

THE ENFORCEMENT OF  
FOREIGN JUDGMENTS IN THE UNITED STATES:  
*THE CHEVRON CORP. V. DONZIGER CASE*

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From 1964 to 1992,<sup>1</sup> Texaco conducted oil operations in the Amazonian region of Ecuador (“*Lago Agrio*”) eventually leading to a myriad of legal, political, and social tensions.<sup>2</sup> The first lawsuit was filed in the U.S. courts in 1993 by a group of representatives from the areas where Texaco (which merged with Chevron Corporation in 2000)<sup>3</sup> conducted its operations.

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1. Although the U.S.-based company stopped its activities in the area in 1992, the environmental and social impacts of its presence in the Ecuadorian rainforest resulted in long-lasting litigation from the communities contaminated by the oil extraction activities.

2. The litigation against Chevron has had a significant presence in popular culture and media. For instance, Rolling Stone and Vanity Fair magazines both covered the story behind the case. See Alexander Zaitchik, *Sludge Match: Inside Chevron’s \$9 Billion Legal Battle with Ecuadorean Villagers*, Rolling Stone, Aug. 2014; William Langewiesche, *Jungle Law*, Vanity Fair, Apr. 2007. In 2009, a documentary film directed and produced by Joe Berlinger was released at the renowned Sundance Film Festival. Finally, a CNN Hero Award was given in 2007 to the Ecuadorian lawyers that led the legal battle against Chevron.

3. In October 2000, Chevron Corporation and Texaco Inc. agreed to merge in a \$100 billion deal. In this context, Chevron Corporation assumed

Since then, numerous cases against the company have resulted in more than two decades of litigation in Ecuador and the United States.

The most recent development in the string of litigation brought this environmental battle back to the jurisdiction of the U.S. courts. For the first time since 1993, Chevron took the initiative by filing a lawsuit under the RICO Act against the attorneys that represented the group of residents of the *Lago Agrio* region—Steven Donziger and his team. In its pleadings, Chevron sought to prevent the enforcement of a US\$8.6 billion judgment ratified by the highest Ecuadorian court in 2013, alleging that Donziger and his team had obtained a favorable judgment in Ecuador by use of fraud and corruption.<sup>4</sup>

In deciding this case, Judge Lewis A. Kaplan denounced the performance of Donziger and Fajardo drawing a simple analogy: “The ends do not justify the means. There is no ‘Robin Hood’ defense to illegal and wrongful conduct.”<sup>5</sup> Indeed, the corruption that occurred before the Ecuadorian courts has served as a “get out of jail free” card for Chevron, both making any kind of remediation or compensation to the environment and the communities of *Lago Agrio* impossible and absolving the Ecuadorian state from any liability in this gigantic social and environmental disaster.

Furthermore, this decision leaves open a question about whether the U.S. court system is an effective tool for making U.S.-based companies accountable for their actions overseas. Such accountability seems impossible to achieve if companies are reluctant to comply with foreign judgments in social and environmental litigation, perhaps even mimicking Chevron’s legal defense strategy of delaying enforcement.

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the liabilities of the original defendant company Texaco and its local subsidiary in Ecuador, Texpet. *See* Press Release, Chevron, Chevron and Texaco Agree to \$100 Billion Merger (Oct. 16, 2004), <https://www.chevron.com/stories/texaco-press-release-chevron-and-texaco-agree-to-100-billion-merger>.

4. Chevron alleged that the defendants procured a multi-billion dollar judgment against the company through fraud, civil conspiracy, bribery, and other violations of Racketeer Influenced and Corrupt Organizations Act (RICO).

5. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014).

This Commentary proceeds in four parts. Part I presents an overview of the factual background of the cases against Chevron. Part II chronologically describes the stages of the litigation in Ecuador and the United States. Part III summarizes the main arguments of the *Chevron v. Donziger* case. Part IV concludes with analyzing the legal effects of this decision for future appeals and other environmental cases in South America.

