than democracy and development. Until Ecuador recognizes *and respects* the rights of the Yasuni Huaorani over their lands, territory, and resources, including the right of local community members to free, prior, and informed consent before development—or conservation—projects can go forward in their territory, the kinds of abusive practices that began with Texaco and are still going on today can be expected to continue, and the rights of the Huaorani will be continue to be violated by state and nongovernmental parties with impunity.

At the same time, Ecuador needs to engage in a dialogue with the communities of contacted Huaorani in Yasuni in order to address the



problems and threats that imperil the Huaorani and the carbon-rich, biologically diverse forest that is their home; ensure that the right of the uncontacted Huaorani family group(s) to live in voluntary isolation is respected; and change the relationship between the Huaorani and the colonizing state, to establish a “just relationship”<sup>186</sup> that would allow the Huaorani to engage (or not) with strangers on their own terms in their own territory. Effective conservation and genuine, sustainable development—and justice and equal protection of the law—cannot be achieved by imposing a supreme and dominant *cowode* law in Yasuni, but rather will require political agreements that Huaorani community members and *cowode* “construct together”<sup>187</sup> in freedom and respect.

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186. The quoted term is borrowed from Russell, who wrote about the landmark *Mabo* land rights litigation in Australia:

They [Aborigines and Torres Strait Islanders] are members of historical societies that have never given up their own laws and their continuing and sovereign responsibility for their lives and their lands. In the resort to the white man’s courts that Eddie Mabo inspired, they hoped to improve their chances for establishing a just relationship with the much more powerful society that has colonized them. In that case, they did achieve a measure of justice. That is about all Indigenous peoples can expect from these courts. As I have written elsewhere, as a person whose ancestral ties are with the colonizing English-speaking people: ‘At their best, my people’s courts can prod, provoke, and, yes, on their *very* best days, inspire my people and our political leaders to work for a just relationship with the peoples we have colonized. But justice will only come through the political agreements my people and Indigenous peoples in freedom construct together.

RUSSELL, *supra* note 15, at 381 (citation omitted).

187. *Id.*