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A Sour Battle in Lago Agrio and Beyond: The Metamorphosis of Transnational Litigation and the Protection of Collective Rights in Ecuador

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A Sour Battle in Lago Agrio and Beyond: The Metamorphosis of Transnational Litigation and the Protection of Collective Rights in Ecuador

Manuel A. Gómez[1]

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I. INTRODUCTION

The conventional debate on transnational dispute resolution has been mostly centered on the use of traditional means such as litigation, and more recently arbitration.[2] These are generally perceived to be among the most favored institutionalized mechanisms available for the processing of complex disputes. In the particular case of litigation, the attention of scholars and practitioners generally revolves around the interpretation and application of national rules regarding jurisdiction,[3] the transmission of judicial documents,[4] the taking of evidence,[5] and the recognition and enforcement of foreign judgments,[6] among other

1. Associate Professor of Law, Florida International University School of Law. The author wishes to thank the participants on the panel "Comparative Studies on Disputing Behavior" (RC 12) held at the XVII ISA World Congress of Sociology in Yokohama, Japan, for their valuable insight and comments to earlier drafts of this work.

2. *See generally,* Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China*, 15 BERKELEY J. INT'L LAW 329 (1997); THOMAS CARBONNEAU, RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION (1988); Christopher A. Whytock, *The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Insights from the U.S. Federal Courts*, 2 WORLD ARBITRATION & MEDIATION REV. 39 (2008).

3. *See, e.g.*, Raymond Paretzky, A New Approach to Jurisdictional Questions in Transnational Litigation in U. S. Courts, 10 U. PA. J. INT'L L. 663 (2014).

4. *See, e.g.*, JOHN OWEN HALEY, FUNDAMENTALS OF TRANSNATIONAL LITIGATION: THE UNITED STATES, CANADA, JAPAN & THE EUROPEAN UNION, 533 (2012).

5. *See, e.g. id.*; Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on its Role in U.S. Civil Procedure*, 57 LAW & CONTEMP. PROBS. 77 (1994).

6. *See, e.g.*, Samuel P. Baumgarter, *Changes in the European Union's Regime of*

aspects. Looking at the formal legal dimension of transnational dispute resolution is important, but neither litigation nor arbitration occurs in a vacuum.[7] The choice of where and how to process a legal dispute depends on an array of factors both internal and external to the parties, including their socioeconomic status, their needs, aspirations and interests, their position vis-à-vis the other party, and their experience, to name a few. This decision is also conditioned by the political, social, and economic conditions affecting the parties and other stakeholders.

Once the parties have chosen a specific institutionalized mechanism for their dispute that does not necessarily mean that they intend to process their differences exclusively through a particular method or forum and rule out every other process. To the contrary, the parties to a legal dispute will rely on as many dispute-processing mechanisms as they deem necessary to obtain leverage toward a favorable outcome. Complex transnational disputes offer a prime example of multiple combinations of this interplay between several mechanisms and fora. These are cases that often encompass several legal issues, which require the application of the laws of more than one jurisdiction or legal system, where the number of parties and other stakeholders tends to be higher than in most ordinary disputes, and where the stakes are also high. Even though the utilization of different procedural means by the parties is often deliberate and follows a preconceived strategy, the parties can rarely control or even predict the outcome.

This article intends to explore the interplay between different dispute processing mechanisms and fora in the realm of transnational litigation, through the lens of the Chevron-Ecuador legal saga. My goal is to discuss the transformation of a transnational complex case and the challenges faced by the parties, their procedural strategies, and the perceived advantages of the different mechanisms. In this regard, I will also address the development of mechanisms for the protection of diffuse rights involving the environment; the role of the courts in supervising compliance with judicial remedies, their engagement in activities that go beyond

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Recognizing and Enforcing Foreign Judgments and Transnational Litigation in the United States, 18 Sw J. INT'L L. (2012); Christopher A. Whytock & Cassandra Burke Robinson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1145 (2011).

7. Manuel A. Gómez, *The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador*, 1 STAN. J. COMPLEX LITIG. 429 (2013) [hereinafter *Gómez, Global Chase*].

their traditional role as simple adjudicators; and the role of privately formed entities in the administration and supervision of monetary awards in Ecuador.

I use the term Chevron-Ecuador legal saga to convey the array of legal proceedings utilized across different jurisdictions in connection with a dispute that arose from the alleged tortious conduct of the oil multinational Texaco while exploring and extracting oil in the Ecuadorean Amazon between 1964 and 1992. Texaco was particularly blamed for causing property damage, personal injuries, increased risks of cancer and other diseases to tens of thousands of indigenous peoples residing in the Oriente region of Ecuador and adjacent areas in Peru, and also for degrading and destroying the environment.[8]

The opening act of the Chevron-Ecuador legal saga was the filing of two class action complaints in the mid-nineties by a group of Ecuadorean and Peruvian citizens against Texaco in a United States federal court. After a pretrial phase that lasted several years, and pursuant to Texaco's own formal request, the cases were jointly dismissed in favor of the courts of Ecuador and Peru. A year later, the plaintiffs re-filed the case in Ecuador against Chevron, as Texaco's successor-in-interest. What appeared to be a straightforward summary proceeding under Ecuadorean law became a judicial hydra of sorts that sprouted outside the courtroom, beyond the initial parties, and across several jurisdictions including the United States, and later on the Netherlands, Canada, Brazil, and Argentina.

Starting in the mid-2000s, the threat of a multi-billion dollar adverse judgment looming over Chevron's head drove the American corporation to mount a vigorous counterattack against the plaintiffs and anyone else who supported or benefited from their cause. The multi-front legal battle is still underway. Chevron's legal campaign comprised at least two investor-state arbitration proceedings in international tribunals, civil litigation under the Racketeer Influenced and Corrupt Organizations Act (RICO) in federal courts, an injunction to block the enforcement of the Ecuadorean judgment in the United States, numerous judicial petitions to obtain evidence for use in foreign or international tribunals, and a petition before the United States Trade Representative.

Plaintiffs, on the other hand, had supplemented their judicial strategy with a forceful public relations campaign that included a

8. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

documentary film, which later on became the epicenter of a public scandal and provided the foundation for Chevron's RICO lawsuit. Plaintiffs also pursued a multi-country enforcement strategy of the $8.6 Billion Ecuadorean judgment entered against Chevron in 2011, which at the time of writing they are still attempting to collect. The most recent move by plaintiffs has been the filing of a formal complaint against Chevron executives with the Office of the Prosecutor of the International Criminal Court.

