

## BREAKING GROUND WITHOUT LIFTING A SHOVEL: ECUADOR'S PLAN TO LEAVE ITS OIL IN THE GROUND

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With a proposal that had been several months in the making, Ecuadorian President Rafael Correa stepped in front of a gathering of world leaders, and delivered an address that has the potential to shift existing environmental and development paradigms and provide a new way of thinking about the complex problems of carbon emissions, deforestation, and foreign debt relief for developing countries. Speaking to the United Nations conference on climate change on September 24, 2007,<sup>1</sup> and again

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1. Press Release, Ministry of Foreign Affairs, Republic of Ecuador, Ecuador Takes Leadership Role on Climate Change (Sept. 24, 2007), *available at* <http://www.prnews.wire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/09-24-2007/0004668939&EDATE=> [hereinafter Ecuador Takes Leadership Role].

to a panel of the Clinton Global Initiative two days later,<sup>2</sup> President Correa outlined a proposal that would leave nearly one billion barrels of heavy crude oil in the ground beneath the Ishpingo Tambococha Tiputini (ITT) oilfield located in his nation's Yasuní National Forest (or Parque Nacional Yasuní), in the environmentally sensitive Amazon River Basin.<sup>3</sup> Not developing the ITT oilfield will avoid a substantial amount of carbon emissions and will protect the forest and indigenous tribes that live in it.<sup>4</sup> In exchange for leaving such a valuable natural resource undisturbed and the corresponding environmental benefits, President Correa explained, Ecuador is seeking "fair compensation" from the international community.<sup>5</sup> By putting forth this proposal, President Correa has moved his country into the forefront of the fight against global man-made climate change, has taken steps toward creating a sustainable economy in Ecuador, and has provided a potential alternative for other developing nations that are faced with difficult choices between the development of their economies and protecting their substantial natural resources.

## I. SAVING THE YASUNÍ NATIONAL FOREST

### A. *The Yasuní National Forest and the ITT Oilfield*

Located just 190 miles from Ecuador's capital city of Quito, the Yasuní National Forest sits in the eastern half of the country, along the border with Peru, in the Amazon River

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2. Press Release, Ministry of Foreign Affairs, Republic of Ecuador, Ecuador's Yasuní-ITT Proposal Recognized at the Clinton Global Initiative (Sept. 26, 2007), available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/09-26-2007/0004670887&EDATE=>.

3. Clinton Global Initiative: CGI Member Commitments, Leaving Ecuador's Oil in the Ground, 2007, <http://commitments.clintonglobalinitiative.org/projects.htm?mode=view&rid=209748> (last visited Jan. 25, 2008) [hereinafter CGI Ecuador Commitment]; Ecuador Takes Leadership Role, *supra* note 1; Chris Holly, *Ecuador to Forgo Oil in Stunning Climate Proposal*, ENERGY DAILY, Oct. 9, 2007, at 1.

4. Ecuador Takes Leadership Role, *supra* note 1.

5. *Id.*

Basin.<sup>6</sup> The forest contains several rivers that feed into the Amazon and is bordered by the Napo and the Curaray Rivers.<sup>7</sup> The humid tropical rainforest is expansive, spanning at least 2.4 million acres, 1.8 million of which constitute a strictly limited “No-Go” zone.<sup>8</sup> The topography of the forest consists primarily of low-lying, flat plains and is dotted with the foothills of the nearby Andes Mountains to the west.<sup>9</sup>

Dubbed the “cradle of the Amazon,” the Yasuní National Forest is one of the most biologically diverse areas in the world.<sup>10</sup> It is thought to contain over 4,000 species of plants, 173 species of mammals, and over 100,000 species of insects per hectare.<sup>11</sup> Moreover, given the forest’s large geographical expanse, it is capable of supporting substantial populations of large carnivores, such as the jaguar and the harpy eagle, which generally cannot survive in smaller parks or wildlife reserves because of the large geographic region these animals need for hunting grounds.<sup>12</sup>

In addition to its incredible array of flora and fauna, the Yasuní Forest also supports several tribes of indigenous people, including the Huaorani, the Tagaeri, and the Taromenane tribes.<sup>13</sup> It is estimated that 9,800 people live in the forest, supporting themselves primarily by agriculture and hunting and

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6. Yasuní National Park, <http://www.ecuador.com/protected-areas/yasuni-national-park/> (last visited Jan. 25, 2008); CGI Ecuador Commitment, *supra* note 3; Olga Herrera-MacBryde & David A. Neill, Yasuní National Park and Huaorani Ethnic Reserve: Ecuador, Data Sheet, <http://www.nmnh.si.edu/botany/projects/cpd/sa/sa8.htm> (last visited Jan. 25, 2008).

