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*by Ryan Haddad**

The Yasuní Rain Forest

Dubbed the "cradle of the Amazon,"[1] and covering more than 2.4 million acres in the Amazon River Basin,[2] Ecuador's Yasuní National Forest is perhaps the most biodiverse place on Earth.[3] Almost 200 species of mammal, 560 fish species, 300 reptile and amphibian species and close to 600 different types of birds can be found within the parks parameters.[4] In just 2.5 acres of the park can be found as many tree species as in the U.S. and Canada combined.[5] In addition to its ecological diversity, Yasuní supports several tribes of indigenous people,[6] which remain voluntarily isolated in the forest.[7] In 1989, the United Nations Education, Scientific and Cultural Organization ("UNESCO") designated Yasuní Forest as a Biosphere Reserve.[8]

However, the Yasuní's ecology is being threatened by the recent discovery of petroleum under the park. In the past several years, nearly 900 million barrels of crude oil –worth billions of dollars – has been discovered.[9] For Ecuador, a country badly in need of money as one-third of the population lives below the poverty,[10] oil companies and consumers will be only too happy to provide this money if drilling is allowed to go forward.[11] However, if Ecuador follows the conventional path of petroleum development, much of Yasuní will be degraded, deforested, and destroyed.[12]

The Yasuní-ITT Initiative

An unconventional alternative has emerged. Speaking to the United Nations conference on climate change on September 24, 2007,[13] Ecuadorian President Rafael Correa outlined the so-called Yasuní -ITT Initiative, which would leave nearly one trillion barrels of heavy crude oil in the ground beneath Yasuní.[14] In exchange for sacrificing billions of dollars worth of oil, and providing the corresponding environmental benefits, Ecuador seeks "fair compensation" from the international community[15] to the tune of $3.6 billion[16] –which equals approximately one-half of the estimated revenue lost by not drilling.[17] By foregoing exploitation of the Yasuní oil, the initiative would protect the forest and its inhabitants from potential development and consequently devastating degradation of the park and its resources.[18] The initiative also claims to prevent the emission of 407 million metric tons of carbon dioxide ("CO2") from the avoided extraction and burning of the fossil fuel, and an additional 800 million metric tons of CO2 from the precluded deforestation as well as reforestation effort that Ecuador will promote nationally.[19]

Under the Yasuní-ITT Initiative, Ecuador would gain its desired portion of lost revenues from other countries, non-governmental organizations, environmental groups, and others,[20] in increments of $350 million annually over 10 years.[21] The funds would then be placed in the Yasuní-ITT Trust Fund, administered by the Multi-Partner Trust Fund Office ("MPTF Office") of the United Nations Development Programme ("UNDP"),[22] and would be used to help Ecuador promote and develop renewable energy projects, transportation systems, programs to eliminate poverty, and equitable access to health care and education.[23] Those who contribute to the trust will be issued Yasuní Guarantee Certificates ("CGYs") equivalent to the face value of contributions.[24] CGY's are essentially state bonds recognized by the government of Ecuador.[25] If Ecuador breaches its promise, the CGY's would then be redeemable, entitling the holders to reimbursement by the Ecuadorian government the face value of the CGY in U.S. dollars.[26] The CGY's will not accrue interest.[27]

International Support

The Yasuní-ITT Initiative ("Initiative") has garnered tepid support from international dignitaries, including UN Secretary General Ban Ki-Moon, Nobel Laureates Muhammad Yunus, Desmond Tutu and others, as well as actors Leonardo DiCaprio and Edward Norton.[28] The initiative has also received the unanimous official support of the German Parliament, as well as the backing of the European Union, other international organizations, and various indigenous organizations and ecological groups in Ecuador. [29]

"This innovative concept to combat global warming strikes at the root of the problem by preventing the release of CO2 in the first place," Ban Ki-Moon said in a 2011 joint press conference with President Correa. [30] "I look forward to seeing what more Ecuador will do to build on the climate change momentum generated by last year's conference in Cancun."[31]