The Ecuadorean judgment entered against Chevron is unprecedented in several ways. First, by all measures it is the largest and most complex award rendered against a multinational oil company in Ecuador, and perhaps in the entire South American region. Second, it is the first major court ruling in Ecuador regarding the protection of the diffuse rights of indigenous peoples under the Environmental Management Act of 1999. And third, this is also the first time an Ecuadorean court has devised a judicially supervised mechanism to administer and disburse a remediation award through a privately formed entity (Amazon Defense Front, or "ADF"). The unique circumstances surrounding the Chevron-Ecuador legal saga, which has been marred by multiple allegations of corruption, political influence, and professional misconduct both in Ecuador and the United States has had a major effect on the fate of this case, it has obviously reshaped the strategies of the parties, and has also cast a cloud of doubt on the legitimacy of the court proceedings and the lawfulness of the remedies issued.

II. THE METAMORPHOSIS OF TRANSNATIONAL LITIGATION

It is not an exaggeration to say that not even in their wildest dreams the parties to the Chevron-Ecuador legal saga could have predicted that their confrontation would last more than two decades, involve several jurisdictions, cost hundreds of millions of dollars in legal fees, and still not be resolved. At first glance, the class action complaints filed in 1993 and 1994 in the Southern District of New York on behalf of Maria Aguinda, Gabriel Ashanga Jota and others against Texaco were nothing out of the ordinary.[9] After all, foreign plaintiffs have always been attracted to the courts of the United States "as a moth is drawn to the light."[10] While there are no statistics available as to how many

9. *See id.*

10. Smith Kline & French Laboratories, Ltd. v. Bloch [1983] 2 All E.R. 72, 74, 1 W.L.R. 730 (C.A. 1982) (Lord Denning M.R.).

class actions lawsuits are filed in United States courts—both federal and state—on behalf of foreign plaintiff every year, the general perception is that the number is on the rise.[11] Foreign plaintiffs, and particularly those from Latin America, seem to find enough incentives to bring their claims to United States courts instead of litigating in their own countries.

The perceived advantages of the American civil justice system that appeal to foreign litigants are several.[12] An important one is the ease of access to adequate legal representation in the United States and to its courts. Unlike many foreign jurisdictions, the United States allows lawyers to take cases on a contingency fee basis, which is generally perceived to enable litigants without sufficient financial means to attain legal representation that would be otherwise prohibitive and to pursue their claims in court. In most Latin American jurisdictions, contingency fees have been traditionally frowned upon or banned outright because of the idea that lawyers should not acquire a personal interest in the matters for which they have been hired. To make up for this shortcoming and to facilitate access to justice, some Latin American nations have sponsored the creation of legal aid societies, but their reach tends to be very limited. Besides, these organizations generally lack the financial incentive to litigate because—unlike American lawyers—they are not supposed to obtain profit from their activities. Other forms of litigation financing widely available in the United States such as non-recourse loans provided by professional litigation funders are also unavailable in Latin America where this industry is yet to develop. A third possible financial upside of the United States litigation system is the absence of a loser-pays rule, which minimizes the pressure on the parties regarding the shifting of legal fees.[13]

Another perceived advantage of the American civil litigation system vis-à-vis that of Latin American countries is the existence of procedural tools such as discovery in the United States, which

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11. Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 HASTINGS INT'L & COMP. L. REV. 205, 206 (2004-2005); Manuel A. Gómez, *Will the Birds Stay South? The Rise of Class Actions and Other Forms of Group Litigation Across Latin America*, 43(3) U. MIAMI INTER-AM. L. REV. 481 (2012) [hereinafter *Gómez, Group Litigation in Latin America*].

12. Manuel A. Gómez, *Like Migratory Birds: Latin American Claimants in U.S. Courts and the Ford-Firestone Rollover Litigation*, 11 SW. J. L. & TRADE AM. 281 (2005).

13. *Id.* at 297.

presumptively facilitates settlement.[14] Unlike most of Latin America, the United States recognizes class actions, which enable the aggregation of claims—which are otherwise impracticable—into a single litigation, and extends the res judicata effect of the decision on the merits beyond the actual parties to include any absent class members who have not opted out. Trial by jury is also a common feature of American civil litigation that is perceived as advantageous by foreign plaintiffs who deem jurors as generally sympathetic to the plaintiff's side, and are presumptively disposed to award significantly larger sums than a single judge elsewhere. Moreover, the United States is one of the few jurisdictions where obtaining punitive or exemplary damages is possible, unlike in Latin American jurisdictions where the concept is extraneous and often deemed contrary to their public policy.

In addition to the above reasons, the fact that defendant Texaco Corporation was an American company with assets in the United States and therefore within reach of a local court for enforcement purposes, is probably what drove Aguinda, Jota, and the other class representatives to bring their claim in the United States. Their choice of forum, however, was not without risk because the United States also recognizes the doctrine of *forum non conveniens*, which is generally used as a tool to remove cases from United States courts in favor of a foreign jurisdiction. According to this doctrine, despite having jurisdiction over all of the parties, an American court may dismiss a case in favor of another available forum (i.e. that also has jurisdiction), which is considered "more convenient," or adequate to the private interest of the parties or the public interest of the fora involved.[15] Conversely, the acceptance of the forum non conveniens doctrine in Latin America is scant.[16]

Filing a motion to dismiss on forum non conveniens grounds

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14. *See, e.g.*, Kuo-Chang Huang, *Does Discovery Promote Settlement? An Empirical Answer*, 6 J. EMPIRICAL LEGAL STUD. 241 (2009).

15. *See* Piper Aircraft v. Reyno, 454 U.S. 235 (1981); Gulf Oil v. Gilbert, 330 U.S. 501 (1947).

16. *See,* e.g., Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21 (2003-2004); LUIS COVA ARRIA, LA DOCTRINA DEL FORUM NON CONVENIENS EN EL DERECHO ANGLO-AMERICANO Y LAS BASES DE LA JURISDICCIÓN EN VENEZUELA: ESTUDIO COMPARADO ESPECIALMENTE REFERIDO A ASUNTOS MARITIMOS, IN LIBRO HOMENAJE A LA MEMORIA DE JOAQUÍN SÁNCHEZ COVISA 40 (1975); *but see*, Victor Hugo Guerra Hernández, La Jurisdicción Venezolana en Materia Extracontractual y la Doctrina del Forum Non Conveniens, in Estudios de Derecho Procesal Civil Homenaje a Humberto Cuenca (Tribunal Supremo de Justicia: Caracas, 2002) at 448.

is one of the premier procedural tactics available to American defendants to delay the process, and ultimately send cases back to their countries of origin where they most likely will not be re-filed. This is not to say that most motions to dismiss on forum non conveniens grounds are meritless or used to manipulate the process and hinder plaintiff's chances to obtain any redress. Its apparent advantages, however, are tempting to an American defendant who is aware that the reason why a foreign plaintiff has filed a lawsuit in this country is precisely because of the obstacles of litigating in their home forum.