7. Herrera-MacBryde & Neill, *supra* note 6.

8. Holly, *supra* note 3, at 3.

9. UNESCO, Biosphere Reserve Information, Ecuador, Yasuní, <http://www.unesco.org/mabdb/br/brdir/directory/biores.asp?code=ECU+02&mode=all> (last visited Jan. 25, 2008) [hereinafter UNESCO Biosphere Reserve Information].

10. Holly, *supra* note 3, at 3.

11. *Id.*

12. See Yasuní National Forest, <http://www.liveyasuni.org/> (last visited Jan. 25, 2008) (detailing the features of the Yasuní National Forest and its biodiversity).

13. Kintto Lucas, *Government Asks for International Support in Keeping Oil Reserve Untapped*, INTER PRESS SERVICE, Aug. 27, 2007, <http://ipsnews.net/news.asp?idnews=39002>.

gathering.<sup>14</sup> The Huaorani live on a 612,000 hectare reserve created by Ecuador's government in 1983.<sup>15</sup> The Tagaeri and Taromenane tribes have remained voluntarily isolated within the forest, leading traditional lifestyles, independent from other civilizations.<sup>16</sup>

Ecuador designated the Yasuní Forest a national park in 1979, recognizing it as a natural resource worthy of protection.<sup>17</sup> It was similarly recognized internationally in 1989, when the United Nations Education, Scientific and Cultural Organization (UNESCO) designated it as a Biosphere Reserve.<sup>18</sup>

The ITT oilfield sits in the easternmost portion of the forest, just along the Ecuadorian-Peruvian border.<sup>19</sup> Estimates show that the oilfield contains at least 900 million barrels of heavy crude oil reserves.<sup>20</sup> That amounts to at least twenty percent of the country's total oil reserves.<sup>21</sup> In order to transport such heavy crude oil via pipeline, the oil must undergo significant processing, which produces four barrels of toxic water for every barrel of oil, and can significantly degrade watersheds in the area.<sup>22</sup>

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14. UNESCO Biosphere Reserve Information, *supra* note 9.

15. Yasuní Depends on You!, Huaorani Territory, [http://www.sosyasuni.org/en/index.php?option=com\\_content&task=view&id=37&Itemid=26](http://www.sosyasuni.org/en/index.php?option=com_content&task=view&id=37&Itemid=26) (last visited Jan. 25, 2008).

16. Lucas, *supra* note 13.

17. *Id.*

18. UNESCO Biosphere Reserve Information, *supra* note 9. UNESCO designates environmentally sensitive areas as "Biosphere Reserves." See generally UNESCO, *Biodiversity in UNESCO*, June 2007, available at <http://unesdoc.unesco.org/images/0015/001514/151402e.pdf> (describing what UNESCO is and how it operates). Biosphere Reserve areas are environmentally sensitive areas that seek to share conservation and sustainable development experiences with each other in order to advance conservation efforts. UNESCO, Biosphere Reserves: Reconciling the Conservation of Biodiversity with Economic Development, <http://www.unesco.org/mab/BRs.shtml> (last visited Jan. 25, 2008) (detailing the purpose and concepts of biosphere reserves).

19. Ecuador's Yasuní-ITT Proposal, University of Maryland College of Chemical & Life Sciences, <http://sef.umd.edu/sef2007.html> (last visited Jan. 25, 2008) [hereinafter Ecuador's Yasuní-ITT Proposal].

20. Holly, *supra* note 3, at 1.

21. *Id.*

22. *Id.* at 3; Ecuador's Yasuní-ITT Proposal, *supra* note 19.