## I. HISTORICAL AND FACTUAL BACKGROUND

In 1964, Texaco signed an agreement with the Ecuadorean State to start oil operations in its Amazonian region. Pursuant to the agreement, the local Texaco subsidiary in Ecuador (Textpet) and the Gulf Oil Corporation were part of a public-private consortium for the exploitation of oil, where the Ecuadorean State<sup>6</sup> was the majority partner. The Ecuadorean State maintained total control over the formal decisions regarding the consortium operations, despite the fact that Texaco maintained day-to-day control of the field activities.<sup>7</sup>

Before the arrival of Texaco, Ecuador did not engage in large-scale oil exploration or acquire the essential infrastructure to develop the oil fields in the country. Likewise, during the period from 1960 to 1980, environmental protection in Ecuador was virtually nonexistent.<sup>8</sup> Despite the provisions of the Hydrocarbons Act (1971) enacted by the Ecuadorean Congress requiring field operators to “adopt necessary measures to protect flora, fauna and other natural resources” and “to prevent

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6. “Ecuadorean State Petroleum Corporation” was initially in charge of operating the oil fields in Lago Agrio. It was later replaced by “Petroecuador.”

7. According to Chevron estimates, the Ecuadorean State received approximate ninety percent of the revenues generated from the oil exploitation in the Eastern region of the country between 1964 and 1992, either via direct revenues or through taxes, royalties, and subsidies. *See* Notice of Arbitration and Statement of Claim at 3, *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, [http://www.italaw.com/sites/default/files/case-documents/ita0155\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf).

8. Suraj Patel, *Delayed Justice: A Case Study Of Texaco And The Republic Of Ecuador's Operations, Harms, And Possible Redress In The Ecuadorean Amazon* (Mar. 20, 2012) (unpublished manuscript), [http://works.bepress.com/suraj\\_patel/1/](http://works.bepress.com/suraj_patel/1/).

contamination of water, air, and soil,”<sup>9</sup> no regulatory system was put into place to demand compliance with this law until the 1990s. In what was an environmental legal vacuum, Texaco set its own environmental standards when it first initiated several infrastructure projects to extract, transport, and export petroleum from the heart of the Amazonas rainforest to the international markets.

During the operations of the consortium in Ecuador, Texaco operated more than 300 wells and excavated more than 800 pits to bury the sludge and contaminated materials produced in the drilling process.<sup>10</sup> Moreover, it used obsolete and highly polluting technologies which resulted in massive water contamination, high-scale deforestation of the Amazon rainforest, and multiple toxic discharges.<sup>11</sup> For instance, the drilling operations were responsible for the deforestation of more than 2 million hectares of land and the discharge of more than 16.8 million gallons of crude into the environment.<sup>12</sup> The operations also had a negative social impact on the local communities of the region. For instance, the construction of roads and pipelines across the lands originally inhabited by indigenous population led to tensions between the government, oil companies, and local communities.<sup>13</sup>

In June 1992, Texaco ceased its operations in Ecuador after Petroecuador assumed operations of the consortium upon the expiration of its agreement with the Ecuadorian State. Upon ceasing its operations, TexPet and Ecuador agreed to conduct an environmental audit of the Consortium’s oil fields. The audit identified certain areas for remediation and estimated that the total cost would be approximately US\$8 million

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9. Decreto Supremo No. 2967, 1 October 1971, *Ley de Hidrocarburos* [Hydrocarbons Act], Registro Oficial No. 711, 15 November 1978 (Ecuador), [http://faolex.fao.org/cgi-bin/faolex.exe?rec\\_id=032582&database=faolex&search\\_type=link&table=result&lang=spa&format\\_name=@SRALL](http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=032582&database=faolex&search_type=link&table=result&lang=spa&format_name=@SRALL).

10. Judith Kimerling, *Lessons from the Chevron Ecuador Litigation: The Proposed Intervenors’ Perspective*, 1 STAN. J. COMPLEX LITIG. 241, 242 (2013).

11. Antoni Pigrau, *The Texaco-Chevron Case in Ecuador: Law and Justice in the Age of Globalization*, 5 REVISTA CATALANA DE DRET AMBIENTAL 1, 4 (2014).