The use of forum shopping strategies in litigation is obviously not exclusive of powerful corporate defendants. Foreign plaintiffs of all sorts are, too, obviously prone to take advantage of the United States civil litigation system, and courts are cognizant of that reality. For example, one of the most common tactics used by foreign plaintiffs is the filing of lawsuits in so-called "plaintiff friendly jurisdictions," which otherwise have no connection with the dispute or with any of the parties. The judicial solution in the context of the forum non conveniens doctrine as applied by United States courts has been to give less deference to the choice of forum made by foreign plaintiffs,[17] which facilitates the dismissal of the case in favor of a foreign jurisdiction, or in some instances, its removal to another jurisdiction within the United States.[18]

In the event of a dismissal of a case in favor of a foreign country, there is a perception that a significant number of dismissed cases are never re-filed in the alternative forum, thus leading to the belief that a forum non conveniens dismissal is really dispositive on the entire case.[19] In order to minimize this risk, United States courts always retain jurisdiction over the parties even after dismissing the litigation. The idea is to ensure that if by any reason a plaintiff is not able to re-file the case in the foreign court, the

17. *See, e.g.*, Harry Litman, *Considerations of Choice of Law in the Doctrine of Forum Non Conveniens*, 74 CALIF. L. REV. 565 (1986).

18. *See, e.g.*, Republic of Bolivia v. Philip Morris Companies, Inc., 39 F. Supp. 2d 1008 (S.D. Tex. 1999).

19. *See* Cassandra Burke Robertson, *Forum Non Conveniens on Appeal: The Case for Interlocutory Review*, 18 SW. J. INT'L L. 445, 449 (2012) ("because dismissal often ends the case, defendants have historically had a strong incentive to file a forum non conveniens motion in nearly every case with a plausible alternative forum"); *see also* David W. Robertson, *Forum Non Conveniens in America and England: A rather fantastic fiction*, 103 L.Q. REV. 398, 418-420 (1987); *but see,* Cassandra Burke Robinson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1131 (2010).

United States courts are still available and the plaintiff is not left without any remedy.

In any instance, regardless of whether an American defendant is able to effectively prevail in obtaining dismissal of the litigation in favor of a foreign forum, the time it takes to argue the motion in the United States court might also have a debilitating effect on a plaintiff with limited resources. The motion to dismiss filed by Texaco in the Aguinda and Jota class actions, for example, took several years to litigate until the case was finally dismissed in favor of Ecuador and Peru, upon the United States District Court's conclusion that the balance of private interest factors swayed toward the foreign fora. One reason for such lengthy process in the Aguinda and Jota litigation was the vast amount of witnesses that had to be deposed, and the tens of thousands of documents submitted into evidence "in an effort to establish a meaningful nexus between the United States and the decisions and practices complained of."[20] Ironically, it was precisely the availability of discovery, which as I said earlier has been generally perceived by foreign plaintiffs as an advantage of American civil litigation that caused such a long delay in the pretrial phase of Aguinda and Jota.

Despite their taxing experience in American courts, the Ecuadorean plaintiffs were not deterred from re-filing the case back home, although the Peruvian claims had a different fate for they were never pursued in the alternative forum, thus validating the common perception about the dispositive nature of the forum non conveniens dismissal to which I referred earlier. In any case, it is not hard to imagine how undesirable would be to any foreign plaintiff whose primary goal for coming to the United States was precisely because of the possibility of obtaining swift justice, to engage in a prolonged legal fight for almost seven years just to see their case dismissed and have to re-file it elsewhere.

As it commonly occurs in forum non conveniens cases, the District Court conditioned its dismissal to certain conditions, to wit: (i) that Texaco would waive any statute of limitations-based defense that matured between the filing of the class actions and sixty days after dismissal, (ii) that Texaco consented to personal jurisdiction in Ecuador and Peru to be sued by members of the putative classes and willingness to accept service of process in those jurisdictions, and (iii) that the parties were able to utilize

20. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 535 (S.D.N.Y. 2001).

the discovery obtained in the United States in the actions to be filed in Ecuador or Peru.[21] Plaintiffs filed a consolidated appeal from the judgments dismissing the two putative class actions but had no success, and the judgment was confirmed by the Court of Appeals on August 16, 2002.[22]

In 2003, Maria Aguinda, and the other Ecuadorean plaintiffs filed a complaint in the Provincial Court of Justice of Sucumbíos against the Chevron Corporation, which two years earlier had merged with Texaco and was thus regarded as its successor in interest. The Complaint was grounded on Ecuador's Environmental Management Act of 1999 (*Ley de Gestion Ambiental de 1999,* or "EMA"),[23] a relatively new statute, which passage was credited to the persistent lobbying efforts of the ADF and the Center for Economic and Social Rights ("CEDES") on behalf of Aguinda's cause.[24] As a result of this special statute and the passage of the International Labour Organization (ILO) Convention 169,[25] the Ecuadorean court system became "more sympathetic than ever before to the plaintiffs and their plight."[26] Notwithstanding the suspicion that EMA was somewhat tailor-made to the Aguinda case, its passage was generally positive because it broadened the scope of the protection of collective rights in Ecuador, and also advanced the cause for enabling aggregate litigation in the region.

Article 43 of EMA essentially gave plaintiffs standing to bring suit on behalf of others similarly situated vis-à-vis any violation to the environment attributable to Chevron.[27] This procedural vehicle is the Ecuadorean version of a class action although its scope is much narrower than its American counterpart contained in Rule 23 of the Federal Rules of Civil Procedure.[28] Aguinda was also the first claim brought under this statute against a multinational corporation, so it was unchartered territory for the court and the parties. Unlike the other forms of judicial protection allowed under

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21. *Id.* at 534.

22. Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002).

23. LEY DE GESTIÓN AMBIENTAL, Law No. 99-37.

24. SUZANA SAWYER, *EMPIRE/MULTITURE-STATE/CIVIL SOCIETY: RETHINKING TOPOGRAPHIES OF POWER THROUGH TRANSNATIONAL CONNECTIVITY IN ECUADOR AND BEYOND*, IN INDIGENOUS PEOPLES, CIVIL SOCIETY, AND THE NEO-LIBERAL STATE IN LATIN AMERICA 77 (Edward F. Fischer ed., 2009).

25. *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 1989 ("ILO Convention 169"), available at: http://www.ilo.org/dyn/normlex/en/f?pNºRMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314.