*B. President Correa's Yasuní-ITT Proposal*

President Correa's proposal would leave this vast natural resource virtually untouched. Although several international oil companies already operate in certain blocks of the Yasuní Forest, including Brazil's Petrobras, Canada's EnCana, and Spain's and Argentina's Repsol-YPF,<sup>23</sup> the Yasuní-ITT proposal would prohibit the development of any blocks sitting over the ITT reserve.<sup>24</sup> In exchange for the payments it has requested, Ecuador indicated it will issue bonds for the crude oil that is to remain undeveloped, with the understanding that the oil will never be extracted and the Yasuní Forest will be protected.<sup>25</sup>

Ecuador is willing to forego the extraction and development of such resources, President Correa explained, because his country believes the value of avoiding the potential negative impacts of climate change and deforestation and of protecting the Yasuní Forest are far greater, both to Ecuador and to the international community, than the financial revenues that would accrue to Ecuador if it allowed drilling and development of the ITT field.<sup>26</sup> In days where the price of oil has reached over \$90 per barrel,<sup>27</sup> revenues from developing the ITT field would be significant, to say the least. Estimates are that the revenues for extraction of this oil would total \$9.2 billion.<sup>28</sup> For a nation that currently achieves revenues equal to one third of its annual budget from oil exports,<sup>29</sup> the loss of such revenue would be too painful to be fiscally responsible, absent some type of offsetting revenue source.

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23. Lucas, *supra* note 13.

24. Yasuní National Forest, *supra* note 12.

25. Lucas, *supra* note 13.

26. Holly, *supra* note 3, at 3.

27. Michael M. Grynbaum, *Supply Worries Push Oil Above \$90*, N.Y. TIMES, Oct. 26, 2007, at C3; Thomas Hogue, *Oil Briefly Rises Above \$91 a Barrel on Supply Worries, Mideast Tensions*, ASSOCIATED PRESS, Oct. 25, 2007, available at <http://www.signonsandiego.com/news/business/20071025-2101-oilprices.html>.

28. CGI Ecuador Commitment, *supra* note 3.

29. Ecuador Takes Leadership Role, *supra* note 1.

Under President Correa's proposal, Ecuador would seek to obtain half of those estimated lost revenues per year from other countries, non-governmental organizations, environmental groups, and others.<sup>30</sup> President Correa asked the international community to contribute \$350 million annually for 10 years, which is equivalent to half of the annual revenues Ecuador would expect to receive from exporting the ITT oil.<sup>31</sup> Payments could take the form of credits against or reduction of Ecuador's foreign debt.<sup>32</sup> Ecuador would place those funds in a "National Development Fund," which would help the country promote and develop renewable energy projects, transportation systems, programs to eliminate poverty, and equitable access to health care and education.<sup>33</sup> Officials have indicated the fund would be administered internationally and structured such that if future administrations drill in the ITT oilfield, Ecuador would risk losing its cash flow from the fund.<sup>34</sup>

In addition to the revenue it would collect, Ecuador would also be able to sell greenhouse gas emissions credits that will result from foregoing the development of the ITT reserve.<sup>35</sup> It is estimated that leaving the ITT oil undeveloped would result in permanently sequestering nearly 436 million tons of carbon dioxide in the ground.<sup>36</sup>

Several entities have already expressed support for the proposal. The government of Norway has stated it supports the plan, at least conceptually, and Spain has reportedly stated it would contribute to a compensation fund if it was found that exploiting the ITT oil was not a "viable option."<sup>37</sup> The Clinton Global Initiative selected Ecuador's proposal to be one of its 2007 "Member Commitments," which are goals that the

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30. Lucas, *supra* note 13.

31. *Id.*

32. *Id.*

33. Holly, *supra* note 3, at 3; Ecuador Takes Leadership Role, *supra* note 1.

34. Amy E. Robertson, *Ecuador Invites World to Save Its Forest*, CHRISTIAN SCI. MONITOR, June 5, 2007, at 6.

35. Ecuador's Yasuni-ITT Proposal, *supra* note 19.

36. Ecuador Takes Leadership Role, *supra* note 1.

37. Lucas, *supra* note 13.

organization pledges to promote and support.<sup>38</sup> The Wallace Global Fund<sup>39</sup>—an international organization that raises money to promote sustainable development and environmental conservation<sup>40</sup>—has pledged \$100,000 to support the proposal in its first year.<sup>41</sup> Other non-governmental organizations and environmental groups have indicated support for the proposal as well.<sup>42</sup>

Nevertheless, if Ecuador is unable to raise the needed capital from the international community, as some doubt that it will,<sup>43</sup> the country has indicated it will develop the ITT oilfield.<sup>44</sup> Ecuador's Ministry of Energy and Mines indicated in April 2007 that it was considering several options for the ITT reserves, only one of which was to leave the oil in the ground and seek international compensation.<sup>45</sup> Other options under consideration all involved extraction and development of the oil, either by Ecuador's national oil company, Petroecuador,<sup>46</sup> or by other international, state-owned oil companies, such as Venezuela's Petroleos de Venezuela, which has already indicated an interest in developing the oilfield.<sup>47</sup> Government talks with international

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38. CGI Ecuador Commitment, *supra* note 3.