The reason for the Initiative's wide-ranging support is not difficult to explain. Yasuní National Park poses a sympathetic figure: an aesthetic and biological wonder. Proponents of the Initiative emphasize that it would have the duplicative effect of reducing both fossil fuel consumption and the destruction of a vast carbon sink.[32] In turn, this would allow the sequestering millions of tons of carbon dioxide,[33] mitigating other greenhouse

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gas emissions, and precluding the resultant environmental degradation caused by crude oil production. [34]

Commentators have argued that such compensated moratoria present a more cost-effective way to address emissions from fossil fuel consumption, deforestation, and biological conservation in developing countries.[35] Others note that this reduction of carbon dioxide emissions and preservation of the national forest will position Ecuador as a major contributor to emission reduction targets under the construct of Kyoto Protocol to the United Nations Framework Convention on Climate Change ("UNFCCC").[36]

Broadly, it has been proffered that the Yasuní -ITT Initiative acknowledges a globally-shared stake in the preservation of natural treasures like Yasuní and a corresponding shared responsibility to help developing countries preserve them.[37] In this way, the Yasuní -ITT Initiative represents a new tool for sustainable development and environmental conservation: the compensated moratorium.[38] As of December 2011, $116 million had been contributed to the Yasuní fund.[39] The Yasuní-ITT Initiative would serve as an unprecedented paradigm shift and could potentially serve as a dry run for further, similar arrangements. Proponents for this concept have identified opportunities for other compensated moratoria in Bolivia, Brazil, Colombia, the Congo, the Dominican Republic, Indonesia, Madagascar, Malaysia, Papua New Guinea, Peru, the Philippines, and Venezuela.[40]

The Truth about the Yasuní -ITT Initiative

Despite this support and potential, the international community would be best served to let the Initiative expire without implementation. Ecuador's precarious recent political history notwithstanding–the country had seven presidents and two constitutions between 1996 and 2006[41]–the Yasuní -ITT Initiative runs against in the best interests of the international community because, as presently constructed, it is wrought with factual and logical inconsistencies, false promise, and redundancy. The Initiative claims unclear and overstated net impacts on greenhouse gas emissions and assigns staggering fiscal costs to marginal impacts on oil consumption. More importantly, support for the Yasuní -ITT Initiative would have a dire precedential impact, setting counter-productive compensation calculations for conservation actions.

The Problems of the Initiative's Compensated Moratorium Regime

The first, obvious, impact of Yasuní-ITT Initiative ratification is that it sets a precedent that the world's developed nations are ready and willing to pay the ransom when the planet's natural wonders are held hostage. Other developing countries would be sure to follow Ecuador's lead, secure in the knowledge that the international community is willing to bargain for the safety and well-being of their ecological crown jewels.

This ransoming aside, the Initiative's compensation structure, which ties remuneration to the opportunity costs associated with leaving petroleum in the ground, is logically flawed, shortsighted, and dangerous. The Initiative in its current terms is a compensated moratorium, not a conservation action, which has the effect of calculating Ecuador's compensation in terms of the market value of the foregone industrial activity, rather than the environmental benefit derived.

By framing Yasuní compensation in the market value of the oil foregone, the international community is establishing a disincentive to other nations for foregoing less economical, but equally environmentally degrading activities. For instance, there would be significantly less incentive for a country like Algeria to forego possibly dangerous shale gas hydraulic fracturing activities because the price of natural gas has fallen and natural gas is less profitable per unit than crude oil.[42] In addition, small-scale projects with far-reaching environmental impacts would not be compensated to the same degree as large-scale projects with relatively smaller environmental impacts.