26. SAWYER, *supra* note 24, at 77.

27. LEY DE GESTIÓN AMBIENTAL, Law No. 99-37, art. 43.

28. FED. R. CIV. P. 23.

EMA, which were limited to injunctive relief,[29] the action filed by Aguinda and others allowed them to seek monetary compensation in addition to an incentive equivalent to ten percent of the total award for the representative party.[30]

EMA established that the proceedings were to be summary and oral, as opposed to a full-blown trial. The statute also gave the trial judge ample powers to order expert reports, calculate damages, and determine the administration and disbursement of any judgment monies.[31] The court with jurisdiction over the dispute was located in the town of Lago Agrio, which is close to where the victims resided, and where the alleged tortious conduct had occurred. Ironically, this put Chevron at a significant tactical disadvantage with regard to the plaintiffs, despite the fact that Texaco had spent several years arguing so vehemently that the action be dismissed in favor of Ecuador.

The manner in which the Ecuadorean process was conducted, including the increased politization of the dispute, and the conduct of certain members of the plaintiff legal team, became the source of a major controversy in the years to come and the basis for Chevron's subsequent collateral attacks. At some point, plaintiffs expressed somewhat cynically that Chevron got what it (Texaco) had bargained for, so it should not be allowed back into the United States when their Ecuadorean litigation went south.[32] However, it would be fair to assume that when Texaco fought for the dismissal of the Aguinda and Jota class actions in New York, the Ecuadorean system that they had in mind was very different from the one that their successor Chevron experienced a few years later. This modification in the circumstances more than justified a change in Chevron's litigation strategy and, perhaps unexpectedly, transformed the initial dispute into something entirely different and disproportionately bigger than what any of the parties might have anticipated.

As the suspicion of bias, judicial corruption, and adverse political pressure against Chevron became stronger, and the imminence of a multi-billion dollar judgment against the multinational company became evident, their legal team decided to launch a counter-offensive in the United States. As in any other legal sys-

29. LEY DE GESTIÓN AMBIENTAL, Law No. 99-37, arts. 41, 42.

30. *See id.* at art. 43.

31. *Id.*

32. Roger Parloff, *Evidence of fraud mounts in Ecuadorean suit against Chevron*, FORTUNE (Sept 13, 2010), http://archive.fortune.com/2010/09/13/news/international/chevron_ecuador_litigation.fortune/index.htm.

tem, Ecuadorean law guarantees the right to file an appeal and to seek other judicial remedies in case of an adverse judgment and this would be the natural course of action for a defendant to follow in any litigation. Although Chevron did exercise their right to appeal in Ecuador where the main litigation took place, their main focus changed to other for a that offered the necessary procedural tools to mount a multi-faceted battle.

One front was international, and it consisted in the filing of two successive demands for arbitration by Chevron against the Republic of Ecuador ("ROE") based on the alleged breach of certain obligations under a bilateral investment treaty ("USA-ROE BIT") signed between the latter and the United States of America. Pursuant to the terms of the treaty, the arbitral proceedings were filed with the International Centre for the Settlement of Investment Disputes ("ICSID") to be administered under the Arbitration Rules of the United Nations Commission on International Trade Law UNCITRAL. The first complaint was filed in 2006 and decided five years later in favor of Chevron and Texaco[33], and the second was filed in 2009 and it is still pending of a final decision on the merits.

Chevron's main assertion in the first arbitration was that ROE had breached the USA-ROE BIT through the conduct of its government and the inaction of its courts in relation to seven domestic court cases involving TexPet—an Ecuadorean subsidiary formed by Texaco to carry out its operations in Ecuador—and pending for more than fifteen years in their docket without proper resolution.[34] Furthermore, Chevron claimed that in addition to constituting a specific violation of the USA-ROE BIT, such undue delay and manifestly unjust decisions against a foreign investor in Ecuador such as Chevron and Texaco were tantamount to a denial of justice, which in turn constituted a violation of both Ecuadorean domestic law and customary international law.[35] The Ecuadorean litigation referred to by Chevron and Texaco in their demand for arbitration resulted from five lawsuits commenced "against the government of Ecuador between 1991 and 1993 relating to . . . allegations of over-contribution of crude oil to domestic

33. Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador, PCA Case No. 34877, Final Award (Aug. 31, 2011), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0154.pdf [hereinafter *Chevron v. Ecuador Final Award*].

34. *Id.* at ¶ 35.

35. *Id.* at ¶¶ 35, 37.

consumption."[36] In addition, there were two other cases "one relating to a *force majeure* issue (Case 8-92) and the other concerning the alleged breach of the 1986 Refinancing Agreement (Case 983-03)."[37] The total amount in dispute in these seven cases was US $553,456,850.81."[38]

Although none of the aforementioned Ecuadorean court cases appeared to have any direct connection with the environmental damages that formed the basis of Aguinda's tort action, they did arise out of the same underlying oil extracting activities between Texaco and the ROE in the Oriente region of Ecuador. As a result, it should come as no surprise that Chevron would use the circumstances surrounding these lawsuits to build their counter-attack in response to the Lago Agrio litigation, especially in a way that weaved the participation of the ROE into the theory of their case: that Aguinda's environmental litigation was nothing more than part of a corrupt enterprise to extort billions of dollars from the multinational oil company.[39] Bringing the ROE onboard and assigning it a role in Chevron's misfortunes in some other Ecuadorean litigation would later help Chevron build the foundation for the second ICSID arbitration filed in 2009, now in direct connection with the Aguinda litigation.[40]

The basis for this second arbitration was the alleged attempt of the ROE "to shift to Chevron Ecuador's own contractual share of liability for any remaining environmental impacts from the pre-1992 activities of the Consortium,"[41] and "the responsibility for impact caused by Petroecuador's own oil operations since 1992, as well as impact caused by government-sanctioned colonization and agricultural and industrial exploitation of the Amazonian region."[42] More specifically, Chevron asserted that "Ecuador has pursued a coordinated strategy with the Lago Agrio plaintiffs that

36. *Id.* at ¶ 46.

37. *Id.*

38. *Id.* at ¶ 47.

39. Amended Complaint for Plaintiff at ¶ 1, Chevron Corp. v. Donziger et. al, 768 F. Supp. 2d 581 (S.D.N.Y. 2011) (No. 11 Civ. 0691) [hereinafter *Chevron's RICO Complaint*"] ("Over the course of several years, defendants, Steven Donziger and his co-defendants and co-conspirators have sought to extort, defraud, and otherwise tortuously injure plaintiff Chevron by means of a plan they conceived and substantially executed in the United States").

40. Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador, PCA Case No. 2009-23, Claimants' Notice of Arbitration (Sept. 23, 2009), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf [hereinafter *Chevron v. Ecuador* Claimants' Notice].

41. *Id.* at ¶ 3.

