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Seeking Justice in Lago Agrio and Beyond: An Argument for Joint Responsibility of Host States and Foreign Investors before the Regional Human Rights Systems

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*by Megan S. Chapman**

Introduction

The last volume of this publication featured an article, *The Clash of Human Rights and BIT Investor Claims: Chevron's Abusive Litigation in Ecuador's Amazon*, which described how one large transnational corporation stalled attempts to hold it liable for massive environmental and health damages by resorting to international arbitration pursuant to the U.S.-Ecuador bilateral investment treaty (BIT).[1] This escape — even if only temporary — from final resolution of seventeen years of litigation illustrates a critical accountability gap resulting from a triangular relationship between the host state, the transnational corporation/foreign investor, and the individual or community of victims. In a world of as-yet un-harmonized bodies of international law, there is no single domestic or supranational forum in which all three actors may easily appear. Accordingly, this article argues that, with appropriate modifications, the regional human rights systems could serve as a forum in which host states and foreign investors could be held jointly accountable to victims who otherwise pay the greatest price of continued impunity.

The relationships at issue in this article lie at the intersection of international human rights and international investment law, two separate bodies of law that impose some limits on state sovereignty. States have negotiated international human rights law to govern their obligations to individuals and communities. In the realm of international investment law, states also frequently intervene to negotiate a special set of protections for foreign investments and investors against host states through instruments like BITs. Individuals, communities, and corporations, meanwhile, are meant to handle their claims against one another before domestic courts, in which the state is generally protected by sovereign immunity. This entire system is based on a fundamentally false underlying premise that powerful economic non-state actors are on the same level as individuals and communities, and that all require the protections of international law against abuses by more powerful states. However, the largest corporations in a hyper-globalized economy are more economically powerful than the governments of less developed states.[2] As a consequence, individuals and communities are at times subject to exploitation by either or both states and corporations, often through some degree of coordinated action, mutual support, or acquiescence.

Courtesy of Infrogmation.

For affected communities, the connection between corporate and state responsibility is clear: signs at a protest following the 2010 BP oil spill.

The good news is that debate in the field of business and human rights, led by the pioneering work of UN Special Representative John Ruggie,[3] is very much alive. Moreover, lawyers and scholars in both international human rights and international investment law are looking beyond legal compartments and discussing how the two fields ought to interact. The investment law side has surveyed case law coming out of the regional human rights systems, seeing how they balance property rights, economic interests, and other human rights factors, and essentially concluded that the Inter-American system, at least, "is not the forum to protect business activity against arbitrary acts of the state."[4] The human rights side has argued that a state's human rights obligations should be taken into account when international arbitration tribunals rule on that state's obligations under a BIT and has lamented the general lack of transparency and opportunities for public participation in international arbitration.[5] But, there is not as of yet a forum in which these two bodies of law are put on the same level or the three parties — host states, foreign investors, and individual or community victims — can simultaneously resolve all their claims against one another. Moreover, rather than functioning in tandem to resolve all related claims, the splitting of jurisdictions and parties often results in continued impunity as in the case in the seventeen-year litigation history of *Lago Agrio*.

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It is relatively easy to argue for closing this accountability gap in which both states and foreign investors often escape full responsibility and victims continue to be denied justice. The problem comes in identifying a possible or appropriate forum in which this could occur. Domestic courts in the investor's host state are problematic because (1) depending on the level of judicial independence, these courts may not be willing or politically able to hold powerful foreign investors or state entities to account; (2) if they are willing to hold investors to account, they still may lack jurisdiction over the state entities that ought to share in a portion of damages; and (3) even if willing, they may be unable to provide sufficient due process guarantees and impartiality to satisfy the high and flexible standards required by BITs, allowing investors recourse to international arbitration against the host state. Domestic courts in the investor's home state or another state that offers more judicial independence and a more impartial forum are often limited because (1) they may not have jurisdiction over the claims of foreign plaintiffs alleging extraterritorial violations; (2) even if the court does have jurisdiction, it may be able to avoid hearing such a claim through a doctrine such as *forum non conveniens*; and (3) unless the foreign (host) state waives sovereign immunity, only the investor will be held to account although the state or state entities may bear a portion of the responsibility.

International forums, meanwhile, are essentially specialized forums applying specialized bodies of law that apply either between states or in a unidirectional claim from a class of private actors — individuals, communities, non-state entities — against the state. Unsurprisingly, these international forums tend to reflect and replicate economic and other power imbalances. Among the international forums, regional human rights systems have developed significantly in recent decades and are often the most effective mechanism for holding states accountable to individuals and communities.[6] Yet, (1) their jurisdiction depends on state consent; (2) they lack very effective enforcement mechanisms; and (3) in order to maintain state consent to jurisdiction and cooperation with final decisions, they generally award non-monetary or minimal monetary remedies to victims. On the investment law side are international arbitration forums, through which foreign investors have direct recourse against host states as a result of BITs negotiated on their behalf by the investor's home state. Unlike regional human rights bodies, international arbitration tribunals can and do award large monetary damages to foreign investors[7] and these awards are generally enforceable in domestic jurisdictions under the widely ratified New York Convention.[8] Yet, although human rights advocates recently won the right to intervene in a single international arbitration between foreign investors and South Africa as a host state, this intervention was only for a limited purpose.[9] Such forums have no jurisdiction over victims' human rights or torts claims against either states or foreign investors and, moreover, specialize only in international investment law.

What is worse for victims, states facing possible litigation before both international forums — regional human rights organs and international arbitration forums — may encounter perverse incentives. Because of the disparity between judgments awarded by international arbitration tribunals and human rights bodies,[10] states would seem to have every incentive to avoid giving the foreign investor cause to go to international arbitration and relatively little reason to fear a condemnatory decision by a regional human rights body. If the specter of international arbitration has a further chilling effect on a host state's ability to regulate and domestic courts' willingness to hold foreign investors accountable, victims will continue to disproportionately bear the costs of epic multi-forum litigation and delayed justice.

[I]n recognition of the accountability gap and fundamental power imbalances, a supranational forum is needed to simultaneously hold foreign investors and states accountable for their relative share of harm to victims.

This article argues that, in recognition of the accountability gap and fundamental power imbalances, a supranational forum is needed to simultaneously hold foreign investors and states accountable for their relative share of harm to victims. An international human rights mechanism provides the most appropriate forum. Among such mechanisms, the regional human rights systems are best prepared based on their experience adjudicating individual claims that involve assessing state responsibility for failure to protect against violations by non-state actors[11] and even informally mediating between victims, foreign investors, and states.[12] Regional human rights mechanisms could be adapted to offer a solution to the present accountability gap if they were provided with (1) narrowly delimited jurisdiction over foreign investors who benefit from BIT protections when states prove unable and unwilling to offer a domestic forum for resolution of victims' torts or human rights claims; (2) jurisdiction to join these foreign investors as co-respondents with states already defending claims brought by victims; and (3) the ability to apportion monetary damages or other remedies between the state and foreign investors.

The article will proceed with a brief analysis of the *Lago Agrio* litigation to illustrate the way BITs affect power dynamics between host states and foreign investors, further sidelining the less economically powerful. It will then offer an overview

of the business and human rights framework in which the argument is grounded and draw two analogies between international criminal law and broader human rights law: (1) the extension of accountability from states to non-state actors; and (2) the notion of complementarity between domestic and a supranational justice mechanisms. Next it will look at several cases in which the European, African, and Inter-American regional human rights systems have held states accountable for violations caused by corporate non-state actors. In such cases, regional organs already analyze the relative accountability of states and non-state corporate actors within the limitations of ultimate state accountability and politically permissible remedies; consequently, the article argues that they could be adapted to close a critical accountability gap and bring more efficient justice to victims of investment-related human rights violations. In the final section, the article will return to *Lago Agrio* to illustrate briefly how such a mechanism could work in practice.

Power Politics and Transnational Litigation in *Lago Agrio*

The involvement of Texaco/Chevron[13] in Ecuador over the thirty years of investment and seventeen years of transnational litigation illustrates the tragic and persistent accountability gap that results from the absence of a single justice mechanism for the triangle of actors discussed above. The *Lago Agrio* litigation involves multiple as-yet unsuccessful attempts in both U.S. and Ecuadorian forums to hold an economically powerful and legally well-advised transnational corporation accountable for its portion of damages to indigenous communities in the Amazon. Neither has the Ecuadorian state — which participated through a state-owned enterprise in a consortium with Texaco and also neglected to regulate the consortium's activities — been meaningfully held accountable or repaired its share of damages. In the meantime, another generation of indigenous communities in Ecuador continues to wait for justice.

The impacts of oil development in the Amazon were devastating. By 1992, when Texaco stopped operating in Ecuador, estimates were that decades of oil extraction had generated 19.3 billion gallons of toxic wastewater, most of which was disposed in open, unlined pits; had spilled 16.8 million gallons of crude; and had burned a daily average of about 49 million cubic feet of natural gas without any emission controls.[14] The Ecuadorian state and Texaco share responsibility for this massive damage. Texaco's local subsidiary, TexPet, was the operating partner in a consortium with the state-owned enterprise Petroecuador.[15] Throughout the consortium's operation, the state failed to regulate the consortium's activities, instead allowing TexPet to self-regulate and relying on Texaco's recognized international expertise in oil extraction,[16] all the while enjoying its share of the profits.[17]

This article will not attempt to chronicle the *Aguinda* litigation in U.S. federal courts, the *Lago Agrio* litigation in Ecuadorian courts, or the numerous other related proceedings between other groups of plaintiffs, various lawyers, the state, and Texaco/Chevron.[18] Suffice it to say that after nine years of litigation in U.S. federal court, Chevron succeeded in having the case against it — a class action filed under the Alien Tort Claims Act — dismissed for *forum non conveniens* in 2001.[19] The case that was re-filed in Ecuador by some of the original plaintiffs has been ongoing since 2003. Without speculating as to its motivations, Ecuador's interventions throughout the long history have not assisted in bringing an efficient, effective, or fair resolution — if that result would have been possible under any circumstances — to the plaintiffs' attempts at judicial recourse. While the matter was pending in the U.S. district court, Ecuador intervened to support Texaco's motion to dismiss;[20] it negotiated without public consultation for remedial work and a final release of the state's claims against Texaco;[21] and it opposed intervention by indigenous community representatives in its separate suit against Chevron in U.S. district court.[22] During the later stage of litigation against Chevron in Ecuadorian courts,[23] the government's interventions — even if intended to improve the chances of judgment in the plaintiffs' favor — seem to have furnished Chevron with the evidence it needs to initiate BIT-based arbitration against the state on the grounds of an alleged denial of procedural justice.[24]

Despite Ecuador's manifold violations of its human rights obligations, the introduction of the U.S.-Ecuador BIT has arguably changed the investor-state power dynamic. The BIT creates additional due process protections for foreign investors tied to international standards[25] that are arguably difficult to meet for states that continue to struggle with the rule of law. It also opens the possibility of international arbitration by the foreign investor against the state for any violation of the BIT terms.[26] Negotiated on behalf of investors by a more powerful home state, in this case the United States, the BIT also reflects inter-state power dynamics. Finally, its standards are flexible enough to offer ample fodder for argument to a sophisticated litigation team such as is normally employed by a transnational corporation seeking to avoid ultimate accountability at all costs. In so doing, the BIT arguably limits Ecuador's ability — where Ecuador is actually willing — to provide adequate and effective judicial recourse to victims of human rights violations by foreign investors.

From a human rights perspective, the Ecuadorian state owes due process protections to everyone who comes before its judicial system, including foreign investors. Yet, there lurks in the background a question of fundamental fairness: should Chevron be able to benefit from lack of regulation and judicial independence when it stands to benefit and have an end-run opt-out through BIT arbitration when it does not? For years, Texaco benefited from its ability to operate in a regulatory vacuum without needing to meet burdensome environmental standards. Then, although it argued that Ecuador's judicial system was adequate,[27] Texaco almost certainly sought dismissal from the U.S. district court because it stood a greater chance of defeating the *Aguinda* plaintiffs in an Ecuadorian court. When the political attitude toward international economic relations changed after the election of President Rafael Correa[28] and the government was more inclined to support plaintiffs' attempts to hold Chevron accountable, the lack of judicial independence and corruption looked less favorable. Yet, the BIT turned these factors into evidence needed for a possible way out of Ecuadorian courts and perhaps even to a damages award for Chevron. Accordingly, Chevron filed a BIT-based arbitration claim against Ecuador in September 2009 alleging "denial of justice" in the *Lago Agrio* proceedings.[29] Although this claim is as yet unsettled,[30] another arbitration tribunal awarded U.S. $700 million to Chevron in its

first arbitration claim against Ecuador to settle separate breach of contract cases against Petroecuador,[31] which illustrates one way the second arbitration could be resolved.

The "Protect, Respect and Remedy" Business and Human Rights Framework and Analogy to Complementarity in International Criminal Law

Under international human rights law, states have a duty to protect those under their jurisdiction against human rights violations by non-state actors.[32] Accordingly, when non-state actors violate human rights, they are not themselves accountable under international human rights law; rather, states are held accountable for these violations if they were complicit or failed to take reasonable steps to prevent[33] a violation the threat of which they were aware or should have been aware.[34] After a violation, states also have a duty of due diligence to investigate, prosecute, and punish — whether implicating state or non-state actors — or provide a remedy or redress for the victim. Failure to fulfill these duties leads to state accountability.[35] Against this background of firm legal duties, UN Special Representative Ruggies has coined the "protect, respect and remedy" framework for business and human rights: the state's *duty to protect*; corporate *responsibility to protect*; and victims' *need for effective remedies*.[36]

Such a system works quite well and makes sense when states actually exercise control over non-state actors — which may include individuals, organizations, rebel groups, corporations, et al — within their territories. But, when states really do not exercise control over certain non-state actors, human rights systems that only impose responsibility on states for failure to protect may actually reinforce impunity. Accordingly, international criminal law allows direct prosecution of both state and non-state actors — although among non-state actors only natural and not judicial persons have been held accountable to date[37] — for widespread violations that rise to the level of violating *jus cogens* norms. The state in which such violations occur may also face international human rights law responsibility if it failed to adequately investigate, prosecute, and punish non-state actors or was otherwise complicit in violations.[38]

Implicit in this system of accountability under international criminal law may be the recognition that sometimes non-state actors are stronger than and beyond the control of states, for example during times of conflict. To tie this to a jurisdictional principle, it could be argued that certain non-state actors are actually acting in international space — although they may formally be within a state's territorial jurisdiction — if the state is too weak to regulate those actors and fulfill its duty to protect. This argument makes particular sense when the non-state actors frequently cross international borders — like the Lord's Resistance Army wreaking havoc between Uganda, the Democratic Republic of the Congo, the Central African Republic, and the Sudan — perhaps even doing so deliberately to avoid the government forces of one state or another or befuddle normal jurisdictional rules and state sovereignty.

International criminal law is a useful analogy for the exception to ultimate state responsibility for human rights argued for in this article. As just discussed, it makes the leap to individual — and perhaps eventually corporate or other non-state entity[39] — liability for violations of international law. Moreover, the system put in place by the Rome Statute of the International Criminal Court (ICC) is founded on the principle of complementarity between States Parties and the ICC as a court of last resort. States Parties have the primary duty to investigate and prosecute international crimes, while the ICC only steps in where states are unwilling or unable to prosecute.[40]

Similarly, enforcement of the corporation's responsibility to respect human rights usually falls within the state's duty to protect and it is the state that should guarantee victims' effective remedies. However, certain foreign investors that benefit from international protections of BITs negotiated between a home state and host state government have an unfair advantage over the host state government. Because such advantage — along with sheer economic power imbalances — may undermine the host state's ability or willingness to regulate investors or provide effective remedies to victims, a supranational forum such as a regional human rights system should complement state mechanisms and hold investors and host states accountable side by side.

Prepared to Take the Leap: How Regional Human Rights Systems Analyze State Accountability for Human Rights Violations Caused by Corporate Non-State Actors

Regional human rights systems are designed to infringe as little as possible on state sovereignty while serving a complementary function aimed not to replace but to reinforce the state's domestic incorporation and enforcement of human rights norms.[41] Such exercise of restraint out of respect for the principle of complementarity is the reason that the regional human rights systems are well positioned to take the next leap without abusing an expanded jurisdiction. Another reason is that the regional systems are able to balance the good and harmful effects of corporate actor's behavior in light of multiple overlapping rights.[42] The African system, for instance, recognizes not only a number of individual human rights, but also the collective right to social, economic, and cultural development.[43] Evaluating corporate activities in such a regional system, thus, may require explicitly weighing progress made toward realizing a collective right to development against a specific individual's or community's rights that may be violated in the development process. Even systems that do not recognize the right to development may employ other procedures to balance at-times conflicting goals, for example by factoring them into analysis of the state's margin of appreciation.

The cases discussed below aim to illustrate these strengths while demonstrating the analysis that all three of the regional human rights systems have used to hold states accountable for human rights violations caused by non-state corporate actors – a method of analysis that could easily be modified to instead apportion responsibility between the two. Generally, each court or commission identifies the harm caused by the corporate actor, often a negative environmental impact, and then assesses the state's performance in light of its responsibility to protect victims against this harm, to investigate and prosecute the corporate actors, or to otherwise provide victims with effective remedies after the fact. This analysis is thus able to assess both affirmative action by the state that infringes on individuals' or

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communities' rights — for instance the state's granting permission for a corporation to undertake economic activity without required public consultation — as well as a state's failure to take necessary action to regulate economic activity that involves abuses. Finally, the exploration below will allude to signs that the regional systems themselves are already taking steps to consider the direct liability of certain non-state corporate actors.

European Court of Human Rights

The European Court for Human Rights (ECtHR) has analyzed a handful of cases involving failure to properly regulate corporate activity. However, the ECtHR tends in these cases to consider the accountability of states with relatively strong domestic regulation and law enforcement and involves smaller *domestic* corporate non-state actors rather than larger foreign investors. Although these cases do not typically deal with violations or impunity on the scale of those coming before the African or Inter-American systems, discussed further below, the ECtHR offers a useful analytical framework — including its approach to assessing the state's margin of appreciation[44] while still finding violations on the part of the state — in cases in which the state would almost always be deemed willing and able to regulate the corporate non-state actor.

In two principal cases, the ECtHR has developed a method for finding the state responsible for harm caused by corporate non-state actors when the state failed to take adequate steps to protect the rights to family and private life guaranteed under Article 8 of the European Convention on Human Rights. The *Guerra* case found Italy in violation of Article 8 for failure to provide information and warnings to residents in an area affected by a fertilizer plant's toxic emissions.[45] The *López Ostra* case held Spain accountable for a violation of Article 8 because it failed to adequately control risks posed by a company that operated a sewage treatment plant, for instance by closing the plant or assisting affected parties to relocate in a timely manner.[46] The ECtHR also indicated the limits of the margin of appreciation afforded to the state in balancing a community's economic interests with individual rights, concluding that Spain "did not succeed in striking a fair balance between the interest of the town's economic well-being — that of having a waste-treatment plan — and the applicant's effective enjoyment of her right to respect for her home and her private and family life."[47]

African System

The African Commission for Human and Peoples' Rights (ACHPR) has faced at least one case involving state responsibility for human rights violations by a large foreign investor, Royal Dutch Shell, where state actors were also directly implicated. In *Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC and CESR) v. Nigeria*,[48] the ACHPR found the state responsible for numerous human rights violations associated with oil extraction by a consortium between state-owned Nigerian National Petroleum Company (NNPC) and Shell in the Ogoniland region.[49]

Courtesy of IndyMedia Ireland.

Ogoni community members protest against Shell's involvement in Nigeria.

The complaint alleged that the Nigerian government had violated several rights enshrined in the African Charter on Human and Peoples Rights: the rights to health (Article 16) and to a clean environment (Article 24) of the Ogoni people. The state

both (1) directly participated through the NNPC, a majority shareholder in the consortium, in contamination of air, water, and land causing adverse health consequences to the Ogoni; and (2) failed to protect the Ogoni population from this type of harm caused by the consortium.[50] Exercising restraint similar to the ECtHR's margin of appreciation analysis, the Commission considered that the government of Nigeria has the right to produce oil to improve the realization of economic and social rights for its people, but not without due care not to violate other rights in the process.[51] Additionally, the Commission found the state responsible for a violation of the Ogoni people's collective right to "freely dispose of their wealth and natural resources" pursuant to Article 21 due to the government's failure to include the Ogoni in its consultations with the consortium.[52] Finally, because of the Nigerian military's further involvement in violence and destruction of property committed against the Ogoni in retaliation against their protests of the consortium's activities, the Commission found the state in violation of additional explicit and implicit rights – including the right to life as well as the rights to property, housing, and food – protected under the Banjul Charter.[53]

In conclusion, the Commission remarked on the balance that the state must strike between competing priorities of economic development and protection of rights:

> The Commission does not wish to fault governments that are laboring under difficult circumstances to improve the lives of their people. . . . The intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities.[54]

The Commission's final recommendations were for the new government to take further steps to ensure "compensation for victims of the human rights violations," "a comprehensive cleanup of lands and rivers damaged by oil operations," and "the safe operation of any further oil development . . . guaranteed through effective and independent oversight bodies for the petroleum industry."[55]

In the decade since this 2001 ACHPR decision, Nigeria has allowed victims to seek remedies through domestic courts, which have twice awarded large monetary damages to victim communities.[56] Shell has used its significant resources to appeal each judgment. Moreover, only Shell has argued these damages should be apportioned between the foreign investor and state-owned enterprise. Meanwhile, Nigeria has not proven itself willing or able to effectively regulate oil companies in the Delta or clean up prior environmental degradation.[57]

In the face of continued and widespread human rights violations associated with foreign investment in Nigeria and elsewhere on the continent,[58] the ACHPR is seeking ways to more directly address such violations caused by non-state corporate actors, particularly those in the extractive industries. In November 2009, the Commission constituted a Working Group on Extractive Industries, Environment, and Human Rights Violations in Africa with a two-year research mandate that includes "inform[ing] the African Commission on the possible liability of non-state actors for human and peoples' rights violations under its protective mandate."[59]

Inter-American System

The Inter-American system has addressed numerous situations akin to that faced by the Ogoni in Nigeria or the *Lago Agrio* plaintiffs in Ecuador, involving human rights violations on a community-wide scale resulting from joint public-private ventures or concessions granted to private corporations without any or adequate consultation with affected indigenous communities. Since the *Awas Tingni* case decided by the Inter-American Court of Human Rights (IACtHR) in 2001,[60] the system has developed a method for preventing potential violations by non-state corporate actors *before* they occur by allowing indigenous communities to challenge government concessions of land or natural resources.[61]

Within the cases emerging from the Inter-American system, there is a subset that commence after substantive human rights violations have resulted from the activities of corporate non-state actors — in short, cases in which a violation of procedural protections may be part of the complaint but come too late to serve a completely preventive function. These cases illustrate how the Inter-American system often ties state responsibility for harm already caused by non-state actors to the requirement of an "adequate and effective remedy" through judicial recourse for violations of substantive rights caused entirely or in part by non-state actors.

Two IACHR cases in particular, *Toledo Maya v. Belize* and *Community of San Mateo De Huanchora and Its Members v. Peru*, demonstrate the method already employed by the Inter-American system. In *Toledo Maya*, the indigenous community challenged Belize's grant of logging and oil concessions on large portions of their ancestral land, among other failures by the state to protect and recognize the indigenous land and resource rights. The petition was filed in 1998, five years after the state first granted the concessions.[62] Although by the time the Commission heard the case, the state claimed that all logging and oil exploration had ceased, the community presented evidence that two large Malaysian timber companies had undertaken significant logging during the interim period.[63] This logging activity, including clear-cutting, fell within the permitted scope of the concessions and was thus legal from the perspective of the foreign investors.[64] Yet, since the state violated the indigenous community's property rights when granting to concessions, the Commission recommended that the state repair the environmental damage caused by logging.[65]

The *San Mateo De Huanchora* case[66] is distinguishable from *Toledo Maya* because it involves domestic corporate non-state actors — not foreign investors — who blatantly violated national law; thus it was a case of state failure to regulate and enforce its own law. In *San Mateo*, a coalition of affected communities brought a complaint against Peru for its failure to address severe pollution from a field of toxic sludge produced by a mining company, Lizandro Proaño S.A.[67] The IACHR granted the petitioners' request for precautionary measures and asked Peru to immediately conduct a new environmental assessment to determine how the sludge should be removed and begin work to transfer and contain the sludge.[68] The Commission also rejected the

state's claim that the petitioners had failed to exhaust domestic remedies, which the government argued for based on its claims that criminal charges were pending against the company's mining director and an administrative proceeding was underway to shut down the mining company and remove the sludge.[69] The Commission found that these measures did not constitute an "adequate and effective" remedy for the present harm resulting from the pollution, and moreover noted that the administrative proceedings had been pending for three years while the pollution continued.[70]

The Leap Forward

Of all the cases surveyed above, perhaps only a case such as that of Shell in Nigeria — notable for its striking similarities to the *Lago Agrio* case — is one in which the narrow exception argued for in this article would apply. The other cases serve as a few examples of the methods employed by regional systems to ensure that under normal circumstances the state is responsibility for protection of human rights and provision of effective remedies to victims. Moreover, these cases demonstrate the analysis employed by regional systems when facing violations that are the joint product of corporate failure to respect and state failure to protect or respect human rights. In a majority of these cases, ultimate and sole state accountability before the regional human rights systems seems appropriate. Yet, in instances of an economically powerful and legally well-advised transnational corporation that benefits from the protections of bilateral investment treaties, this system of accountability is less tenable. Shell, like Chevron in Ecuador, continues to use tremendous legal resources to avoid Nigerian attempts to hold it accountable for its share of damages, while pointing out that it should not be held solely accountable where it worked in consortium with a state-owned enterprise. In such circumstances, a supranational forum ultimately concerned with human rights and the availability of effective remedies is the appropriate forum for assessing and apportioning damages between the state and the foreign investor.

A More Efficient Path to Justice?

Returning to *Lago Agrio* in Ecuador, this final section aims to sketch out how a regional human rights system such as the Inter-American could be adapted to provide a more efficient path to justice for victims who otherwise bear far too great a share of the costs of delayed justice. Years before the *Aguinda* suit was ever filed in the United States, the Huaorani people, one of the indigenous groups in Ecuador most impacted by the Texaco/Petroecuador consortium's oil extraction in the Amazon, petitioned the IACHR alleging that other prospective oil development activities threatened numerous rights.[71] In September 1991 and October 1993, the IACHR held hearings on the petition.[72] Yet, the Commission realized that the "general claims lodged concerning the Huoarani [were] not unique."[73] Accordingly, it organized a country visit to Ecuador, including Lago Agrio and its surroundings, and in 1997 issued a report on the human rights situation with chapters on human rights in Ecuador's interior affected by oil development and on human rights issues of special relevance to indigenous communities.[74] The Commission found ample evidence to support a theory of state responsibility for human rights violations associated with oil extraction,[75] and concluded its report with strong words:

> Decontamination is needed to correct mistakes that ought never to have happened. Both the State and the companies conducting oil exploitation activities are responsible for such anomalies, and both should be responsible for correcting them. It is the duty of the State to ensure that they are corrected.[76]

By Kate Fisher.

Huoarani children near Lago Agrio, Ecuador.

While its actual recommendations were somewhat less forceful, they did include calling for Ecuador to undertake "preventive and remedial action" and reminding the state that it is obliged to ensure "that all individuals of the Oriente have access to effective judicial recourse to lodge claims concerning the rights under the Constitution and the American Convention."[77]

In the ensuing thirteen years, Ecuador has progressed little in complying with these recommendations, a fact which may be faulted to both the government and the power dynamics identified at the outset of this article. At the time of the Commission's visit, Texaco was undertaking remedial work pursuant to its MoU with Petroecuador and the Ecuadorian state,[78] and the Commission was able to document the affected community's mixed responses to the work.[79] No matter the criticisms of how Texaco executed its remedial work, the MoU divided the remedial work to be done and the part delegated to Petroecuador has yet to be completed. Some affected communities, and perhaps even the government, seem to be waiting for a judgment against Chevron to pay for a major remediation project.[80] Other affected communities like the Kichwa and Huaorani are "beginning to develop and implement remedial projects themselves, rather than simply denouncing, exhorting, petitioning — and waiting for others to act."[81]

As for judicial recourse, Ecuador passed a new law in 1998 creating a cause of action for individuals to sue for environmental damage; this law was one of the legal bases for the suit filed by the *Lago Agrio* plaintiffs. But, the Ecuadorian judiciary did not permit a separate complaint by a broader coalition of indigenous plaintiffs to proceed in seeking recourse against Chevron.[82] Moreover, whether it speaks to perceived or real lack of judicial independence, the *Lago Agrio* plaintiffs did not bring

a suit against the state-owned Petroecuador;[83] nor has Chevron impleaded Petroecuador in the suit against it in Ecuador. Finally, until the *Lago Agrio* suit is actually resolved — and unless it results in complete environmental remediation that eliminates the continuing dangers to the health and lives of people in the affected communities[84] — that form of judicial recourse cannot be deemed effective.

But imagine if the Huoarani community's 1990 petition had been based on past rather than prospective harm caused by oil extraction and had alleged direct violations by the state and violations of its duty to protect. Imagine that the Commission had permitted such a complaint to proceed, finding that domestic remedies would be ineffective under the circumstances because the judiciary would be unable to hear a complaint against a state-owned entity or against a foreign investor that had been part of a consortium with a state-owned entity. Imagine that the Commission had proceeded with its state visit and issued its recommendations to Ecuador as part of an Article 50 report in response to the Huoarani community petition. After the required time passed and Ecuador did not seem to be complying with recommendations, imagine that the Commission had referred the petition to the Inter-American Court. Then, imagine that at some point in the preparations for hearings, the Court took judicial notice of developments in the litigation against Chevron in Ecuador and determined that the state was unable or unwilling to provide effective remedy against Chevron in its judicial system on account of its BIT obligations to a foreign investor. Then, upon this finding, imagine that the Court had been able to join the foreign investor and the respondents in a single case responding to the petitioners' claims. Finally, imagine that after evaluating the harm to the petitioners and the defenses presented by both respondents, the Court had been able to grant an appropriate remedy that apportioned damages according to relative fault between the foreign investor and Ecuador, resolving in a single supranational proceeding all related claims between the three parties.

In embarking on this flight of imagination, this article does not deny the substantial procedural and jurisdictional changes that would be required for the regional human rights systems to make such adaptation — nor does it underestimate the political barriers any attempts at such adaptation would surely encounter. The Organization of American States and the African Union might have to revisit the constitutive documents for each of the regional organs; the regional organs would have to modify their rules of procedure and develop jurisprudence to govern the exceptional joinder of foreign investors to proceedings; and there might have to be some consent to the jurisdiction of such organs by foreign investors.[85]

This article will not go further in sketching out these logistics as each step would require many parties negotiating and exploring the boundaries and overlaps between the as-yet un-harmonized bodies of international human rights and international investment law. It would also involve confronting the very triangulation and power imbalances that have resulted in the accountability gap for both host states and foreign investors to the detriment of victims. Suffice it to say that adaptation of regional human rights systems to fill an identified accountability gap is possible and is perhaps the path *least* fraught with difficulties that could provide victims with a more effective and more efficient justice than what they have found thus far in *Lago Agrio*. **HRB**

ENDNOTES: Seeking Justice in *Lago Agrio* and Beyond: An Argument for Joint Responsibility of Host States and Foreign Investors before the Regional Human Rights Systems

1 Steven Donziger, Laura Garr & Aaron Marr Page, *The Clash of Human Rights and BIT Investor Claims: Chevron's Abusive Litigation in Ecuador's Amazon*, 17 No. 2 Hum. Rts. Brief 8, 10 (2010).

2 As of 2000, 51 of the largest 100 economies were corporations, while only 49 were states. Sarah Anderson & John Cavanaugh, *Top 200: The Rise of Global Corporate Power*, Global Policy Institute (2000), http://www.globalpolicy.org/component/content/article/221/47211.html (last visited Dec. 10, 2010).

3 In 2005, then UN Secretary-General Kofi Annan appointed Professor John Ruggie as the Special Representative on the issue of human rights and transnational corporations and other business enterprises. Press Release, United Nations, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005).

4 The essay that came to this conclusion weighed the facts that the system "resists mixing wholly economic interests with human rights protection, even if property is involved in the conflict," that it "has implicitly tended to favour indigenous communities' property in case of conflict," and that does not "order high amounts to compensate violations of property, regardless the actual extension of damages." Pedro Nikken, *Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights*, *in* Human Rights in International Investment Law and Arbitration 263, 270 (Oxford 2009).

5 In a recent and unprecedented victory, four human rights organizations — the Centre for Applied Legal Studies and the Legal Resources Centre from South Africa, the Center for International Environmental Law, and INTERIGHTS — petitioned and were granted permission to advise an international arbitration tribunal interpreting South Africa's obligations to investors under its BITs with Italy and Luxembourg. The tribunal, constituted under the World Bank Group's International Center for the Settlement of Investment Disputes (ICSID), resisted strong objections by the investors who filed the claim and are permitting the named organizations to review documents and submit written comments to the tribunal. Proceedings and documents are usually confidential under arbitration practice, per the wishes of the parties. Mavish Tetteh, *Arbitration Tribunal to Accept Human Rights Arguments in Investment Dispute*, Public Agenda (Ghana) (Oct. 30, 2009), http://www.ghanaweb.com/public_agenda/article.php?ID=14030 (last visited Dec. 10, 2010). On April 28, 2010, the parties agreed to abandon the claim and the tribunal discontinued arbitration. *Piero Foresti, Laura de Carli and others v. South Africa*, INTERIGHTS (Oct. 17, 2010), http://www.interights.org/foresti (last visited

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