Even if the Initiative were to adopt a compensation framework that takes into account environmental benefits, the asserted impact of the Initiative is vastly inflated. First, regarding the issue of leakage, it has been argued that, by leaving almost a trillion barrels of oil in the ground, the Initiative will reduce total greenhouse gas emissions globally.[43] However, it has been noted elsewhere that the Initiative cannot be expected to provide the GHG-avoidance windfall it purports to, particularly in the short-term.[44]

The decision to forego oil supply will do nothing for demand, meaning the net emissions in the immediate future are unlikely to be impacted.[45] The Initiative's claim to reduce global emissions is dependent on various assumptions about world oil supply and consumption.[46] Burning the 846 million barrels of heavy crude oil in the ITT oilfield would produce 407 million tons of CO_2 emissions.[47] However, If Ecuador reduces oil production through the Initiative, another producer in South America or the Middle East could very well pump more oil to make up for the shortfall,[48] or the demand might be met by expanded shale gas production in the United States, eroding the net climate benefits.

Likewise, accounting for forest preservation at Yasuní is fraught with a lack of clarity. Forestry accounts for 2.3% of GDP in Ecuador[49] and provides employment for 8.4% of the economically active population.[50] It is more likely than not that foregoing timber production in Yasuní will lead to a reallocation of the deforestation to another region in Ecuador to meet these established demands.

Though the terms of the Initiative refer to the possibility of generating carbon offset credits under the Kyoto Protocol,[51] the Initiative's inherent uncertainty disqualifies the Yasuní-ITT Initiative under the Kyoto Protocol and most other rules.[52]

The Death of Autonomous Conservation Efforts in the Developing World

In the past, countries have tended to be more inclined to exercise governments' police powers and forego environmentally risky action when there is an existing or apparent threat to the environment and public interest (i.e. the current moratorium on high-volume hydraulic fracturing in New York state).[53] By monetizing moratoria, any progress towards such autonomous, unsubsidized moratoria and reform in relation to degradation and GHG emission would be reversed or irreparably stunted.

In recognition of the need for individualized, domestic environmental operation within a common framework, the UNFCCC acknowledges the "common but differentiated responsibilities"[54] of member parties to curb environmental degradation and greenhouse gas emissions.[55] While the UNFCCC prescribes benchmark targets for reductions in greenhouse gas emissions and a framework for environment conservation, administration is ultimately left to the member nations to determine the mechanisms by which compliance will be achieved.[56] The UNFCCC assigns responsibility to sovereign nations to protect against actions that will cause damage beyond national jurisdiction.[57]

The Yasuní-ITT Initiative's compensated moratorium model breaks the bounds of the UNFCCC, establishing a regime in which each individual domestic environmental issue becomes a common operational burden for all member parties. In this way, such compensated moratoria could actually have the effect of encouraging more aggressive exploration and exploitation of natural resources in the developing world. In a regime where a developing nation could see an influx of capital if a pending action would have the extensive impact of environmental degradation, nations might be inclined to overstate risks, inflate surveying results, and pour extra development resources into vulnerable regions, in hope that the international community might buy them out.

Redundancy in Light of REDD+

Though an argument can be made that the Initiative is a necessary measure to avoid deforestation, the Yasuní-ITT Initiative is redundant because there is already a mechanism being instituted to compensate nations for preserving their forests.

Having identified the need to fill regulatory gaps in the Kyoto Protocol by engaging the developing world in efforts to attain climate change compliance,[58] the 2009 Copenhagen Accord adopted the "Reducing Emissions from Deforestation and Degradation Plus"[59] mechanism (REDD+).[60] REDD+ was spearheaded by the Coalition of Rainforest Nations,[61] a group of developing nations characterized by high percentages of tropical rain forests that support the use of carbon credits to curb tropical deforestation,[62] of which Ecuador is a member.[63]

Under the REDD+ mechanism participating developed countries are essentially compelled to compensate developing countries for the developing nations' actions to protect their tropical forests as an international climate change mitigation strategy.[64] Scientists and environmentalists have widely viewed the strategy as a way to address environmental degradation by assigning value to intact ecosystems like rain forests and peat swamps.[65] In 2009, nine industrialized governments announced plans to put $165 million toward the World Bank's newly created Forest Carbon Partnership Facility, a system that will offer countries carbon offset credits to protect tropical forests.[66]

Ecuador is an active participant in REDD+.[67] By 2013, it is Ecuador's goal to have completed the readiness stage for the implementation of the REDD+ mechanism as required by the UNFCCC at the national level.[68] The readiness stage requires relevant national institutions and stakeholders to take preparatory measures to address biodiversity conservation, integrated natural resource management, environmental management, and the development of responses for adaptation and mitigation to climate change.[69] Estimates place the total funded budget for implementation at $4,000,000.[70] Ecuador also plans to reduce deforestation by 30% before 2013.[71] Though Ecuador has thus far been excluded from the World Bank's funding system, the country has found other avenues of funding for its participation in REDD+. In June 2010, the Ecuadorian government and German national bank contracted for $10 million in non-reimbursable aid between 2011 and 2016 for REDD+ implementation.[72]

Though it complies with many of the tenets of REDD+, the Yasuní-ITT Initiative is seemingly meant to operate outside of the mechanism.[73] Ecuador's motivation for attempting to skirt REDD+ is simple. Under REDD+, Ecuador would be compensated for protecting the Yasuní Rain Forest with carbon offset credits. Under Yasuní-ITT, that compensation would take the form of debt forgiveness and cash, which is more liquid than the offset credits, and ostensibly with a much higher value than that that of the offset credits.[74]

Ecuador's participation in REDD+ is tacit approval of the framework, while the Yasuní-ITT Initiative is a rejection of the REDD+ compensation scheme. By allowing Ecuador to continue the Initiative, the global community will render REDD+ impotent and obsolete, and all of the progress that REDD+ represents will be struck moot.

Conclusion

International support for the Yasuní-ITT Initiative represents a real, long-term threat to international sustainability efforts, deforestation mitigation, and greenhouse gas emission compliance strategies. Support for the initiative sets the ugly precedent that the jewels of the natural world can be held hostage for ransom. In addition, the initiative represents a step back in terms of autonomous efforts on the part of sovereign nations to mitigate environmental threats. Instead, it shifts the burden of such actions to the international community, creates a market price for preservation actions that is tied to unrelated commodity markets rather than the global benefits of conservation actions, relies heavily on misstated impacts, and renders REDD+ moot and ineffectual.

While the international community should reject Yasuní-ITT unilaterally, the proposal is somewhat beneficial in that it exposes the shortcomings of REDD+ as presently constructed. As UNFCCC continues to fill out the REDD+ mechanism, it must create a framework that incentivizes countries like Ecuador to "play ball." Conservation actions are not always about the value of the lumber or the value of the land, but what is underneath it. Avenues must be created to take these outliers into account under REDD+. It is imperative that UNFCCC address the gap that exists in the compensation scheme between the carbon offset credit value of pending conservation action and the opportunity cost associated with foregoing development and exploitation of natural resources. It has been proposed that REDD+ compensation be based on foregone opportunity costs or the value of on the value of carbon market prices.[75] In fact, the most equitable compensation scheme would reject such an either-or system in

favor of one that takes weighted consideration of both the foregone opportunity costs and the value of carbon market prices as it relates to the action's impact on greenhouse gas emissions. This type of framework would not only save the natural wonder of the Yasuní but also represents a large step in the fight against global climate change.

Endnotes: An Un-Conventional Approach: Ecuador's Yasuní-ITT Initiative is in Discord with the UNFCCC

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[20] Alien Tort Statute, 28 U.S.C. § 1350 (2006). *But see* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (holding that, in establishing a valid Alien Tort Statute, "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized"); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (imposing liability on corporations for violations of customary international law "has not attained a discernible, much less universal, acceptance among nations of the world in their relations inter se" and would therefore not meet the requirements of *Sosa*).

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[69] *Id.* at 69-74.
[70] *Id.* at 2.
[71] *Id.* at 41.
[72] *Id.* at 43.
[73] *See infra*, notes 14 – 17. (The proposal does not mention REDD+, and proposes a compensation system predicated on the market value of the foregone oil, rather than the benefits of deforestation and reduction in greenhouse gas emissions.).
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