42. *Id.*

involves Ecuador's various organs of State,"[43] including the executive and judicial branches. Regarding the latter, the statement of claim accused the Ecuadorean courts of conducting "the Lago Agrio litigation in total disregard of Ecuadorean 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."[44] All of this, Chevron and Texaco concluded, "violates the terms of the Ecuador-United States BIT and the terms of the investment agreements between Ecuador and TexPet."[45]

On the other hand, the ROE has defended itself by alleging that Chevron's strategy is simply "to avoid responsibility for the degradation of the Ecuadorean Amazon"[46] and that their use of arbitration as a collateral proceeding is "to avoid liability to parties not present here,"[47] in reference to Aguinda and the other alleged victims.

Despite the fact that Aguinda and the other plaintiffs are not parties to the arbitration, with these proceedings Chevron clearly aimed to set the stage to seek interim measures directed at thwarting any adverse outcome resulting from the Aguinda litigation in the Sucumbíos court. In fact, as early as April 1, 2010, and in several other occasions during the next few years, Chevron asked the arbitral tribunal to order the ROE to take all measures at its disposal to prevent or suspend the enforcement of any judgment adverse to Chevron originating from the court handling the Aguinda litigation.[48] So far, the arbitral panel has sided with Chevron on this issue, and as of the time of writing this article, has issued at least four interim awards ordering the ROE to take all measures to suspend enforcement of the US $8.6 Billion Lago Agrio judgment.[49] The ROE has repeatedly argued that fulfilling

43. *Id.* at ¶ 4.

44. *Id.*

45. *Id.* at ¶ 5.

46. Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador, PCA Case No. 34877, Track 2 Supplemental Counter-Memorial on the Merits of the Republic of Ecuador, (Nov. 7, 2014), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw4095.pdf [hereinafter *Chevron v. Ecuador* Supp. Counter-Memorial].

47. *Id.* at ¶ 1.

48. *See, e.g.*, Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador, PCA Case No. 2009-23, Claimants' Request for Interim Measures (Apr. 1, 2010), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0159.pdf.

49. *See, e.g.*, Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador, PCA Case No. 2009-23, First Interim Award on Interim Measures (Jan. 25, 2012), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0173.pdf;

Chevron's demands would violate the ROE's own Constitution and laws.[50] The ROE has further asserted, "[e]ach measure would require circumventing established judicial procedure in direct violation of Article 168 of the Constitution. Such violations would lead to administrative, civil, and criminal liability for the entities or individuals who carried out the claimants' demanded interference with the judiciary."[51]

In light of the complexity and scope of the issues presented to the arbitral tribunal, since April of 2012, the proceedings were bifurcated so one track would be devoted to address the legal interpretation and legal effect of certain Settlement Agreements entered between the parties in 1995.[52] The second track, on the other hand, would be devoted to "all extant issues that may be required finally to decide the Parties' dispute."[53] As mentioned earlier, the second BIT arbitration is still underway, and a decision on the merits is yet to be rendered. Notwithstanding, Chevron has relied on the jurisdictional authority of the arbitral tribunal to intensify their collateral attack geared to prevent Aguinda and others from collecting the US $8.6 Billion judgment granted by the Sucumbíos court in February of 2011.[54]

The use of an investment arbitration-related claim as a strategy to block the enforcement of a domestic court judgment was a creative move by Chevron's lawyers but also a sign of the times. In recent years, international arbitration and litigation have become more interdependent than ever before. The idea of inter-

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Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador, PCA Case No. 2009-23, Second Interim Award on Interim Measures (Feb. 16, 2012), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0174_0.pdf; Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador, PCA Case No. 2009-23, Third Interim Award on Interim Measures (Feb. 27, 2012), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0175.pdf; Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador, PCA Case No. 2009-23, Fourth Interim Award on Interim Measures (Feb. 7, 2013), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1274.pdf.

50. *See, e.g.*, Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador, PCA Case No. 2009-23, Respondent's Letter to the Tribunal (Jan. 9, 2012), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0172.pdf.

51. *Id.* at 6.

52. Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador, PCA Case No. 2009-23, Procedural Order No. 10 (Apr. 9, 2012), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0913.pdf.

53. *Id.* at ¶ 2.

54. Maria Aguinda y otros v. Chevron Corporation, Sentencia definitiva, Corte Provincial de Justicia Sucumbíos, Sala Unica de la Corte Provincial de Justicia de Sucumbíos, February 14, 2011, file 2003-0002 [hereinafter *Aguinda v. Chevron, Sucumbíos Judgment, February 14 2011*].

national arbitration and transnational litigation as two separate and totally independent procedural avenues that can only be used in a mutually exclusive manner is not true anymore. National courts are essential in the life of international arbitration not only because they interpret and help carrying out the parties' will to submit themselves to arbitration and help ensure that the arbitral process goes without hiccups, but more importantly because they give effect—by way of granting recognition and enforcement—to the final awards issued by arbitral tribunals.

On the other hand, as we can learn from the Chevron-Ecuador legal saga, the power of arbitral tribunals can be used, in turn, to monitor the performance of national courts and other state organs, and—at least in theory—to protect the parties from judicial abuse, denial of justice, and offer them appropriate redress. Put more simply, national courts are relied upon to assist arbitral tribunals and guarantee that the proceedings go according to the parties' will, and conversely, arbitral tribunals can also be used to ensure that national courts act properly. The second arbitration commenced by Chevron against the REO is precisely geared to remedy a purported treaty violation stemming from actions attributed to Ecuador's national courts and other state organs. But even if Chevron were to prevail in its claims, the only apparent way for it to obtain satisfaction would be if a national court (presumptively, from Ecuador itself) agreed to recognize and enforce the award issued by the arbitral panel;[55] a typical catch-22 situation.[56] In any case, and regardless of the ultimate outcome of the Chevron-Ecuador dispute, the use of arbitration in tandem with litigation, as opposed to as an alternative, might be attractive to certain parties who—like Chevron in this case—choose to combine different mechanisms as part of a broader strategy to pursue a specific goal.

As the legal battle between Chevron, Aguinda, and now the ROE expanded from one forum to another, the case gained more attention in the media. Taking advantage of the technology, each side launched or participated in dedicated websites, blogs, and print media. The pinnacle of this strategy was the making of a documentary film by director Joe Berlinger with financing from

55. *See* 330 UNTS 38, 49–51 (1958).

56. The term "catch-22" denotes a quandary that is unsolvable because of a problem inherent to that same situation. *Catch 22 definition*, OXFORD LEARNER'S DICTIONARIES, *http://www.oxfordlearnersdictionaries.com/us/definition/english/catch-22* (last visited March 18, 2015).