12. AK Hurtig & M San Sebastián, *Epidemiology vs Epidemiology: The Case of Oil Exploitation in the Amazon Basin of Ecuador*, 34 INT’L J. EPIDEMIOLOGY 1170, 1171 (2005).

13. Judith Kimerling, *Oil, Contact, and Conservation in the Amazon: Indigenous Huaorani, Chevron, and Yasuni*, 24 COLO. J. INT’L ENVTL. L. & POL’Y 44 (2013).

to US\$13 million. In December 1994, Ecuador and Texpet signed a Memorandum of understanding (MOU) in which they agreed to “negotiate the full and complete release of TexPet’s obligations for environmental impact arising from the operations of the Consortium,” leading to a final Settlement Agreement signed in March 1995. The Settlement Agreement required Texpet, among other actions, to perform remediation work for the environmental impact related to their operations in Ecuador as well as to finance and conduct socioeconomic projects to compensate the social impacts of the operations on the local communities.<sup>14</sup>

After expending approximately US\$40 million on environmental remediation and community development in Ecuador, Texpet fulfilled its legal obligations under the Settlement Agreement in September 1998. In that month, Ecuador, Petroecuador, and Texpet executed the *Acta Final*, which certified that Texpet “had performed all of its obligations under the 1995 Settlement Agreement”<sup>15</sup> fully releasing it from any and all environmental liability arising from the Consortium’s operations.

## II. THE GLOBAL CASE AGAINST CHEVRON

The first legal action against Texaco was filed in November 1993 before the New York federal courts under the Alien Tort Claims Act (ATCA)<sup>16</sup> by representatives of the indigenous population of *Lago Agrio* (Lago Agrio Plaintiffs or LAPs). The ATCA states that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>17</sup> In the merits of their complaint, the plaintiffs al-

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14. Notice of Arbitration and Statement of Claim at 5, *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, [http://www.italaw.com/sites/default/files/case-documents/ita0155\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf).

15. *Id.*

16. Alien Tort Claims Act, 28 U.S.C. §1350 (2012). The ACTA was originally part of the Judiciary Act of 1789. Although initially used for crimes such as piracy, the law now acts as a tool for holding human rights violators liable to victims seeking redress when options in their own countries are limited.

17. The ATCA was not used in modern times until *Filartiga v. Pena-Irala*, a 1980 case in which a Paraguayan police officer was held liable in a U.S. court for the torture of a Paraguayan national. 630 F.2d 876 (2d Cir. 1980).

leged that they had suffered personal injuries including “a significantly increased risk of developing cancer as a result of exposure”<sup>18</sup> to hazardous wastes from Texaco’s operations. In response to this legal action, Texaco moved to dismiss the action on the grounds of international comity and forum non conveniens—the idea that any suit related to its operations in Ecuador should be filed in Ecuadorian court, as long as the court system was a fair and adequate alternative forum.

In November 1996, Judge Jed Rakoff accepted dismissal on these grounds, although without any reference to the acceptance of Texaco to submit the case before the Ecuadorian courts. In 1998, the Second Circuit Court of Appeals decided that the district court must confirm whether or not Texaco was prepared to submit to the Ecuadorian courts, in the event that the forum non conveniens exception was ruled applicable.<sup>19</sup> Four years later, the Second Circuit Court of Appeals affirmed the decision of the district court to apply the doctrine of forum non conveniens and concluded that Texaco was committed to accept the jurisdiction of the Ecuadorian courts to decide this case.<sup>20</sup>

Following the decision of the U.S. courts, the representatives from the indigenous population of the Ecuadorian Amazon filed a class action suit against Texaco under provisions of the Civil Code of the Republic of Ecuador and the Environmental Management Law. The plaintiffs sought the elimination or removal of pollutants that continued to threaten the environment and the health of the residents. They also demanded that the company conduct a comprehensive clean-up and remediation process in the area.

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“The ATCA was successfully employed by Filartiga’s lawyers primarily because the crime was determined to be state-sponsored torture, which is a violation of international customary law. The court established that ‘the law of nations must be interpreted “not as it was in 1789, but as it has evolved and exists among the nations of the world today.”’” See Elizabeth C. Black, *Litigation as a Tool for Development: The Environment, Human Rights, and the Case of Texaco in Ecuador*, 15 J. PUB. & INT’L AFF. 142, 148 (2004) (quoting Harold Koh, *Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2034 (2001)).

18. Complaint ¶ 51, *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996) (No. 93 Civ. 7527).

19. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

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

After a seven-year trial, the Court of Nueva Loja (Ecuador) found Texaco-Chevron liable for pollution caused in the area and issued a US\$8.6 billion judgments against the company, plus ten percent compensation to the plaintiffs, which would increase to US\$19 billion if Texaco-Chevron did not promptly issue a public apology to the communities.<sup>21</sup> The decision was ratified by a court of appeals and in November 2013, the National Court of Justice of Ecuador affirmed the judgment but later reversed punitive damages reducing the total amount of the judgment against Texaco-Chevron to a total of US\$9.5 billion.<sup>22</sup>

After the publication of this decision, the main issue of contention was the enforceability of the award before the U.S. courts. In the opinion of international analysts, the verdict was “probably unenforceable . . . given the lack of local assets” of the company in Ecuador.<sup>23</sup> Moreover, in 2014, Chevron initiated a strategy to delay any enforcement of the award and even filed a lawsuit against the lawyers representing the initial plaintiffs.

Chevron attempted to prevent the enforcement of the judgment in Ecuador and other jurisdictions through a new course of legal action in 2007 and 2009, filing two complaints against the Republic of Ecuador before the Permanent Court of Arbitration at The Hague under UNCITRAL arbitration rules.<sup>24</sup> Chevron alleged several violations to the Bilateral In-

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21. Antoni Pigrau, *supra* note 11, at 14.

22. Jucio No. 174-2012, de las 3:00 p.m., 12 Nov. 2013, Maria Aguinda Salazar y otros v. Chevron Corp., Corte Nacional de Justicia, Sala de lo Civil y Mercantil [National Court of Justice, Civil and Corporate Division] (Ecuador), <https://pabloarturo10.files.wordpress.com/2013/11/sentencia-casa-cic3b3n-chevron.pdf>.

23. Joe Carroll & Karen Gullo, *Chevron's Ecuador Award "Unenforceable," Analysts Say*, Bloomberg (Feb. 14, 2011), <http://www.bloomberg.com/news/articles/2011-02-14/chevron-to-appeal-adverse-judgment-in-ecuador-pollution-case>.

24. In response to the allegations against Chevron, the company filed two separate lawsuits against the Republic of Ecuador before the Permanent Court of Arbitration at The Hague. The first lawsuit was filed on October 19, 2007 (PCA Case No. 34877). In this case, the company sought damages after Ecuador violated several specific standards of protection under the BIT. The Arbitration Panel awarded damages to Chevron for a total of US\$96 million.

The second lawsuit was filed on September 23, 2009 (PCA Case No. 2009-23). In this case, the company sought to limit its “liability of responsibility for environmental impact, including but not limited to any alleged liabil-

vestment Treaty signed between the United States and Ecuador in 1993, such as denial of justice, unfair and inequitable treatment, and discrimination related to the original lawsuit filed by the LAPs against the company in 2003, among others.<sup>25</sup>

Given the lack of local assets of Chevron in Ecuador, as well as the actions taken by the company in order to avoid the enforcement of the judgment, the LAPs adopted a new strategy to seize Chevron's assets in different countries, including Argentina, Brazil and Canada.<sup>26</sup> In response, Chevron filed a civil complaint in the Southern District of New York in February 2011, under the Racketeer Influenced and Corrupt Organisations Act (RICO Act) against the attorney Steven Donziger and his law offices and a number of other individuals and entities involved in the *Lago Agrio* litigation.<sup>27</sup>

### III. THE RICO ACT LAWSUIT: *CHEVRON CORPORATION V. DONZIGER*

In their complaint, Chevron alleged that the Judgment of the Ecuadorian courts was the product of fraud and violations of the RICO Act, including extortion, fraud, money laundering, and obstruction of justice, among other offenses.<sup>28</sup>