39. Wallace Global Fund Home Page, <http://www.wgf.org> (last visited Jan. 25, 2008).

40. See CGI Ecuador Commitment, *supra* note 3 (describing the Wallace Global Fund's goal as helping to "realize a new economic paradigm based on well-functioning natural resources (natural capital) and human capital, rather than on extraction of nonrenewable resources").

41. *Id.*

42. See Lucas, *supra* note 13 (noting that there have been over 100 expressions of interest in supporting Ecuador's proposal). Other such organizations include the Pachamama Alliance, the CS Mott Foundation, and the World Resources Institute. *Id.*; Holly, *supra* note 3, at 3.

43. See *Having It Both Ways*, THE ECONOMIST, June 21, 2007, at 47, available at [http://www.economist.com/world/la/displaystory.cfm?story\\_id=9366138%20](http://www.economist.com/world/la/displaystory.cfm?story_id=9366138%20) (explaining the Yasuni-ITT proposal and the issues that face Ecuador in adopting such a proposal).

44. Mercedes Alvaro, *Ecuador to Wait Up to a Year Before Developing ITT Field*, DOW JONES NEWSWIRES, Apr. 19, 2007, available at <http://www.easybourse.com/Website/dynamic/News.php?NewsID=181823&lang=fra&NewsRubrique=2&pageliste=>.

45. *Id.*

46. *Ecuador Seeks Compensation to Leave Amazon Oil Undisturbed*, ENVTL. NEWS SERV., Apr. 24, 2007, <http://www.ens-newswire.com/ens/apr2007/2007-04-24-04.asp>.

47. Alvaro, *supra* note 44. Ecuador's marked preference for other Latin American state-owned oil companies to develop the ITT reserve stems at least in part from the

oil companies were underway last spring, prior to the formal announcement of the proposal,<sup>48</sup> and in March and April, 2007, Petroecuador signed several memoranda of understanding with international oil companies to develop the ITT field.<sup>49</sup>

From both an environmental and an economic development perspective, President Correa's proposal builds on and shifts existing paradigms. While unique in the scope of compensation Ecuador is seeking, its proposal draws upon past experiences. If successful, it may provide a unique alternative for developing countries that seek to preserve their natural resources while, at the same time, develop their economies.

*C. The Development Context: Drawing Upon the Debt-for-Nature Swap Experience*

President Correa's proposal is similar in many respects to so-called "debt-for-nature swaps" that evolved during the 1980s as a means for developing nations to relieve some of the burdens of their foreign debt without over-exploiting their natural resources.<sup>50</sup> During the 1970s, developing nations borrowed approximately \$700 billion from international lenders, including the International Monetary Fund, the World Bank, certain

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long, unhappy history of American oil companies that have operated in Ecuador, including other areas of the Yasuní National Forest. See ANGELA G. ARMSTRONG & MARLON VALLEJO, TRADE & ENVIRON. DATABASE CASE STUDIES, AM. UNIV., ECUADOR OIL EXPORT DISPUTE (1992), <http://www.american.edu/TED/ecuador.htm> (referencing the treatment of indigenous peoples by U.S. oil companies and the resulting lawsuits filed against those companies by indigenous tribes). Ecuadorans have protested the presence of U.S. oil companies in the Amazon River Basin, claiming these companies have polluted and destroyed natural resources and have ruined the traditional habitats of indigenous people. *Id.*; see, e.g., Yasuní Depends on You!, The Worst Case of Oil Pollution on the Planet, <http://www.sosyasuni.org/en/content/view/106/1> (last visited Jan. 25, 2008) (confirming that a previous corporation's presence in the area is threatening indigenous people).

48. Alvaro, *supra* note 44. These companies included Petrobras, China Petroleum & Chemical Corp. (Sinopec), and Enap, which is the Chilean state-owned oil company. *Id.*

49. *Ecuador Seeks Compensation to Leave Amazon Oil Undisturbed*, *supra* note 46.

50. See generally Amanda Lewis, *The Evolving Process of Swapping Debt for Nature*, 10 COLO. J. INT'L ENVTL. L. & POL'Y 431, 432-35 (1999) (discussing the development, process, and criticisms of debt-for-nature swaps).

developed nations, and large foreign banks.<sup>51</sup> The combination of rapidly skyrocketing interest rates and a deteriorating market for these nations' chief exports in the early 1980s led to a debt crisis, with several borrower nations indicating they could not make payments on their debt, beginning with Mexico in 1982.<sup>52</sup>

Developing nations are generally required to repay their foreign debt in hard currency, as opposed to their own local currency.<sup>53</sup> These countries have typically raised hard currency for debt servicing by developing and exporting their natural resources, for example, through mining, logging, and ranching.<sup>54</sup> Large foreign debts therefore often have a dual impact on a country's natural resources. First, the need to raise capital to make payments on the debt creates significant incentives for debtor nations to develop their resources.<sup>55</sup> Second, the revenues raised by such development are primarily used to service the debt, as opposed to further protecting or conserving the country's remaining resources.<sup>56</sup>

In response to the debt crisis and the perceived negative incentives it created for developing nations to exploit their natural resources, in 1984, the then-vice president of the World Wildlife Fund, Dr. Thomas Lovejoy, wrote an editorial encouraging commercial banks to offer discounts or credits to debtor nations in exchange for the protection of their natural resources, thus "swapping" debt relief for conservation of their natural resources.<sup>57</sup> Instead of creating incentives that could lead to over-development of these resources, as more traditional payment options had done, the debt-for-nature swap thus sought

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51. *Id.* at 432. By the late 1980s, this debt had ballooned to \$1.3 trillion. *Id.*

52. *Id.*; Priya Alagiri, *Give Us Sovereignty or Give Us Debt: Debtor Countries' Perspective on Debt-for-Nature Swaps*, 41 AM. U. L. REV. 485, 485-86 (1992).

53. Lewis, *supra* note 50, at 432.

54. *Id.*

55. *See id.* (connecting developing countries' large debt to deforestation because the need to raise hard currency motivates development of natural resources for export).

56. *Id.*

57. Thomas E. Lovejoy, *Aid Debtor Nations' Ecology*, N.Y. TIMES, Oct. 4, 1984, at A31; Douglas Logsdon, *Debt-for-Nature Evolves: The Enterprise for the Americas Initiative*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 635, 638 (1992).

to require the developing nation to protect its resources.

Although they can take many forms, these arrangements generally involve developing countries setting aside conservation easements to be used only for sustainable development projects, and in exchange, some portion of their foreign debt is canceled.<sup>58</sup> Developing countries have entered into such swaps with a wide range of counterparties, including foreign nongovernmental organizations and environmental groups, international banks, creditor nations, and even businesses, which typically purchase the debt for less than face value on the secondary market and then either provide aid to the country directly (through cash or bonds) or establish a fund to oversee conservation efforts within the country.<sup>59</sup>

Proponents of these arrangements assert that such agreements protect a developing country's natural resources for future generations, protect its national sovereignty, and enable the developing country to relieve large portions of its debt.<sup>60</sup> Since the early 1980s, many such arrangements have been developed, each one learning from and building upon the last.<sup>61</sup>

Debt-for-nature swaps do have their critics, however. In particular, some have argued that these arrangements are a

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58. Jacqueline Klosek, *The Destruction of the Brazilian Amazon: An International Problem*, 6 CARDOZO J. INT'L & COMP. L. 119, 151 (1998).

59. See Lewis, *supra* note 50, at 432–33 (discussing variations of debt-for-nature swaps, including transactions in which aid to the developing country is distributed in the form of cash or bonds, and illustrating how counterparties pay less for the debt than face value); Alagiri, *supra* note 52, at 494 n.52, 494–95 (describing steps in a debt-for-nature swap between a developing country, its central bank, and an international conservation organization, including obtainment of the debt instrument from the secondary market, conversion of the debt into local currency or bonds, and establishment of a conservation program).

60. Alagiri, *supra* note 52, at 493–94; see Klosek, *supra* note 58, at 151–52 (discussing how debt-for-nature swaps can be perceived as protecting sovereignty because they do “not directly result in external dominance through foreign ownership”); see also Lewis, *supra* note 50, at 433–34 (noting that, for the most part, debtor countries no longer consider debt-for-nature swaps as threats to their national sovereignty). Benefits to the developing nation's counterparty in a debt-for-nature swap may include favorable publicity, tax benefits, and the supporting of environmental and/or conservation goals. Klosek, *supra* note 58, at 152.

61. See Lewis, *supra* note 50, at 435–52, for a discussion of several of the debt-for-nature swaps that have been agreed upon throughout the last 20 years.

violation of the national sovereignty of developing nations—yet another way, critics charge, that wealthier creditor nations can use their superior economic position to force their priorities upon developing nations that are otherwise hard-pressed to pay off their debt.<sup>62</sup> Other critics have argued that such debt reduction is essentially “free money” and has not been sufficient to save the rainforests; real preservation will only be achieved, these critics argue, by direct aid.<sup>63</sup> Other critics claim that debt-for-nature arrangements infringe upon the sovereignty of indigenous peoples, who often inhabit the land offered up in exchange for the debt cancellation, and who may be forced to give up traditional claims to and uses of the land in order to make way for the developing nation’s conservation efforts.<sup>64</sup>

Ecuador itself has a history with debt-for-nature swaps. In 1987, the World Wildlife Fund and The Nature Conservancy agreed to obtain \$10 million of Ecuador’s commercial debt and to create a fund to establish and support a private Ecuadorian conservation group, Fundación Natura, to protect Ecuador’s nature reserves.<sup>65</sup> While this arrangement was successful in many respects, it garnered substantial criticism for excluding indigenous peoples who lived in the Amazon, including the Huaorani tribe, from the negotiations.<sup>66</sup>

In several respects, Ecuador’s current proposal to protect the Yasuní National Forest is not a traditional debt-for-nature swap. Instead of negotiating directly with non-governmental organizations or foreign banks to cancel or purchase part of its

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62. *Id.* at 433; Klosek, *supra* note 58, at 152.

63. Lewis, *supra* note 50, at 434–35.

64. Klosek, *supra* note 58, at 152; Lewis, *supra* note 50, at 434. For instance, in one of the first swaps, a 1987 arrangement that sought to protect the Beni area of Bolivia, indigenous people complained that the negotiating parties had not consulted them, and that they had been seeking to obtain legal title to the land but that the swap divested them of their rights. Lewis, *supra* note 50, at 435–36.

65. Lewis, *supra* note 50, at 437.

66. *Id.* at 438. As one indigenous leader explained in later discussions with American environmentalist groups: “[w]ithout consulting us, you have traded our land for a debt we did not incur.” *Id.* (quoting Monte Hayes, *South American Indians, Ecologists Join Forces to Save Amazon*, ASSOCIATED PRESS, May 12, 1990, available at 1990 WL 6004641). In order to address some of these concerns, several international conservation groups signed the Iquitos Declaration with indigenous leaders in May 1990, which recognized the sovereignty of indigenous peoples over tribal lands. *Id.*

debt, Ecuador is seeking to collect capital to further the development of its economy, although Ecuadorian officials have indicated that a portion of its sought-after compensation could include debt reduction.<sup>67</sup> Moreover, Ecuador proposes to use international compensation to address other needs besides simply debt reduction and hopes to use it as a vehicle to build its economy.<sup>68</sup> Additionally, Ecuador will undertake the conservation efforts directly by setting aside the ITT oilfield.<sup>69</sup>

The Yasuní proposal also appears to address some of the national sovereignty criticisms of traditional debt-for-nature swaps. Ecuador itself is proposing the trade and has called for international partners to contribute capital to its economy on Ecuador's own terms.<sup>70</sup> Thus, the proposal may raise fewer concerns about the infringement of Ecuador's national sovereignty.

It is not clear, however, how President Correa proposes to handle the rights of indigenous peoples who call the ITT oilfield and surrounding areas home. While he has indicated that his proposal would protect these peoples' traditional way of life,<sup>71</sup> the details of this aspect of the proposal have not yet fully emerged. If Ecuador's proposal gains sufficient international participation to move forward, Ecuador should strive to ensure that the indigenous peoples in the Yasuní Forest are consulted and their rights are protected.

*D. The Environmental Context: Reducing Global Carbon Emissions and Protecting the Rainforests*

From an environmental perspective, too, Ecuador's proposal builds upon existing strategies. While Ecuador, as a developing nation, is not subject to binding emissions reduction targets under the Kyoto Protocol to the United Nations Framework Convention on Climate Change,<sup>72</sup> the Yasuní proposal's

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67. Holly, *supra* note 3, at 3.

68. Ecuador Takes Leadership Role, *supra* note 1.

69. CGI Ecuador Commitment, *supra* note 3.

70. Lucas, *supra* note 13.

71. CGI Ecuador Commitment, *supra* note 3; Ecuador Takes Leadership Role, *supra* note 1.

72. See Brian Evans, *Principles of Kyoto and Emissions Trading Systems: A Primer*

substantial avoidance of future carbon dioxide emissions and its preservation of the Yasuní Forest position Ecuador to be a major contributor under the Kyoto Protocol construct.

The binding emissions limitations in the Kyoto Protocol came about as a result of international debate and negotiations during much the same time as developing countries were experiencing the foreign debt crisis in the 1970s and 1980s.<sup>73</sup> During this time, the global community began exploring and debating the potential impact of “greenhouse gases” and the global warming effect. The Intergovernmental Panel on Climate Change (IPCC) issued its first report in 1990, warning that “emissions [of greenhouse gases] resulting from human activities are substantially increasing the atmospheric concentrations of the greenhouse gases . . . , resulting on average in an additional warming of the Earth’s surface.”<sup>74</sup> The IPCC and other scientists identified two primary suspected causes of greenhouse gas emissions: (1) the burning of fossil fuels and (2) the loss of so-called “carbon sinks” that absorb carbon dioxide and prevent it from entering the atmosphere (e.g., forests, soils, oceans, peat, and permafrost).<sup>75</sup>

As a first step, the United Nations adopted the United Nations Framework Convention on Climate Change (Convention or UNFCCC) in 1992, seeking to stabilize atmospheric greenhouse gas concentrations at a level that would prevent further impact on the climate.<sup>76</sup> The agreement included the “aim” of returning national greenhouse gas emissions of

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*for Energy Lawyers*, 42 ALTA. L. REV. 167, 172–73 (2004) (“Developing countries face no immediate reduction target.”); Kyoto Protocol to the United Nations Framework Convention on Climate Change arts. 1, 3, Dec. 10, 1997, 37 I.L.M. 22 (outlining what countries “shall” reduce their greenhouse gas emissions).

73. See Evans, *supra* note 72, at 172 (discussing the meetings throughout the 1970s and 1980s that led to the execution of the Kyoto Protocol); Lewis, *supra* note 50, at 432 (stating that loans were made to developing countries in the 1970s and the debts peaked in the 1980s).

74. Peter H. F. Bekker, *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 92 AM. J. INT’L L. 315, 316 (1998) (citation omitted).

75. *Id.* at 317; see Evans, *supra* note 72, at 171 (discussing carbon sinks).

76. United Nations Framework Convention on Climate Change art. 2, May 9, 1992, 171 U.N.T.S. 107.

developed countries to 1990 levels by the year 2000.<sup>77</sup> The Convention, however, did not contain any binding emissions limits.<sup>78</sup>

Realizing that the aspirational nature of the Convention likely was insufficient to significantly reduce the causes of global warming, the parties to the Convention negotiated the Kyoto Protocol, which was formally adopted in December 1997.<sup>79</sup> The Protocol established—for the first time—legally binding targets for the reduction of emissions of six greenhouse gases—carbon dioxide, nitrous oxide, methane, sulfur hexafluoride, hydrofluorocarbons, and perfluorocarbons.<sup>80</sup> The Protocol contemplates a total reduction in these greenhouse gases by 5.2% below 1990 levels during the 2008–2012 commitment period.<sup>81</sup> It also requires industrialized nations to develop programs to address climate change in developing countries and to support technology transfer to those countries.<sup>82</sup>

Consistent with the underlying principle of the UNFCCC that whatever emissions limits were adopted should not include new commitments by developing nations, only industrialized nations are subject to the Protocol's binding reduction targets.<sup>83</sup> These nations agreed to “differentiated” targets, and each was free to negotiate its particular reduction target based on its degree of economic development, population, climate, and size.<sup>84</sup>

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77. Bekker, *supra* note 74, at 317–18. The underlying principle embodied in the UNFCCC and subsequent agreements is that developed nations have contributed at a higher level to the current levels of greenhouse gases in the atmosphere and thus should bear a higher responsibility for lowering their emissions. *Id.* at 318–19. In international negotiations on these agreements, developing nations have insisted that they not be subjected to emissions limits that would stifle economic development in their countries. *Id.*

78. *Id.* at 318.

79. Evans, *supra* note 72, at 172.

80. *Id.* at 173. Of these six gases, the first three (carbon dioxide, nitrous oxide, and methane) are naturally occurring, while the last three (sulfur hexafluoride, hydrofluorocarbons, and perfluorocarbons) are synthetic. *Id.*

81. *Id.*

82. *Id.* at 172.

83. *Id.* at 173; Bekker, *supra* note 74, at 318–19.

84. Evans, *supra* note 72, at 173. For example, the European Community pledged to achieve an 8% reduction below 1990 emissions levels, the United States adopted a 7% reduction target, and Japan and Canada each agreed to 6% cuts. *Id.*; Global Climate

To assist industrialized nations in meeting their binding targets, the Kyoto Protocol established so-called “Flexibility Mechanisms,” which provide for international emissions trading, joint implementation of conservation projects between nations, and the “Clean Development Mechanism.”<sup>85</sup> Under the latter, industrialized nations may invest in projects in developing nations that result in emissions reductions, and then credit some portion of these reductions to their own emissions reduction targets.<sup>86</sup> “[A] share of the proceeds of these projects will be used to finance adaptation to climate change in particularly vulnerable developing countries . . . .”<sup>87</sup>

The environmental benefits of the Yasuní proposal are apparent. As currently envisioned, the proposal would take aim at two of the primary suspected causes of increasing greenhouse gas emissions and global climate change: consumption of fossil fuels and the destruction of a vast carbon sink. Leaving the ITT oil untouched would eliminate the consumption of an estimated 900 million barrels of oil.<sup>88</sup> It would also sequester millions of tons of carbon dioxide underneath the forest floor.<sup>89</sup> Conserving the forest will also leave intact millions of acres of old-growth forest, which serves as a carbon sink, absorbing other greenhouse gas emissions from the atmosphere.<sup>90</sup> Finally, the proposal would avoid the environmentally harmful production process involved in the extraction and processing of crude oil.

These environmental and conservation benefits may ultimately provide the incentives needed to encourage counterparties to contribute. Given the vast amount of carbon dioxide that will be sequestered, Ecuador will be able to trade

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Change, <http://www.un.org/News/facts/climate.htm> (last visited Jan. 25, 2008). While the United States has ultimately determined it will not ratify the Kyoto Protocol, it was active in its negotiation and agreed to reduction targets as part of that negotiation. Evans, *supra* note 72, at 169; Global Climate Change, *supra*.

85. Evans, *supra* note 72, at 173–74.

86. Bekker, *supra* note 74, at 325.

87. *Id.*

88. Ecuador’s Yasuní-ITT Proposal, *supra* note 19.

89. Ecuador Takes Leadership Role, *supra* note 1.

90. Robertson, *supra* note 34, at 6; Evans, *supra* note 72, at 171.

the emissions credits from such sequestration in international emissions trading markets.<sup>91</sup> Under the Kyoto Protocol's framework, industrialized nations that are subject to binding emissions reduction targets may be able to utilize the Protocol's various Flexibility Mechanisms,<sup>92</sup> thereby helping them meet the targets they have adopted.

## II. AN ALTERNATIVE FOR THE FUTURE?

Ecuador's proposal to leave the ITT oil under the ground is striking in its scope and its creativity. Leaving 900 million barrels of oil in the ground, particularly at times when oil prices are reaching all-time records, amounts to an enormous amount of revenue foregone. Ecuador, from a short-term economic perspective, can sorely afford it.<sup>93</sup> The plan's proponents, however, believe that from an environmental perspective, as well as from a long-term economic perspective, the proposal offers real and substantial benefits, not just to Ecuador but to the entire world.

It remains to be seen whether Ecuador's proposal will garner enough international financial support to move forward. Some are doubtful that it will. Significant details also remain to be clarified—in particular, how the rights of indigenous tribes in the Yasuní National Forest will be protected. Nevertheless, the proposal offers a significant and innovative step forward in the way that the world deals with problems like developing nations' foreign debt, the exploitation of natural resources in developing countries, and global climate change.

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91. Ecuador's Yasuní-ITT Proposal, *supra* note 19.

92. See Evans, *supra* note 72, at 173–75 (discussing the various mechanisms of the Kyoto Protocol).

93. See Holly, *supra* note 3, at 3 (noting that Ecuador will develop the ITT reserves if its proposal is not accepted).