Russell De Leon, one of the plaintiffs' supporters. The film was released on January of 2009 and entered into at least fifteen film festivals.[57]

As the film's main content was the progress of the legal case in Ecuador, many of the scenes showed meetings of plaintiffs' lawyers, and interviews with people involved in the litigation. After noticing the mismatch between certain scenes that originally appeared in the film but were cut from later versions, Chevron's lawyers sought a judicial order to obtain discovery from the film director, which resulted in a federal judge in the Southern District of New York ordering the release of hundreds of hours of outtakes for further use in the foreign proceedings pursuant to 28 U.S.C. § 1782.[58]

The result of this expedition was the exposure of numerous scenes showing Steven Donziger and other members of the plaintiffs' legal team engaged in ethically questionable behavior that further compromised the integrity of the Ecuadorean proceedings, and later served as the basis for one more lawsuit filed by Chevron in the same New York federal court that years earlier had dismissed the Aguinda litigation in favor of Ecuador. The new complaint, filed on February 1, 2011, was grounded in RICO[59] and based on Chevron's theory that all the activities led by Aguinda and others were part of an ongoing criminal organization to extort and defraud the multinational company with "a sham litigation in Lago Agrio, Ecuador, claiming to seek money damages from 'collective environmental rights' of the 'affected' 'communities' to remediate alleged petroleum contamination in Ecuador's Oriente region."[60]

The complaint named a long list of individuals as co-defendants and co-conspirators led by United States plaintiff lawyer Steven Donziger; other American law firms such as Kohn Swift & Graf, P.C., Emery Celli Brinckerhoff & Abady, LLP, Motley Rice LLC, and Patton Boggs LLP; the environmental firm Stratus Consulting and its principals; several environmental activists including Amazon Watch and Rainforest Action Network; public relations consultants; third party funders; and several Ecuado-

57. Awards and Festivals, CRUDE: A JOE BERLINGER FILM, http://www.crudethemovie.com/awards-and-festivals, (last visited March 18, 2015).

58. 28 U.S.C. § 1782 (2012).

59. 18 U.S.C. §§ 1961-1968 (2012).

60. Amended Complaint at 3, *Chevron Corp. v. Donziger*, 886 F. Supp. 2d 235 (S.D.N.Y. 2012) (No. 11 Civ. 0691).

rean nationals.[61] The two-hundred-page complaint filed by Chevron merely days prior to the Lago Agrio judgment being handed down in Ecuador, described in great detail many instances of alleged fraud, corruption, misrepresentation, pressure tactics, and collusion with Ecuadorean government officials, obstruction in United States courts, and falsification of documents. The complaint listed nine claims for relief, including fraud, tortious interference with contract, trespass to chattels, unjust enrichment, civil conspiracy, violation of New York Judiciary Law §487, and a declaratory judgment that the decision issued by the court of Sucumbíos against Chevron is unenforceable and non-recognizable.

The last claim for relief listed in the complaint was undoubtedly the most important piece toward advancing Chevron's immediate goals, for it aimed directly at blocking the recognition and enforcement of the impending Ecuadorean judgment in the United States. At the same time of filing the RICO Complaint, Chevron also brought an action against the legal representatives of the Ecuadorean plaintiffs seeking preliminary injunction principally to bar enforcement outside of ROE of multibillion dollar judgment entered against corporation in Ecuadorean provincial court.[62] Chevron's request offered a detailed recount of how Ecuador lacked impartial courts that violated international and domestic due process, and how plaintiffs had engaged in fraudulent activities to procure a judgment against Chevron.[63] Despite the gravity of these allegations, Chevron's petition had a fundamental problem because, at the time of filing the request for preliminary injunction, there was simply no Ecuadorean judgment; the Sucumbíos court had not issued it yet. The judgment did not come out until February 14, 2011, i.e. two weeks after Chevron's preemptive request against it.

Roughly a month later, the New York Court issued a lengthy order whereby it granted a preliminary injunction "against all defendants other than Stratus Consulting, Douglas Beltman and Ann Maest,"[64] and thereby enjoined and restrained them "from directly or indirectly funding, commencing, prosecuting, advancing in any way, or receiving benefit from any action or proceeding, outside the Republic of Ecuador, for recognition or enforcement of

61. *Id.* at 1.
62. *See Donziger,* 886 F. Supp. 2d at 594.
63. Chevron Corp. v. Naranjo, 667 F.3d 232, 240 (2d Cir. 2012).
64. *See Donziger,* 886 F. Supp. 2d at 660.

the Judgment previously rendered in *Maria Aguinda y otros v. Chevron Corporation, No. 002-2003* (. . .) or any other judgment that hereafter may be rendered in the *Lago Agrio Case* by that court or by any other court in Ecuador in or by reason of the *Lago Agrio Case* . . . ."[65] The District Court's decision was appealed by the plaintiffs' lawyers, and after briefing, the Court of Appeals for the Second Circuit of New York reversed the Order and vacated the preliminary injunction, concluding that Chevron's theory of New York's Uniform Foreign Money Judgments Recognition Act did not support the injunction it sought.[66]

After analyzing the facts and circumstances of the case, the Court of Appeals noted "the Recognition Act nowhere authorizes a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor."[67] The Court was troubled by the fact that the finality, conclusiveness, and enforceability of the Ecuadorean judgment did not precede the invocation of the Recognition Act, therefore leaving the injunction with no legal basis.[68] Moreover, such basis could only exist when "judgment-creditors affirmatively seek to enforce their judgment in a court governed by New York or similar law."[69] With regard to the overreaching effect of the District Court's injunction beyond the territory of the United States, the Court of Appeals concluded that the District Court had abused its discretion, and then established that "permitting such speculative declaratory relief would encourage efforts by parties to seek a res judicata advantage by litigating issues in New York in order to obtain advantage in connection with potential enforcement efforts in other countries."[70]

Despite the setback caused by the reversal of the preliminary injunction, the RICO litigation continued its course, and after a very intense trial on March 4, 2014, the District Court issued a 497-page opinion whereby it granted Chevron total relief.[71] The ruling determined that the lawyers who represented Aguinda and others "procured the judgment by fraud and through violation of the RICO statute,"[72] and therefore enjoined them "from instituting

65. *Id.*

66. *Naranjo,* 667 F.3d at 239.

67. *Id.* at 240.

68. *Id.* at 242.

69. *Id.*

70. *Id.* at 245-46.

71. *See generally* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (hereinafter SDNY's RICO Decision March 4, 2014).

72. *Id.* at 481.

any enforcement proceedings in the United States."[73] Furthermore, the District Court created a constructive trust for Chevron's benefit on any rights, including legal fees, other payments, and property pertaining to Donziger and his other co-defendants in connection with the Lago Agrio litigation.[74] The co-defendants filed an appeal, which as of March 2015, is still pending.