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ity for impact to human health, the ecosystem, indigenous cultures, the infrastructure, or any liability for unlawful profits, or for performing any further environmental remediation arising out of the former Consortium that was jointly owned by TexPet and Ecuador, or under the expired Concession Contract between TextPet and Ecuador." (Notice of Arbitration and Statement of Claim at 17, *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, [http://www.italaw.com/sites/default/files/case-documents/ita0155\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf).) In this case, the Arbitration Panel decided to release Chevron and its subsidiaries from any liability or responsibility under the Settlement Agreement signed between Texaco (now Chevron Corp.) and the Republic of Ecuador in 1995. (First Partial Award on Track I at 45, *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, <http://www.italaw.com/sites/default/files/case-documents/italaw1585.pdf>)

25. Kimerling, *supra* note 10, at 255.

26. See, e.g., Antoni Pigrau, *The Texaco-Chevron Case in Ecuador: Law and Justice in the Age of Globalization*, 1 *REVISTA CATALANA DE DRET AMBIENTAL* 31 (2014) (noting that the Ecuadorian judge ordered a precautionary measure for the seizure of assets belonging to Chevron Argentina S.R.L.).

27. Amended Complaint, *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (No. 11 Civ. 691).

28. *Id.* ¶¶ 339–79.



The thesis developed by Chevron was that the LAPs representatives were part of a criminal organization with the purpose of extorting Chevron. These allegations were made based on the following facts:

- Donziger and the LAP representatives instigated U.S. action against Chevron based on false and misleading representations. In addition to the coordinated media campaign conducted by Donziger in the United States and Ecuador, Donziger drafted a letter in late 2005 to the Securities and Exchange Commission requesting that they open an investigation about the violation of regulations governing disclosure obligations.<sup>29</sup> This request was based on a misleading study conducted by a member of the LAP team.<sup>30</sup>
- Donziger and the LAP representatives coerced the then-Presiding Judge of the Court of Nueva Loja, Jorge Yañez, through drafting a sexual harassment complaint and then threatening to file it if the Court did not grant their motions.<sup>31</sup> One of these motions sought to cancel the formal Court inspection of the sites supposedly affected by the pollution of Texaco-Chevron, after an initial informal inspection showed negatives results for the interest of the plaintiffs. By granting this motion, the Court excluded important evidence for the defendants.<sup>32</sup>
- Donziger and the LAP representatives secretly paid Richard Cabrera, a supposedly impartial settling expert appointed by the Court, to allow them to ghostwrite the contents of his report. According to the evidence provided by Chevron, Donziger and the LAPs repre-

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29. *Id.* ¶ 239. Although Donziger drafted the letter, it was ultimately sent by Amazon Watch. Amazon Watch is a nonprofit organization founded in 1996 to protect the rainforest and advance the rights of indigenous peoples in the Amazon Basin. *Id.*

30. The letter used an early and rescinded US\$6 billion estimate of the clean-up costs created by David Russel despite that Donziger knew when he wrote it that Russel had told him that it was wildly inaccurate. *Id.* ¶¶ 239, 101–08.

31. *Chevron Corp. v. Donziger*, 833 F.3d 74, 91 (2d Cir. 2016).

32. *Id.*

sentatives provided technical support to Cabrera and even hired him a private secretary.<sup>33</sup>

- Donziger and the LAP representatives bribed the then-Presiding Judge of the Provincial Court of Nueva Loja, Nicolás Zambrano, to allow them to ghostwrite the final judgment of the case.<sup>34</sup>

In March 2014, Judge Lewis A. Kaplan of the U.S. District Court for the Southern District of New York concluded, in a 500 page-long decision, that the judgment against Chevron in Ecuador was obtained by corrupt means:

Justice is not served by inflicting injustice. The ends do not justify the means. There is no “Robin Hood” defense to illegal and wrongful conduct. And the defendants’ “this-is-the-way-it-is-done-in-Ecuador” excuses—actually a remarkable insult to the people of Ecuador—do not help them. The wrongful actions of Donziger and his Ecuadorian legal team would be offensive to the laws of any nation that aspires to the rule of law, including Ecuador—and they knew it.<sup>35</sup>

The Court restrained Donziger and the LAP representatives from filing or prosecuting any action for recognition or enforcement of the judgment, including the seizure or attachment of Chevron’s assets based on the Ecuadorian judgment. The Court also set up a constructive trust to help Chevron recover any property that Donziger and the LAPs representatives had already or might receive through enforcing the Judgment in other countries.<sup>36</sup>

More recently, in August 2016, the U.S. Court of Appeals for the Second Circuit affirmed the decision of Judge Kaplan and stated that:

The relief tailored by the district court, while prohibiting Donziger and the LAP Representatives from seeking enforcement of the Ecuadorian judgment in the United States does not invalidate the Ecuadorian judgment and does not prohibit any of the LAPs from seeking enforcement of that judgment any-

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33. *Id.* at 101.

34. *Id.* at 111.

35. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 385 (S.D.N.Y. 2014).

36. *Id.* at 639–42.

where outside of the United States. What it does is prohibit Donziger and the LAP Representatives from profiting from the corrupt conduct that led to the entry of the Judgment against Chevron, by imposing on them a constructive trust for the benefit of Chevron.<sup>37</sup>

#### IV. THE FAILURE OF THE ROBIN HOOD ANALOGY

As Judge Kaplan claimed, this case has a notorious resemblance with the tale of Robin Hood, a narrative tradition thriving in the popular literature of England from the medieval period to the nineteenth century. If the Robin Hood analogy is well-known for the catchphrase “taking from the rich and giving to the poor,” it also represents the broader idea that wrongdoings can be excused by the terrible disparity between the social enemy and the community. Not only is “[t]he outlaw hero . . . forced to defy the law . . . by oppressive and unjust forces or interests,” he is also justified.<sup>38</sup>

However, the Robin Hood analogy fails in a world where basic social values, such as honesty and integrity, are decisive no matter the cost.<sup>39</sup> The goals of the LAP representatives to remediate their communities and the environment was subverted by the means used to achieve them. According to the evidence presented during the proceedings of the case, the LAP representatives and its legal team did not hesitate to violate ethical and legal obligations in attempting to make Chevron accountable for its tremendous impact on the environment. The outcome of the global litigation against Chevron is therefore unlikely to end like the fortunate destiny of Robin Hood. The actions of the LAP representatives not only ob-

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37. Chevron Corp., 833 F.3d at 151.

38. Graham Seal, *The Robin Hood Principle: Folklore, History, and the Social Bandit*, 46 J. FOLKLORE RESEARCH 67, 74 (2009). Some other elements of the Robin Hood tale have been present throughout this long-lasting case. The worldwide attention that has been given to a small group of indigenous activist from Ecuador battling a David-versus-Goliath fight in the name of the environmental can be explained by the “fascination with the figure of the outlaw [Robin Hood], the man who exists beyond human society and has adventures which would be impossible for normal members of society in their normal social environments.” Joseph Falaky Nagy, *The Paradoxes of Robin Hood*, 91 FOLKLORE 198, 198 (1980).

39. Nagy, *supra* note 38, at 207.

structed the final goal of remediating the environmental damage in Ecuador but also let Chevron off the hook absolving the state from its own role in perpetuating the damage.

A. *No Further Remediation Has Been Undertaken*

Despite the admiration that Robin Hood behavior instills among environmental activists, the outcome of the global litigation against Chevron has not led to any remediation in the areas polluted during the eighties and the nineties. Even more so, not a single penny has been paid to compensate the communities of *Lago Agrio*. In the Robin Hood tale, the outlaw gang steals from the rich and provides to the poor; in this case, the unethical and illegal conduct of the LAP representatives did not lead to any retribution or gain.

B. *The Role of the Ecuadorian State*

The Robin Hood analogy also fails because the LAPs representatives did not simply challenge every bad actor, but rather teamed up with one of them: the Ecuadorian State who also polluted the Ecuadorian rainforest. As pointed out by Judge Kaplan in his decision, LAPs representatives granted PetroEcuador and the Republic of Ecuador immunity from suit in exchange for assistance in the class action lawsuit filed in 1993 before the U.S. courts, an alliance that has strengthened over time.<sup>40</sup> Moreover, since 2008, the plaintiffs have found in the government of President Rafael Correa a main supporter to strengthen their story in the eyes of the public opinion. He has repeatedly sided with the LAP representatives, calling Chevron's Ecuadorian past "a crime against humanity."<sup>41</sup>

However, this alliance between the LAP representatives and the Ecuadorian government has left open an important question in this global litigation: What is the responsibility of the Ecuadorian State in the pollution of the Lago Agrio region?<sup>42</sup> The fearless dispute between the LAP representatives

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40. Chevron Corp., 974 F. Supp. 2d at 390.

41. Belen Marty, *Rafael Correa Accuses Chevron of Cheating Ecuadorian Justice*, PANAMPPOST (May 22, 2014, 8:17 AM), <https://panampost.com/belen-marty/2014/05/22/rafael-correa-accuses-chevron-of-cheating-ecuadorian-justice>.

42. The Ecuadorian State had a significant participation on the benefits derived from the operation of Texaco in the country. Indeed, since 1976,

and Chevron's attorneys has centered the discussion on the participation of the U.S.-based company in the harmful activities conducted in the Amazonas, without mentioning the significant participation of the Ecuadorian State in the oil extraction operations. In fact, since the beginning of Texaco's operations in Ecuador, the "Ecuadorian State Petroleum Corporation" and "PetroEcuador," both state-owned companies, were part of the consortium that operated the oil field in the *Lago Agrio* region.<sup>43</sup>

The pursuit for a landmark decision against a multinational company ruined the possibility of making the Ecuadorian State accountable for its participation in the oil extraction operations in the Amazonas.

### C. *The Liability of Chevron*

The unethical and illegal behavior of Donziger and the LAP representatives also casts shadows over the responsibility of Chevron for the environmental damage in the Amazonas. Unlike in the Robin Hood tale, the actions of the LAP representatives tremendously contributed to the position of Chevron. As Judge Kaplan wrote:

The Court assumes that there is pollution in the Orienté. On that assumption, Texaco and perhaps even Chevron—though it never drilled for oil in Ecuador—might bear some responsibility. In any case, improvement of conditions for the residents of the Orienté appears to be both desirable and overdue. But the defendants' effort to change the subject to the Orienté, understandable as it is as a tactic, misses the point of this case. The issue here is not what happened in the Orienté more than twenty years ago

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PetroEcuador owned the 62.5% of the consortium that operated the oil field in Lago Agrio, and since 1992, PetroEcuador acquired the 100% of the rights to exploit and operate the oil fields. (Notice of Arbitration and Statement of Claim at 2, *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, [http://www.italaw.com/sites/default/files/case-documents/ita0155\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf)).

43. Notice of Arbitration and Statement of Claim at 2, *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, [http://www.italaw.com/sites/default/files/case-documents/ita0155\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf).

[but] who, if anyone, now is responsible for any wrongs then done.<sup>44</sup>

D. *The Message of the U.S. Courts*

These results convey a clear message to NGOs, governments, and environmental law attorneys. The enforcement of foreign judgments in the United States are subject to an analysis about the conduct of the attorneys involved in foreign lawsuits. The United States courts will not enforce a foreign judgment procured by corrupt means, regardless of whether the cause is just.<sup>45</sup> This message may end up helping other multinational companies based in the United States in their environmental litigation, especially for activities related to oil and mining. This is especially the case as the decision creates questions about whether the U.S. courts can effectively hold U.S.-based companies accountable for their overseas activities. Chevron's broader legal strategy might serve as a model for other companies to mimic in attempting to avoid or delay the enforcement of adverse judgments.

As the plot of this global litigation continues to develop, what remains is one clear lesson: acting like Robin Hood does not help protect the polluted environments and the communities that live in them.

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44. *Chevron Corp.*, 974 F. Supp. 2d at 385.

45. *Chevron Corp.*, 833 F.3d at 151.