As early as 2004, prior to Chevron's anti-enforcement strategy in the judicial and international arbitration realms, the multinational oil company had begun mounting a political and economic pressure campaign against the ROE consisting, among other things, of the filing before the Office of the United States Trade Representative of a Petition Requesting Withdrawal or Suspension of the Designation of Ecuador as an Andean Trade Preference Act Beneficiary Country.[75] The petition, which Chevron has repeatedly filed roughly every four years, is based on the alleged questionable conduct of the Ecuadorean government in failing to abide by their obligations to recognize and respect the rights of Chevron as a United States citizen.

In the last iteration of Chevron's petition, submitted in 2012, the American company based its request for sanctions on "Ecuador's failure to act in good faith in recognizing as binding or in enforcing an award in the pending Chevron v. Ecuador arbitration," and on their "gross improprieties and denials of basic fairness and due process," during the handling of the Lago Agrio litigation by Ecuadorean courts.[76] These acts, Chevron concluded, had caused Ecuador to cease "to meet the criterion requiring it to act in good faith in recognizing as binding and enforcing an arbitral tribunal's award," and thus justified its withdrawal from the list of ATPA beneficiary countries.[77]

While Chevron has continued to broaden its counterattacks against the Lago Agrio plaintiffs, the ROE, and all persons who assisted them in this legal saga, Aguinda and the rest of the indig-

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73. *Id.* at 479.

74. *Id.* at 478.

75. Petition Requesting Withdrawal or Suspension of the Designation of Ecuador as an Andean Trade Preference Act Beneficiary Country from Chevron Corporation, Country submitted to Mr. Bennett Harman, Chairman of the Andean Subcommittee, Trade Policy Staff Committee, Office of the United States Trade Representative (September 17, 2012), available at https://lettersblogatory.com/wp-content/uploads/2012/09/Chevron-comment.pdf (hereinafter Chevron's ATPA Petition Against Ecuador).

76. *Id.* at ¶ 4.

77. *Id.* at ¶ 11; *see also* Andean Trade Preference Act, or "ATPA" 19 U.S.C. § 3202 (2012).

enous peoples from Ecuador have struggled to obtain the recognition and enforcement of the 2011 judgment that made Chevron liable for Texaco's conduct in the Ecuadorean Amazon. Recognition and enforcement efforts have been sought in Argentina, Brazil and Canada, with no results to this date.[78] Aguinda's quest for justice appears to have fallen through a rabbit hole of sorts and into a surreal world where the center of attention has been progressively drifting away from the environmental tort action that brought the parties to seek judicial remedies in the first place.

Largely due to Chevron's multifaceted counter attack strategy, what started as a group action for the protection of environmental and related rights more than two decades ago has morphed into something entirely different that goes beyond the simple attempt to block the recognition of a foreign judgment. To anyone following the intricate Chevron Ecuador legal saga, upon every new twist, this case appears to be much less about the protection of collective rights than it is about the display of seemingly unlimited litigation resources, creative lawyering, political power, and the maneuvering of dispute processing mechanisms and fora in the pursuit of self-interested goals. Notwithstanding this deviation, it is still worthwhile looking at the Aguinda litigation in the realm of the protection of collective rights in Ecuador, and we now turn to it.

III. The Elusive Protection of Diffuse Rights in Ecuador

As mentioned in the previous section, the Ecuadorean action filed on behalf of Aguinda and others against Chevron in 2003 was novel. EMA was the first statute of its nature adopted by the South American nation. It was also the first time anyone other than the government was given standing to bring an action created to protect collective interests and seek compensation and not just injunctive relief.[79] Furthermore, EMA allowed the plaintiff of an environmental group action to pursue their claim through summary and verbal proceedings as opposed to the long ordinary trial.[80] The statute also broadened the scope of judicial authority by allowing the judge to calculate the amount of damages to be awarded, allocate any monies directly to the victims, and desig-

78. For a detailed discussion about the enforcement actions, *see Gómez, Global Chase*, *supra* note 7.

79. Ley de Gestión Ambiental, Law No. 99-37, art. 43.

80. *Id.*

nate a third party to carry out any activities or reparations needed.[81] This specific feature of EMA could be deemed as opening the door to judicially supervised remedies in Ecuador. Finally, as a way to stimulate the filing of group actions for the environment, EMA gave plaintiffs the right to collect a fee equivalent to ten percent of the total monies awarded for damages.[82]

Regardless of whether EMA resulted from the lobbying efforts of the Lago Agrio plaintiffs or some of their supporters,[83] the passage of the statute was undoubtedly a positive signal. For one, it helped bring Ecuador up to speed with several other countries in the region such as Brazil and Colombia, which had already embraced group litigation in one form or another.[84]

The availability of EMA was also one of the main reasons why the United States court considered Ecuador as an adequate alternative forum and dismissed the Aguinda class action back in 2001.[85] The movement toward the enactment of class action-like procedures in Latin America for the protection of individual, collective, and diffuse rights had begun as early as the nineties during the wave of constitutional reforms,[86] but the adoption of specific legislation took much longer.[87] As a result, despite an increasingly active policy debate on the need to enable aggregate litigation in the region, Latin American parties were still attracted to United States courts and to the perceived advantages of the American legal system.[88]

Another positive trait of EMA was the fact that by giving anyone standing to sue and not just to the direct victims, EMA created a mechanism of public participation whereby the citizenry was empowered to protect the environment.[89] Moreover, the right to file a collective action was granted not only to individuals, but also to any entity or group, thus opening the possibility to advocacy groups and non-governmental organization to become effectively engaged in litigation. In addition to the statutory remedies created by EMA, Ecuadorean citizens retained the possibility of

81. *Id.*
82. *Id.*
83. *See* SAWYER, *supra* note 24, at 77; *see also* SDNY's RICO Decision March 4 2014, *supra* note 71, at 15.
84. *See generally Gómez, Group Litigation in Latin America*, *supra* note 11 (discussing in detail the development of aggregate litigation in Latin America).
85. *See* Aguinda, Dismissal Stipulation and Order, *supra* note 21.
86. *Id.* at 492.
87. *Id.*
88. *Id.* at 493.
89. *Id.* at 29, 41, 42.

filing an extraordinary writ of amparo where violations are deemed to have affected the Constitution.[90]

Given the high stakes of the Aguinda litigation, the handling of a seemingly straightforward collective action set forth in article 43 of EMA became a gargantuan enterprise for the Lago Agrio court. Besides a series of preliminary objections submitted by Chevron alleging the lack of jurisdiction of the Sucumbíos court and the lack of standing of Chevron,[91] one of the most hotly debated issues was the appointment of an expert to assist the judge in determining the extent of the harm attributed to Chevron, so he could then calculate the damages. After a highly contentious exchange between the parties and multiple attempts to attack the credibility of the parties' own experts,[92] the presiding judge appointed Richard Cabrera, who, after carrying out multiple site inspections, issued a report that served as the basis for the trial court's decision.[93] Unsurprisingly, Chevron's lawyers aggressively contested the report, which assessed damages for US $27 billion. The challenge was not only to the report and its methodology, but also, more importantly, to the alleged misconduct of expert Cabrera during the litigation, and to the possibility that his report might have been ghostwritten by plaintiffs.[94] These and other allegations of serious misconduct were later used in the RICO proceedings in the United States to demonstrate Chevron's assertions of widespread fraud and corruption.[95]

The final judgment issued by the Sucumbíos court was deemed to prove the harm attributed to Chevron, and devised three types of remedies: principal measures (*medidas principales*) "destined to restore the natural resources to their original state as soon as possible";[96] supplementary measures (*medidas complementarias*), which aim to "offer compensation when restoration is not possible and compensate for the time passed without remedy",[97] and; mitigation measures (*medidas de mitigación*), geared to "reduce and attenuate the effect of damages that are impossible to remedy." The court devised a detailed scheme to materialize its

90. *Id.* at art. 41.

91. *Aguinda v. Chevron*, Sucumbíos Judgment, February 14 2011 at 3.

92. *See* Chevron RICO Complaint, *supra* note 39, at 19-22.

93. *Id.* at 62.

94. Theodore J. Boutrous, Jr., *Ten Lessons from the Chevron Litigation: The Defense Perspective*, 1 STAN. J. COMPLEX LITIG. 199, 224 (2013).

95. *See* Chevron RICO Complaint, *supra* note 39, at 47.

96. *Aguinda v. Chevron,* Sucumbíos Judgment, February 14, 2011, at 177.

97. *Id.*

award, including an order to establish a health program to benefit the affected communities,[98] and a mitigation plan for harms inflicted on the culture of the indigenous groups affected by Texaco's activities.[99]

In order to administer the award monies, the court ordered the plaintiffs to establish a trust fund within sixty days of the judgment in favor of the Amazon Defense Front (*Frente de Defensa de la Amazonía, or ADF*), or the persons designated by ADF. ADF is a non-governmental private organization formed in 1994 to organize and protect the rights of those affected by oil operations in the Orellana and Sucumbíos provinces of the Oriente region.[100] The Ministry of Social Welfare of Ecuador approved ADF in 1998, and twenty other organizations are members.[101] Even though the use of judicially created compensation funds is commonplace in United States mass tort litigation,[102] the establishment of a compliance mechanism that involved an entity such as ADF was unprecedented in Ecuador.

The potential advantages of this solution included the possibility of allowing the victims to obtain a direct benefit from the judgment, the legitimacy of the mechanism, and the possibility of having external agencies oversee the remediation process. Notwithstanding, the Sucumbíos court did not make the system accountable, nor did it implement a monitoring mechanism to evaluate and supervise the ADF and its representatives. Also, by allowing ADF to name a third party to administer the funds and carry out the remediation, the court left open the door to potential mismanagement and manipulation by the parties.

The purported control of ADF by Donziger and his associates is precisely what Chevron alleged during the RICO litigation, and what the federal judge observed in its decision to allow the fraud claims.[103] In order to show the existence of a conflict of interest between ADF and the Lago Agrio plaintiff, the United States judge in charge of the RICO case also highlighted that the head of

98. *Id.*

99. *Id.* at 183-84.

100. THE FRONT FOR THE DEFENSE OF THE AMAZON, http://www.ecuanex.net.ec/fda/fda.htm

101. *Id.*

102. *See, e.g.,* Linda S. Mullenix & Kristen B. Stewart, *The September 11th Victim Compensation Fund: Fund Approaches to Resolving Mass Tort Litigation*, 9 CONN. INS. L.J. 121 (2002-03); Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims – A Fund Too Far*, 71(3) LA. L. REV. 819 (2011).

103. *See* SDNY's RICO Decision March 4 2014, *supra* note 71, at 16.

ADF, Luis Yanza, "has been paid throughout from funds raised to finance the case,"[104] and that "Donziger even purchased a residence for him out of personal funds, through this expense ultimately was reimbursed to Donziger by the Kohn firm".[105]

Regardless of the outcome of the RICO litigation and whether there indeed was corruption in the handling of the Ecuadorean proceedings, it is evident that the compliance mechanism devised by the Sucumbíos court felt short of meeting its goal. Even if Chevron had not challenged the Lago Agrio litigation, this judicially-created compensation mechanism did not consider some important aspects such as accountability and monitoring of the system, and it also failed to screen and oversee those in charge of it. Unfortunately, the losers in this battle will be—time and again—those who were supposed to be made whole in the first place.

IV. Conclusion

The convoluted nature of the ongoing Chevron-Ecuador legal saga makes it difficult to summarize the myriad of procedural twists and turns during more than two decades of legal wrangling in several jurisdictions. Perhaps driven by the lawyers involved or by others who always looked at the trees and definitely ignored the forest, what began as a relatively simple and straightforward environmental damage lawsuit on behalf of indigenous peoples of the Ecuadorean Amazon, ended up becoming the judicial version of a hydra—the mythical multi-headed monster that grew a new head every time it lost another. Each new proceeding, petition, or mechanism pursued in this case reveals a new level of lawyerly creativity, but also moves the case further from why it started in the first place. Although this may obviously be seen as an unfortunate feature, on the other hand, this multilayered reality can also be seen as a living laboratory that help us see the complexities of protecting collective rights in a globalized society.

Despite the unfortunate turn of events in Ecuador, the misconduct of the plaintiffs' representatives, the seemingly extravagant defense strategy pursued by Chevron, and the mishandling of the Lago Agrio litigation by the Sucumbíos court, the Chevron-Ecuador saga has helped accelerate the discussion about the protection of environmental and indigenous rights in the South

104. *Id.* at 28.
105. *Id.*

American nation, and has also brought to the table many issues that need to be addressed in order to attain the effective safeguard of collective rights in our modern society. As Judge Kaplan pointed out during the conclusion of his ruling in the RICO litigation, "the saga of the Lago Agrio case is sad."[106] Aguinda and the other class members may not see redress anytime soon for Chevron has vowed to fight this case "until hell freezes over—and then out on the ice."[107] But even if they are ever able to effectively enforce the judgment against Chevron, the inherent deficiencies of the judicially-created mechanism for the disbursement and management of the award monies, and the unfortunate circumstances surrounding the parties' manipulation of the process, are likely to affect its effectiveness, create uncertainty, and jeopardize any value that might come out of it.

106. *Id.* at 484.

107. Patrick Radden Keefe, *Reversal of Fortune*, THE NEW YORKER (January 9, 2012), http://www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe.