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THE PROBLEM OF ENFORCING NATURE'S RIGHTS UNDER ECUADOR'S CONSTITUTION: WHY THE 2008 ENVIRONMENTAL AMENDMENTS HAVE NO BITE

Mary Elizabeth Whitemore[†]

Abstract: In 2008, Ecuador became the first nation to give rights to nature when it ratified constitutional amendments (new articles 71-74) that grant the environment the inalienable right to exist, persist, and be respected. Environmentalists hope Ecuador's amendments will lead to improvement in a country devastated by resource exploitation, and that other countries will follow. Yet, many wonder whether the amendments will be enforced. This comment argues that—all things considered—successful execution of the amendments is unlikely. Ecuador's President has not demonstrated a sincere intention or ability to implement the amendments. Further, plaintiffs who sue under the amendments face significant legal barriers, such as Ecuador's lack of a standing doctrine and a history of judicial corruption and dysfunction. To counteract these problems, Ecuador should grant lifetime tenure to its constitutional court judges, codify a standing doctrine, create an independent enforcement body, and create an independent environmental tribunal with criminal contempt power.

I. INTRODUCTION

“We’re making history! Onward!” Ecuador’s President Rafael Correa rejoiced in late September 2008.¹ President Correa was celebrating the news that voters had approved Ecuador’s new Constitution.² He called the vote a “historic victory” and promised that it would incite “rapid, profound change” in Ecuador,³ an economically and politically fragile⁴ equatorial country on the Pacific coast of South America. This new Constitution promises many new rights, but it has primarily caught international attention because Ecuador is now the first nation in the world

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¹ *Ecuadoreans Back New Constitution*, BBC NEWS (Sept. 29, 2008), <http://news.bbc.co.uk/2/hi/7640704.stm>.

² Simon Romero, *President Wins Support for Charter in Ecuador*, N.Y. TIMES (Sept. 28, 2008), <http://www.nytimes.com/2008/09/29/world/americas/29ecuador.html>.

³ *New Ecuador Constitution Includes Gay Rights Guarantees*, THE ASSOCIATED PRESS (Sept. 29, 2008), <http://www.365gay.com/news/new-ecuador-constitution-includes-gay-rights-guarantees/>.

⁴ WORLD BANK, OPERATIONS EVALUATION DEPARTMENT, EVALUATIONS OF THE WORLD BANK GROUP'S ACTIVITIES IN THE EXTRACTIVE INDUSTRIES: BACKGROUND PAPER: ECUADOR COUNTRY CASE STUDY 1-2 (2003).

to grant inalienable, substantive rights to nature.⁵

Other constitutions express commitment to environmental value,⁶ but an anthropocentric⁷ format is more typical. Ecuador, by contrast, now treats the environment as a right-bearing entity alongside and equal to humans. These provisions represent a shift in Ecuador (and perhaps Latin America generally) from an exclusively anthropocentric view of environmental rights to a more eco-centric view⁸ and have led some commentators to dub Ecuador's Constitution the "most progressive in the world."⁹

Specifically, the new articles grant the environment the inalienable right to exist, persist, regenerate, and be respected.¹⁰ They also guarantee Ecuadorean citizens the right to sue for enforcement of these rights.¹¹ Much of the attention the provisions have received has been cautiously positive; observers want to see how constitutional rights for nature may be enforceable and in what types of legal proceedings.¹² Will they have what the legal community calls "teeth" in court? Will other countries follow?

It is significant that Ecuador is the first country in the world to codify such novel constitutional mandates. Ecuador is home to at least eight groups of indigenous peoples, over thirteen million hectares of tropical rain forest in the Amazon basin,¹³ and the treasured Galápagos Islands. Unfortunately, Ecuador is also home to an environmentally devastating oil industry that has

⁵ CONSTITUCIÓN POLITICA DE LA REPÚBLICA DEL ECUADOR, art. 56-60, available at <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html#mozTocId64283> [hereinafter CONST. ECUADOR].

⁶ Out of approximately 190 nations in the world, the constitutions of 117 mention protection of the environment or natural resources. EARTH JUSTICE, ENVIRONMENTAL RIGHTS REPORT: HUMAN RIGHTS AND THE ENVIRONMENT 37 (2005), available at http://www.earthjustice.org/library/references/2005_ENVIRONMENTAL_RIGHTS_REPORTTrev.pdf.

⁷ An anthropocentric (or "homocentric") format grants environmental rights to human beings. See Carolyn Merchant, *Environmental Ethics and Political Conflict: A View from California*, 12 ENV. ETHICS 1, 52-57 (1990).

⁸ See CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? LAW, MORALITY AND THE ENVIRONMENT 164 (3d ed. 2010); Merchant, *supra* note 7, at 56; Myrl L. Duncan, *The Rights of Nature: Triumph for Holism or Pyrrhic Victory?* 31 WASHBURN L. J. 61, 67 (1992).

⁹ See, e.g., Clare Kendall, *A New Law of Nature*, THEGUARDIAN.CO.UK (Sept. 24, 2008), <http://www.guardian.co.uk/environment/2008/sep/24/ecuador.conservation>; cf. David Takacs, Note, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVTL. L. J. 711, 730 (2008) (positing that South Africa's Constitution may be the world's most progressive).

¹⁰ CONST. ECUADOR, *supra* note 5, at art. 71.

¹¹ *Id.*

¹² See, e.g., Kendall, *supra* note 9.

¹³ Judith Kimerling, *Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorean Amazon*, 14 HASTINGS INT'L & COMP. L. REV. 849, 849 (1991).

caused vast deforestation in the Amazon,¹⁴ contaminated water, and rampant illness.¹⁵ In sum, it is not difficult to say that no country needs this amendment more than Ecuador.

However, it remains unclear whether President Correa intends to implement these changes, or even has the resources necessary to do so. As illustrated by the fact that President Correa is Ecuador's eighth president in ten years,¹⁶ the last few decades of Ecuador's government is best characterized by turmoil.¹⁷ The question of the amendments' likelihood of success therefore provides an opportunity to examine the chances of fair environmental adjudication in Ecuador and its government's practical ability to implement change.

This comment examines the principal factors affecting Ecuador's ability to execute these unique amendments and argues that, all things considered, successful execution of the environment provisions is unlikely in Ecuador's legal and political environment. Part II discusses the political barriers that hinder execution of the environmental provisions of the new Constitution—namely, a lack of government accountability and doubts about President Correa's intention and ability to implement his promises. Part III addresses the legal barriers to implementation: procedural confusion over standing and concerns with the structure and past corruption in Ecuador's constitutional court. Finally, Part IV suggests some ways that Ecuador could counteract these political and legal barriers and improve the likelihood of successful implementation. Specifically, Ecuador needs to award lifetime tenure to its constitutional court judges, codify its standing doctrine, and create of an independent body for enforcement of environmental court rulings.

¹⁴ Ecuador's deforestation rate is the highest in Latin America: it loses about 200,000 hectares per year, and in 2009, it had less than half its original forest. See Daniel V. Ortega-Pacheco & Inés M. Manzano-Torres, *Institutional Change and Climate Policy in Ecuador* 6 (2009) (forthcoming in IMPLEMENTING THE CLEAN DEVELOPMENT MECHANISM: LEGAL AND INSTITUTIONAL CHALLENGES (M. Mehling, A. Merrill, & K. Upston-Hooper eds. 2011)).

¹⁵ Kimerling, *supra* note 13, at 849 (summarizing the contamination that resulted from Texaco's operations in the Amazon); see also Kendall, *supra* note 9 (describing the contamination as the "Amazonian Chernobyl"). In February 2011, an Ecuadorean court ended a seventeen-year lawsuit when it ordered Chevron to pay more than \$9 billion in damages for polluting Ecuador's Amazon jungle. Chevron inherited the lawsuit when it acquired Texaco. Clifford Krauss & Simon Romero, *Ecuador Judge Orders Chevron to Pay \$9 Billion*, N.Y. TIMES, at A4 (Feb. 14, 2011), <http://www.nytimes.com/2011/02/15/world/americas/15ecuador.html?scp=2&sq=Texaco&st=cse>.

¹⁶ Daniel Schweimler, *Ecuador: New Hopes and Challenges*, BBC NEWS (Apr. 16, 2007), <http://news.bbc.co.uk/2/hi/americas/6561961.stm>; Simon Romero, *Ecuador Vote: Leader Forges Middle Road Among Leftists*, N.Y. TIMES (Nov. 28, 2006), <http://query.nytimes.com/gst/fullpage.html?res=9A04E4D7103EF93BA15752C1A9609C8B63&pagewanted=all>

¹⁷ See *infra* Part III.C.

II. THE AMENDMENTS WILL REMAIN MERE LIP SERVICE UNTIL PRESIDENT CORREA SHOWS A SINCERE ABILITY AND INTENTION TO IMPLEMENT THEM

A major problem with Ecuador's new environmental provisions is the uncertainty over the executive's ability and intention to implement them. The turnover rate in Ecuador's executive has been so high in recent years that, as mentioned above, eight presidents have taken office in the span of a decade.¹⁸ Therefore, an analysis of the new amendments' chances of success must properly account for the instability of the branch that created them.

The amendments were President Correa's brainchild; he proposed the new Constitution as part of his presidential campaign¹⁹ for "change."²⁰ However, the extreme volatility of Ecuador's executive leaves the new provisions vulnerable to neglect by current and future executives. Considering Ecuador's rapid presidential turnover in the past decade, it is unclear how long President Correa will remain in office. It is likewise unclear whether his successors will enforce the amendments, ignore them, or annul them with another constitutional amendment. In this political climate where constitutional amendments are commonplace²¹ and presidencies fleeting, the success of the amendments in future executive administrations hinges on their initial treatment by the current administration. However, President Correa's recent behavior contradicts his supposed good intentions and implies that he lacks a sincere intention to implement the amendments.²²

A. *Correa Has a Track Record of Choosing Profit Over Pachamama*

How will President Correa implement his many promises and simultaneously keep the country economically afloat? Although President Correa has expressed support for the indigenous plaintiffs suing Texaco over environment concerns,²³ his actions in other arenas have been inconsistent with the amendments, earning him a reputation as an "ambivalent

¹⁸ Schweimler, *supra* note 16; Romero, *supra* note 16.

¹⁹ Agustín Grijalva, Courts and Political Parties: The Politics of Constitutional Review in Ecuador 150 (2010) (unpublished Ph.D. dissertation, Univ. of Pittsburgh).

²⁰ Catherine Conaghan & Carlos de la Torre, *The Permanent Campaign of Rafael Correa: Making Ecuador's Plebiscitary Presidency*, 13(3) PRESS/POLITICS 272, 278 (2008).

²¹ The 2008 Constitution is Ecuador's twentieth. Jose Luis Cordeiro, *Latin America: Constitution Crazy*, LATIN BUSINESS CHRONICLE (Oct. 6, 2008), <http://www.latinbusinesschronicle.com/app/article.aspx?id=2799>.

²² See *infra* Part II.B.1-2.

²³ Nikolas Kozloff, *Ecuador's Rafael Correa: Copenhagen Climate Hero or Environmental Foe?*, http://www.sosyasuni.org/en/index.php?option=com_content&view=article&id=137&catid=1&Itemid=34.

environmentalist.”²⁴ President Correa has tough choices to make, considering Ecuador’s economy survives mainly off its extractive industries. In 2008, oil and mining comprised 26.8%—by far the biggest chunk—of Ecuador’s GDP,²⁵ so approximately one-third of Ecuador’s spending budget comes from petroleum products.²⁶ The country needs this income: almost half its population lives below the poverty line.²⁷ President Correa seems to approach the role of extractive industries in the national economy with pragmatism. In a 2009 radio address, he commented, “It is absurd that some want to force us to remain like beggars sitting atop a bag of gold.”²⁸

However, the same industries bringing Ecuador profit are also polluting it—a situation that now violates the Constitution. Even some environmentalists doubt the amendments can survive those economic realities.²⁹ This basic conflict begs the question of whether nature can truly have rights in a country whose economy survives on nature’s exploitation.

1. *Correa’s Troubling Reaction to Constitutional Challenges to Mining Foreshadows His Reaction to Constitutional Challenges Under the New Environmental Amendments*

President Correa’s reaction to a conflict between the interests of the country’s mining industry³⁰ and the constitutional “right to water” provides an example of his duplicity.³¹ In January 2009, President Correa backpedaled on the new “right to water” language by passing a new mining law that opened up the country to large-scale metal mining by foreign companies.³² The mining threatens indigenous water supplies and the “right to water” held by indigenous communities who cannot survive without clean

²⁴ *Id.*

²⁵ *Background Note: Ecuador*, U.S. DEP’T OF STATE: BUREAU OF WESTERN HEMISPHERE AFFAIRS (May 24, 2010), <http://www.state.gov/r/pa/ei/bgn/35761.htm>.

²⁶ Kozloff, *supra* note 23.

²⁷ The Associated Press, *supra* note 3.

²⁸ Daniel Denvir, *Resource Wars in Ecuador: Indigenous People Accuse President Rafael Correa of Selling out to Mining Interests*, IN THESE TIMES (Feb. 28, 2009), http://www.inthesetimes.com/article/4252/resource_wars_in_ecuador/.

²⁹ One commented, “It sounds great, but in practice, governments like Correa’s will argue that funding his political project, which will bring ‘well being and relieve poverty,’ overrules the rights of nature because the best technology will be used and mining and other extractive industries will be, of course, sustainable.” Cyril Mychalejko, *Ecuador’s Constitution Gives Rights to Nature*, PHILADELPHIA INDEP. MEDIA CENTER (Sept. 28, 2008), <http://www.phillyimc.org/en/node/75055>.

³⁰ Oil and mining activities comprise 26.8% of Ecuador’s gross domestic product. U.S. DEP’T OF STATE, *supra* note 25.

³¹ CONST. ECUADOR, *supra* note 5, at art. 66.

³² Paul Dosh & Nicole Kligerman, *Correa vs. Social Movements: Showdown in Ecuador*, 42 N. AMERICAN CONGRESS ON LATIN AMERICA 5 (Sept./Oct. 2009), available at <https://nacla.org/node/6094>.

water.³³ Indigenous *campesinos* (peasant farmers) and groups like the Confederation of Indigenous Nationalities of Ecuador (“CONAIE”³⁴) are outraged at Correa’s duplicity. Tens of thousands protested the passage of the mining law.³⁵

2. *President Correa’s Anti-NGO Response to the Protests Raises Doubt as to the Sincerity of His Intention to Implement Nature’s Rights*

President Correa’s response to the protests did nothing to dissipate the conclusion that the new constitutional provisions are insincere or to narrow the growing rift between the government, who initially supported the new constitution, and social movements.³⁶ Ignoring the protestors’ argument that the mining violates the new constitution, President Correa pointed fingers at the protestors, calling them “nobodies” and “extremists.”³⁷ He also shut down several organizations that participated in the protests. First, President Correa moved to close down the Development Council of the Indigenous Nationalities and Peoples of Ecuador (“CODENPE”), claiming its executive secretary was misappropriating funds to her home province.³⁸ Next, President Correa undermined the National Directorate of Intercultural Bilingual Education (“DINEIB”), which supported the anti-mining movement by placing it under control of the Ministry of Education.³⁹ The proximity of these actions to the protests (one to two months) renders President Correa’s motivations extremely suspect.⁴⁰

President Correa’s administration also garnered international criticism by shutting down Acción Ecológica (“AE”),⁴¹ a leading non-governmental organization (“NGO”) and one of Latin America’s best-known

³³ Raúl Zibechi, *Ecuador: The Logic of Development Clashes with Movements*, AMERICAS PROGRAM (March 17, 2009), <http://upsidedownworld.org/main/ecuador-archives-49/1772-ecuador-the-logic-of-development-clashes-with-movements>.

³⁴ CONAIE is one of Latin America’s most powerful indigenous groups. Robert Andolina, *The Sovereign and Its Shadow: Constituent Assembly and Indigenous Movement in Ecuador*, 4 J. LAT. AMER. STUD. 35, 721–750 (2003), available at <http://journals.cambridge.org>.

³⁵ Zibechi, *supra* note 33; see also Kozloff, *supra* note 23; Dosh & Kligerman, *supra* note 32.

³⁶ These movements are now “increasingly disillusioned with the possibility that Correa represents a continuation of neoliberal policy,” which President Correa’s campaign specifically promised to avoid. Dosh & Kligerman, *supra* note 32.

³⁷ Denvir, *supra* note 28; see also Kenneth P. Jameson, *The Indigenous Movement and the Economic Trajectory of Ecuador* 23 (Univ. of Utah Dep’t of Econ., Working Paper No. 2008-05), available at http://www.econ.utah.edu/activities/papers/2008_05.pdf (“...There have already been areas where the Correa administration and Pachakutik have been at odds.”).

³⁸ Dosh & Kligerman, *supra* note 32.

³⁹ *Id.*

⁴⁰ See generally Denvir, *supra* note 28.

⁴¹ “Environmental Action” is an NGO that since the 1980s has protested exploitation of oil, water, and precious metals in Ecuador, as well as pollution and deforestation. Dosh & Kligerman, *supra* note 32.

environmental groups,⁴² which supported the mining protests.⁴³ The government's reasons for revoking AE's legal status are still unclear: initially, Ecuador's Health Minister claimed that AE failed to fulfill its NGO charter, but she later changed her story, saying that Ecuador simply wanted to move AE's registration to the new Ministry of Environment, which did not exist when AE was founded.⁴⁴ However, AE was given no advance notice before being shut down, making it hard for most activists to believe this was merely administrative streamlining.⁴⁵ Whatever President Correa's real reasons, the revocation of AE's legal status undermines confidence in his intentions to implement the new environmental provisions, as shutting down Latin America's leading environmental organization is a move that is fundamentally at odds with improving environmental protection. In sum, friction over the mining law illuminates a critical limitation in the new environmental provisions: they conflict with President Correa's other political and economic priorities.

III. PROCEDURAL CONFUSION, TEXTUAL VAGUENESS, AND THE CHAOTIC HISTORY OF ECUADOR'S CONSTITUTIONAL TRIBUNAL WILL HINDER IMPLEMENTATION

Numerous legal barriers impede Ecuador's implementation of its environmental amendments. First, Ecuador lacks a clear standing doctrine. It is unclear who may bring an action on its behalf, and what he or she must prove to gain standing.⁴⁶ This lack of a clear standing doctrine creates fundamental uncertainty about the justiciability of claims under the amendments.⁴⁷ Second, the amendments are textually vague and

⁴² Daniel Denvir, *Injustice in Ecuador: Ecuadorean Government Shuts Down Leading Environmental Group*, MANGROVE ACTION PROJECT (Mar. 16, 2009), http://mangroveactionproject.org/news/current_headlines/injustice-in-ecuador-ecuadorian-government-shuts-down-leading-environmental-group/.

⁴³ AE leader Ivonne Ramos released a statement calling the administrations' actions arbitrary censorship and likening them to an episode of authoritarianism "that is intolerable in a democratic regime." Denvir, *supra* note 42. Canadian author and activist Naomi Klein wrote an open letter to President Correa, saying his actions resembled "something all too familiar: a state seemingly using its power to weaken dissent." Dosh & Kligerman, *supra* note 32.

⁴⁴ Denvir, *supra* note 42.

⁴⁵ *Id.*

⁴⁶ Michelle P. Bassi, *La Naturalez O Pacha Mama De Ecuador: What Doctrine Should Grant Trees Standing*, 11 OR. REV. INT'L L. 461, 464 (2009) ("Ecuador's constitution is unclear about the requirements for standing, and in fact, standing to enforce nature's rights appears to be merely a constitutional directive.").

⁴⁷ The exact concept of standing varies by country. See Angel R. Oquendo, *The Solitude of Latin America: The Struggle for Rights South of the Border*, 43 TEX. INT'L L.J. 185, 217-218 (2008) (providing general background on the different approaches to standing taken by different Latin American countries).

inconsistent with other provisions. Finally, Ecuador's constitutional court has been politically comprised for decades;⁴⁸ this judicial corruption will be a hurdle to enforcement of the new provisions—even though the 2008 amendments aim to reverse these patterns.

A. *Ecuador's Lack of a Useable Standing Doctrine Impedes Implementation and Litigation of the Amendments*

The procedural questions the amendments raise are not particularly new—and neither is the idea that the environment should possess its own rights.⁴⁹ In 1972, Professor Christopher Stone published what has become an iconic article, positing that nature should have standing in court.⁵⁰ Nearly forty years later, Stone's article is now a book,⁵¹ and Ecuador is the first country to try to prove his thesis workable. But procedural ambiguity stands in the way of completely granting legal status to the environment. In this way, Ecuador demonstrates what renowned environmentalist and law professor Joseph Sax mused in 1971: “An essential question that must be asked whenever proposals for an environmental declaration of rights are raised, is whether those rights are going to be enforceable, and if so, by whom.”⁵² In short, Ecuador's standing doctrine—or lack thereof—is a fundamental barrier to the enforceability of the amendments.

Ecuador's Constitution and statutory law fail to clearly articulate its standing doctrine.⁵³ The absence of criteria for who may sue on the environment's behalf creates fundamental uncertainty about the justiciability of claims under the amendments—and indicates doubt as to the Constitution's ability to serve as a source of real rights and remedies. Currently, a citizen can have no idea how to establish him or herself as the proper voice to sue on the environment's behalf. This uncertainty critically impairs citizens' ability to sue for enforcement of the new provisions. Consider an example: a multinational oil company has polluted an Ecuadorean neighborhood's water source. Outraged citizens prepare to sue

⁴⁸ See *infra* Part III.C.1.

⁴⁹ See, e.g., RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* (1989).

⁵⁰ See generally Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). Standing “is the authority of someone to initiate an action.” STONE, *supra* note 8, at 35.

⁵¹ STONE, *supra* note 8.

⁵² JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 235 (1971).

⁵³ Bassi, *supra* note 46, at 463 (“In a civil law legal system, where case law and judicial interpretation do not create precedence, the standing doctrine is susceptible to changes through ensuing legislation . . . Ecuador's constitutional standing for the environment has yet to be codified or litigated . . .”).

for an injunction to enforce nature's constitutional right to "persist and exist."⁵⁴ How do they proceed?

The plaintiffs would first have to file an *acción de amparo*, a citizen's remedy expressly created by Ecuador's Constitution⁵⁵ for the judicial protection of constitutional rights.⁵⁶ The question of the proper plaintiff under the new environmental provisions is a tricky one, because the plaintiff in an *amparo* "must be precisely the injured or aggrieved person."⁵⁷ In other words, the new Article 71 grants rights to nature, but trees, streams, and animals cannot hire lawyers, appear in court, pay court fees, or collect damages. The courtroom advocate must be a human, and that human must have standing to bring the environmental claim.

Standing is a threshold issue in the adjudication of any constitutional right. Hence, Ecuadorean plaintiffs suing to enforce nature's rights under the new environmental amendments must first know and meet the standing requirements before they can get in the courtroom.⁵⁸ Proof of standing in the United States is usually difficult to achieve in environmental litigation because it is often difficult to demonstrate the direct harm U.S. courts require.⁵⁹

Ecuador's standing doctrine is a far cry from the enumerated standing requirements under Article II of the United States Constitution.⁶⁰ Because Ecuador's standing doctrine is not well developed,⁶¹ plaintiffs in Ecuador do not know what they must show. The Ecuadorean amendments try and fail to clarify standing, but to that end they only vaguely grant legal standing to persons defending nature's rights.⁶² This sweeping language does nothing to clarify the requirements. What we do know is that in most cases, only the

⁵⁴ CONST. ECUADOR, *supra* note 5, at art. 71.

⁵⁵ *Id.* at art. 88

⁵⁶ See ALLAN R. BREWER-CARIAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS 153 (2009).

⁵⁷ *Id.* at 181.

⁵⁸ *Id.* at 181-83.

⁵⁹ See Joshua J. Bruckerhoff, Note, *Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights*, 86 TEX. L. REV. 615, 628 (2008).

⁶⁰ In the United States, a plaintiff earns standing in federal court by showing "that (1) through breach of a duty owed by defendant to it; (2) a plaintiff has suffered an 'injury in fact' that is a legally recognized harm that is both (a) concrete and particularized and (b) 'actual or imminent, not "conjectural" or "hypothetical"; (3) the injury is fairly traceable to the challenged action of the defendant ('causation'); (4) it has to be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision ('redressability')." STONE, *supra* note 8, at 36 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Systems (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). Precise standing requirements often vary by statute.

⁶¹ Bassi, *supra* note 46, at 465 ("... nature's rights will be substantively litigated only after Ecuador determines the contours of their standing doctrine...").

⁶² CONST. ECUADOR, *supra* note 5, at art. 71.

injured party has standing to file the *amparo*,⁶³ but the Constitution nevertheless allows for the possibility for other persons to sue on the injured party's behalf in some cases.⁶⁴ This is of course the format that suits brought under the new environmental provisions will require; since nature cannot sue on its own behalf, humans must do it.

A crucial problem with humans acting as nature's courtroom representative is that Ecuador's new Constitution omits any criteria as to which of nature's millions of potential representatives can earn standing. The text merely states that "each person, community, neighborhood and nationality shall have the power to enforce the rights before the public authority."⁶⁵ Even accepting for a moment that any person really can bring an *amparo* to enforce nature's rights, plaintiffs still face the procedural problem of knowing what they must prove in order to earn standing. Thus, plaintiffs must litigate at the whim of judges with diverse environmental viewpoints, who could toss their case for lack of standing at any point in the litigation since the doctrine is undefined.⁶⁶ Consequently, the mandate granting rights to nature "appears to be merely a constitutional directive" that is not self-executing.⁶⁷ Until Ecuador clarifies the standing criteria, plaintiffs will not be able to effectively sue, and nature's new "rights" will remain unenforceable.⁶⁸

Countless other procedural questions remain unanswered. For instance, the text provides no guidance as to which tribunal will handle the environmental claims except to say that the "public authorities" can be called upon to enforce nature's rights.⁶⁹ If the court awards damages, how is the money judgment to be executed and to whom is it payable? Who will pay for the legal representation and court fees? What are the contours of the causation requirement for showing the root of the environmental damage at issue?⁷⁰ The new Constitution provides no answers, and these questions are

⁶³ See BREWER-CARIAS, *supra* note 56, at 183 n.328.

⁶⁴ *Id.* at 186 n. 339.

⁶⁵ CONST. ECUADOR, *supra* note 5, at art. 71 ("toda persona, comunidad, pueblo o nacionalidad podrá exigir a la autoridad pública el cumplimiento de los derechos de la naturaleza") (translation by author).

⁶⁶ See Bassi, *supra* note 46, at 465.

⁶⁷ For a constitutional right to be enforceable, it must be either self-executing or the legislature must directly enact legislation for its enforcement. See Bruckerhoff, *supra* note 59, at 627. A provision is self-executing if it is directly enforceable without supplemental legislation. See Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL. L. J. 338, 358 (1996).

⁶⁸ Bassi, *supra* note 46, at 464.

⁶⁹ CONST. ECUADOR, *supra* note 5, at art. 71.

⁷⁰ The causation requirement becomes especially tricky when the claim concerns climate change, as these claims create "daunting problems of proof." STONE, *supra* note 8, at 50.

beyond the scope of this article. Nevertheless, this lack of procedural clarity renders the new rights meaningless until procedural criteria are clarified. Without legislation or further clarification of Ecuador's standing doctrine, these constitutional "rights" will only exist in theory.

B. Textual Vagueness and Internal Inconsistencies: What is "Nature," and What Happens When Rights Conflict?

Latin American Constitutions generally tend to be comprehensive and use broad language, thus lending themselves to internal contradictions.⁷¹ This generality holds true for Ecuador in this instance, as its new amendments conflict with other provisions of the Constitution.⁷² In addition to a lack of procedural clarity, the new environmental amendments are also textually vague. For one, the provisions define neither the entities they purport to protect nor the extent of the protection.⁷³ The text uses the terms "la naturaleza" (nature) and "la Pacha Mama" (Mother Earth).⁷⁴ These two extremely broad concepts are likely to confuse courts and litigants alike, especially since Ecuador has failed to define (or codify) their breadth. What is a litigant to think?

An environmental litigant preparing to bring an *amparo* under the new provisions could move to protect anything arguably characterized as nature.⁷⁵ In other words, one might presume that the drafters meant to protect the colloquial aspects of nature that first spring to mind for many, such as animals, plants and bodies of water. But these storybook images are not the extent of nature. Literally and scientifically, the environment includes less endearing entities like pests, viruses, bacteria, tornadoes, and intangible entities like climate.⁷⁶ Thus, the new Constitution, read literally, grants all of these entities equal rights to "restoration," as well as the right to exist and regenerate.⁷⁷

This broad grant of protection is impractical and destined to create bizarre conflicts where natural ecological relationships become litigation fodder. In the natural environment, organisms fight others for survival.

⁷¹ Patricio Navia and Julio Ríos-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 COMPARATIVE POL. STUDIES 189, 193 (2005).

⁷² Compare CONST. ECUADOR, *supra* note 5, at art. 71-74 with art. 12 and with art. 57.

⁷³ *Id.* at art. 71-74.

⁷⁴ *Id.*

⁷⁵ The "environment" is defined as "the complex of physical, chemical, and biotic factors (as climate, soil, and living things) that act upon an organism or an ecological community and ultimately determinate its form and survival." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 188 (10th ed. 1995).

⁷⁶ *Id.*

⁷⁷ CONST. ECUADOR, *supra* note 5, at art. 71-72.

Does Ecuador's new Constitution mean that these competitors could wind up in its courts? Consider what would happen if pests devoured an entire crop of bananas. Bananas are a cash crop in Ecuador,⁷⁸ so could one assume their rights would trump those of the pests? The text provides no such rule. Perhaps the drafters intentionally left these determinations to the courts, but such determinations would be a blatant waste of time and resources for Ecuador's judiciary, which is notoriously inefficient as it is.⁷⁹ In sum, bizarre conflicts of interest could wind up in Ecuador's tribunals without further clarification of just what the drafters meant by "nature." Until this clarification occurs, the provision cannot achieve the drafters' aims, and environmental plaintiffs cannot act on nature's "rights."

The potential for internal conflict extends beyond the animal kingdom: what happens when nature's constitutional rights conflict with humans' constitutional rights? Consider again the scenario of the pests destroying the bananas. If the banana farmer destroys the pests, he would be in violation of the constitution for denying the pest its Article 71 right to exist.⁸⁰ However, the farmer could argue that under Article 12, all Ecuadoreans have the constitutional right to "safe, permanent access to healthy, adequate and nutritional food, preferably produced locally and in keeping with their cultural identities and traditions."⁸¹ Assuming for the sake of the exercise that bananas satisfy the local, healthy and traditional criteria, what could result under the new Constitution? The lack of clarity regarding the hierarchy of rights the drafters intended is currently a blockade to effective litigation of nature's rights. The Constitution provides no answer as to whether human rights trump nature's rights.⁸² Without this clarity, Article 71's grant of rights to the environment will have no bite in court.

⁷⁸ U.S. DEP'T OF STATE, *supra* note 30.

⁷⁹ Kenneth W. Dam, *The Judiciary and Economic Development* 11 (The Chicago Working Paper Series, John M. Olin Law & Economics, Working Paper, No. 287, 2006), *available at* <http://www.law.uchicago.edu/Lawecon/index.html> and http://ssrn.com/abstract_id=892030.

⁸⁰ CONST. ECUADOR, *supra* note 5, at art. 71.

⁸¹ *Id.* at art. 13.

⁸² Additionally, the new constitution grants indigenous communities several rights that potentially conflict with the environment's Article 71 rights. For example, Article 57 grants indigenous peoples the right to manage their community lands. CONST. ECUADOR, *supra* note 5, at art. 57. Management is left undefined, and thus could mean, in some cases, partial destruction, as communities need raw materials for shelter and plants and animals for consumption. As with the banana scenario, this indigenous activity would technically impinge on nature's Article 71 rights. And as with those scenarios, the constitutional text provides no insight as to the priority such rights should take.

C. *A Long History of Corruption in Ecuador's Constitutional Court Will Be a Hurdle for Environmental Plaintiffs, but President Correa's New Court Could Potentially Reverse These Patterns*

In addition to textual and procedural vagueness, Ecuador's judicial dysfunction poses another challenge to enforcement of the new constitutional provisions.⁸³ As positive as the new provisions seem, they can only have practical bite if Ecuador's tribunals possess legitimate power to rule on claims brought under them. As one scholar summarized, "A sound judiciary is the key to enforcement... no degree of improvement in substantive law... will bring the rule of law to a country that does not have effective enforcement."⁸⁴ Effective enforcement is critical for environmental plaintiffs because plaintiffs in Ecuador are barred from bringing an *amparo* action against judicial decisions.⁸⁵ The court's decision, whether right or wrong, is the end of the road—a scary reality considering the amount of political entrenchment present in the court's past decisions.⁸⁶

The history of Ecuador's constitutional court shows that effective enforcement of constitutional rights was virtually impossible until very recently.⁸⁷ A historical account demonstrates the chaos and political manipulation that has pervaded Ecuador's constitutional court ("CC").⁸⁸ Its long history of abuse by the executive and legislative branches will be a hurdle to the enforcement of these new environmental provisions—even though the 2008 amendments aim to reverse these patterns.

1. *Institutionalized Corruption in Ecuador's Constitutional Court Will Likely Forestall Meaningful Litigation of Environmental Claims*

Ecuador's new Constitutional amendments carry with them a legacy of corruption and chaos that began in the nineteenth century. An overview of this history illuminates the fragility of new Constitutional provisions and the tendency of the government to ignore the Constitution altogether. Because of this lack of judicial independence, environmental plaintiffs should expect that resolution of their claims will turn on politics, not merit.⁸⁹

⁸³ See generally Grijalva, *supra* note 19.

⁸⁴ Dam, *supra* note 79, at 1.

⁸⁵ See BREWER-CARIAS, *supra* note 56, at 323-24 (citing PESANTES, *supra* note 63, at 84).

⁸⁶ See Part II.C.1.

⁸⁷ See generally Grijalva, *supra* note 19.

⁸⁸ *Id.*

⁸⁹ TGC case law shows that Ecuador's constitutional court lacked judicial independence until 2007 (and even after the recent amendments, independence is far from certain). A 2001 economic policy case regarding a value added tax ("VAT case") proposal reveals that TGC judges often voted blindly along party

Until 1945, Ecuadorean citizens had no action, institution or mechanism to bring a claim that a law violated the Constitution.⁹⁰ No separate constitutional court existed as it does now; Ecuador's Congress itself conducted constitutional review.⁹¹ The 1906 Constitution even formalized that only Congress could declare a law unconstitutional.⁹² Finally, in 1945, the Tribunal of Constitutional Guarantees ("TGC") was formed.⁹³ The TGC was a Constitutional tribunal outside the judiciary, and thus a completely separate court from Ecuador's Supreme Court.⁹⁴ The TGC's power was limited. It could review Congressional proposals *a priori* but Congress had the final word on a law's constitutionality.⁹⁵ Thus, the TGC's authority was limited to making observations about constitutionality and suspending the law until Congress could decide the issue.⁹⁶ Real power to render binding decisions remained with Congress, and the Court functioned more as an "administrative court that exercised control over the executive [branch rather] than a court [that performed] constitutional review

lines, and not by the merits. TC ruling 126-2001-TP; Grijalva, *supra* note 19, at 119. In 2001, President Gustavo Noboa proposed a tax reform that, among other things, would have increased the value added tax ("VAT") from twelve to fifteen percent. *Id.* at 118. The proposal received vehement opposition in Congress from parties on both the right and left. *Id.* The proposal went to Congress in March 2001, and when Congress overturned it, Noboa vetoed Congress's decision, edited the proposal, and sent it back proposing a smaller increase. *Id.* This time, Congress failed to reach the two-third majority that the Constitution required to override a presidential veto. CONST. ECUADOR (1998), art. 153, available at <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador98.html> [hereinafter CONST. ECUADOR (1998)]; Grijalva, *supra* note 19, at 119. The president's proposal therefore became law after thirty days, as the Constitution required. CONST. ECUADOR (1998), *supra* note 89, at art. 155, 156; Grijalva, *supra* note 19, at 119. The opposition challenged the proposal's constitutionality before the TGC, which held the VAT increase unconstitutional in a five-four decision. Grijalva, *supra* note 19, at 120. The TC made the wrong decision, as Ecuador's Congress never reached a two-thirds majority required to override the presidential veto. Significantly, every TGC member in the majority was publicly linked to parties who opposed Noboa's administration and the VAT. *Id.* The dissenting TGC members were all publicly linked to pro-government parties. The court's vote did not follow ideological lines: if it had, the members linked to the ID and PSE who voted with the majority would have instead voted with the dissent (which would then have been the majority), because those parties sit left of center on the political spectrum and tend to favor tax hikes for "social redistributive purposes." *Id.* This outcome proves that partisan loyalties dictated a critical constitutional ruling. Indeed, the majority gained a definitive advantage in voting with Congress and against the president: they avoided impeachment by the legislature. *Id.* at 122.

⁹⁰ Grijalva, *supra* note 19, at 28.

⁹¹ *Id.*

⁹² CONSTITUTION OF ECUADOR (1906) Provisions 6 & 7, available at <http://www.constitutionnet.org/vl/item/constitucion-de-1906-del-ecuador>. These provisions were reiterated in all Ecuadorean Constitutions until the 1992 reform. Grijalva, *supra* note 19, at 28.

⁹³ The TGC's name changed to the Constitutional Tribunal (*Tribunal Constitucional*) ("TC") in 2006. Grijalva, *supra* note 19, at 20.

⁹⁴ The TC's independence from the Court is a strength of Ecuador's judiciary. Navia & Ríos-Figueroa, *supra* note 71, at 196-97.

⁹⁵ Grijalva, *supra* note 19, at 33.

⁹⁶ *Id.* at 30, 42 n.28.

of legislation enacted by Congress.”⁹⁷

Despite several amendments between 1946 and 1992, the Court's power and existence remained under the thumb of Congress and the President.⁹⁸ Just one year after the TGC's founding, the President discarded the 1945 Constitution and wrote a new one that did not include the TGC—simply because he was unhappy with the restraints the TGC imposed on the executive branch.⁹⁹ Just like that, the Court was gone, and Congress—the branch that passed the laws—was put in charge of deciding whether laws violated the constitution.¹⁰⁰ The 1967 amendments resurrected the TGC, but its power was still limited to formulating observations about the constitutionality of laws and decrees.¹⁰¹ The Court's decisional independence from other branches of government withered away: it became merely an “‘extended sub-committee’ of Congress.”¹⁰² In 1983, the TGC finally received the power to suspend unconstitutional laws,¹⁰³ but even as late as 1992, Congress retained general power to determine the meaning of unconstitutional provisions¹⁰⁴ (which is, paradoxically, a power necessary for the TGC to perform constitutional review). This lack of judicial independence begs the conclusion that environmental rights¹⁰⁵ stood little chance of enforcement under these past constitutions.

Progress seemed to arrive in 1996, when the TGC became the *Tribunal Constitucional* (“TC”), and the Court earned the power “of final say for constitutional review.”¹⁰⁶ The Court now had power to rule with finality on constitutional rights, although formally, Congress remained the “ultimate interpreter of the constitution.”¹⁰⁷ Until these reforms, a citizen's only recourse for constitutional violations was a claim (*queja*) over which the TGC could merely “make observations.”¹⁰⁸ The 1996 Constitution also created the writ of *amparo*, an individual “legal action to immediately

⁹⁷ *Id.* at 27.

⁹⁸ *Id.* at 32, 33, 39, 42.

⁹⁹ *Id.* at 32.

¹⁰⁰ *Id.* at 33.

¹⁰¹ Grijalva, *supra* note 19, at 33.

¹⁰² *Id.* at 39.

¹⁰³ *Id.*

¹⁰⁴ CONSTITUTION OF ECUADOR (1978), Provisions 141-42, available at <http://www.constitutionnet.org/vl/item/constitucion-de-1978-del-ecuador-codificada-en-1984>; Grijalva, *supra* note 19, at 39, n. 26.

¹⁰⁵ At this point, constitutional environmental rights did not extend to the environment itself; rather, humans enjoyed the right to a “healthy environment.” See Erin Daly & James R. May, *Vindicating Fundamental Environmental Rights Worldwide*, 11 ORE. REV. INTL. L. 265, 395 (2009).

¹⁰⁶ Grijalva, *supra* note 19, at 42.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 42 n. 28.

suspend authorities' actions when a constitution right is being violated."¹⁰⁹ Things were improving. These reforms changed the way a citizen could request constitutional review by the Court. Under Provision 277, groups of at least one thousand citizens could request constitutional review.¹¹⁰ An individual citizen could also challenge a law, but the Constitution required him to first obtain a positive opinion declaration¹¹¹ from an Ombudsman¹¹² before he could take his case before the TC.¹¹³ Furthermore, the 1998 reforms continued to expand the TC's power by requiring the legislature to follow mandatory impeachment procedures before removing TC members from the court.¹¹⁴ Together, the 1996 and 1998 reforms gave the Court "a wider set of tools [for] constitutional control."¹¹⁵ It seemed that Ecuador had finally created an independent constitutional judiciary, as TC decisions were final and Congress had no right to review them.¹¹⁶ Under this scheme, environmental claims would seem to stand a chance of fair adjudication.

In reality, however, political manipulation of the TC continued even after the 1996 and 1998 reforms. After 1997, Ecuador's political scene was "characterized by almost continuous presidential crisis."¹¹⁷ As a result of the chaos, the TC became "a sort of additional legislative arena," and, "political parties permanently looked for influence or control over TC judges."¹¹⁸ Between 1996 and 2007, no TC or individual Justice completed the constitutionally mandated four-year term.¹¹⁹ The inter-branch tension was such that three Presidents were unconstitutionally removed from office between 1997 and 2005,¹²⁰ and five constitutional tribunals were unconstitutionally removed.¹²¹ After one such removal, new TC members

¹⁰⁹ *Id.*

¹¹⁰ CONST. ECUADOR (1998), *supra* note 89, Art. 277; Grijalva, *supra* note 19, at 66.

¹¹¹ A "positive opinion" is one where the Ombudsman found the challenge adequate in that it established at least the formal requirements. This opinion could contain information about the plaintiff and the law or norm that the plaintiff was challenging. Grijalva, *supra* note 19, at 66, 88.

¹¹² In Ecuador, as in many other Latin American countries, the Ombudsman functions independently from the government and represents citizen rights, not government interests. Grijalva, *supra* note 19, at 88. While the Attorney General represents the interests of the government, the Ombudsman possesses the political power to both denounce human rights violations and initiate legal actions, like *amparo* and *habeas corpus*, before the Supreme Court or TC. *Id.* at 72.

¹¹³ CONST. ECUADOR (1998), *supra* note 89, at art. 277; Grijalva, *supra* note 19, at 66.

¹¹⁴ Grijalva, *supra* note 19, at 48.

¹¹⁵ *Id.* at 47.

¹¹⁶ *Id.* at 48.

¹¹⁷ *Id.* at 49

¹¹⁸ *Id.*

¹¹⁹ Santiago Basabe-Serrano & John Polga-Hecimovich, *Legislative Coalitions and Judicial Turnover in Ecuador's Constitutional Court (1999-2007)*, www.flacso.org.ec/docs/doctrabpp_basabe3.pdf.

¹²⁰ Conaghan, *supra* note 20, at 271.

¹²¹ Grijalva, *supra* note 19, at 25, 36, 49, 51 (t. 2-4).

were not appointed for eleven months, during which time the court simply ceased to function.¹²²

In sum, chaos and fragmentation characterized Ecuador's constitutional court until just four years ago when President Rafael Correa took office in January 2007 as Ecuador's eighth president in ten years.¹²³ Infrastructural problems have made the TC "vulnerable and unstable,"¹²⁴ rendering it utterly unreliable for plaintiffs with constitutional grievances. These factors have eroded judicial independence in Ecuador during this period.¹²⁵ The Court's inconsistent existence and powers of constitutional review suggest that the environmental rights provisions introduced in Ecuador's 2008 Constitution would stand little chance of meaningful enforcement in this judicial scheme. What should have been Ecuador's most competent constitutional court became ensnared in conflicts with the executive and legislative branches.¹²⁶ The TC lacked legitimate authority to make binding constitutional rulings, and judges were political marionettes.¹²⁷ During this period of turmoil, plaintiffs could not rely on the court's existence or independence—let alone its power to issue a binding judgment safe from Congress's reversal.¹²⁸ This account serves as a caution to environmental plaintiffs that their claims in all likelihood would turn more on political loyalties than legal merit.¹²⁹

¹²² *Id.* at 60.

¹²³ *Id.* at 49; Romero, *supra* note 18; Schweimler, *supra* note 16.

¹²⁴ Grijalva, *supra* note 19, at 44.

¹²⁵ *Id.* at 61.

¹²⁶ Conaghan, *supra* note 20, at 271; Grijalva, *supra* note 19, at 25, 36, 49, 51 (t. 2-4).

¹²⁷ Appointments of TC members "served as patronage to be distributed among the government's new allies in exchange for congressional support to avoid impeachments, passing legislation or implementing policy." Grijalva, *supra* note 19, at 26. Studies demonstrate that between 1979 and 1998 judicial posts served as "discretionary collation payoffs available to Ecuadorean Presidents." *Id.* at 63.

¹²⁸ CONST. ECUADOR (1906), *supra* note 92; Grijalva, *supra* note 19, at 27, 30, 32, 33, 39 n.26, 42 n.28.

¹²⁹ Two TGC decisions cut against the argument that the TGC lacked the ability to fairly adjudicate environmental claims during this period. In *Fundación Natura v. Petro Ecuador*, the Court relied on Ecuadoreans' right to a healthy environment in upholding a civil verdict that Petro Ecuador's production of leaded fuel violated Ecuador's federal law. See May & Daly, *supra* note 105, at 395 (citing Case Nos. 377/90, 378/90, 379/90, 380/90 combined, *Fundacion Natura v. Petro Ecuador*, Tribunal of Constitutional Guarantees, Resolution No. 230-92-CP, Oct. 15, 1992 (Ecuador)). In *Arco Iris v. Instituto Ecuatoriano de Minería*, the TGC examined environmental degradation occurring in Podocarpus National Park in Southern Ecuador. The court concluded that the company's mining and road building operations in the park were "a threat to the environmental human right of the inhabitants of the provinces of Loja and Zamora Chinchipe to have an area which ensures the natural and continuous provision of water, air humidity, oxygenation and recreation." See May and Daly, *supra* note 105, at 395 (citing Case No. 224/90, *Arco Iris v. Instituto Ecuatoriano de Minería*, Tribunal of Constitutional Guarantees, Judgment No. 054-93-CP, translated from Environmental Law Institute, U.N. Env't Program [UNEP], *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* 26 (2007)). These cases were environmental victories, and thus seem to undermine the conclusion that the court lacked independence during this period. However, it is

1. *Under the Correa Administration, Environmental Claims May Now Stand a Chance of Fair Adjudication*

Despite the past dysfunction in Ecuador's judiciary, a strong argument exists that President Correa's changes would force Ecuador's constitutional tribunal to function more independently from the other branches of government.¹³⁰ If this happens, environmental claims brought under the new amendments would receive fairer adjudication than they would have under previous reforms. The 2008 Constitution significantly changed the format of constitutional adjudication in Ecuador,¹³¹ and may increase the chances that Ecuador's courts will be able to meaningfully enforce the new environmental mandates. Others argue that the changes make Ecuador's constitutional tribunal more dependent on the President¹³²—and thus represent no real improvement.

Structural changes to the Court seem to improve access to justice. The 2008 Constitution, which replaced the TC with the Constitutional Court ("CC"),¹³³ allows ordinary citizens to file cases directly with the court (instead of relying on the Ombudsman's¹³⁴ approval, as required in the past).¹³⁵ A third of the CC will be replaced every three years,¹³⁶ and appointments are now merit-based.¹³⁷ The CC enjoys more power and independence than the Court ever did in the past—it is finally "completely clear" that the CC is "the only final interpreter of the constitution, and this interpretation cannot be overruled by the legislature."¹³⁸ Therefore judicial independence is more plausible under the 2008 reforms than under past

unclear whether the court would come out the same way as it did in *Arco Iris* when faced with a suit that did not concern federally protected parkland.

¹³⁰ See Roque Planas, *Ecuador Divided Over Correa's Referendum*, AMERICAS SOCIETY/COUNCIL OF THE AMERICAS (Feb. 23, 2011), http://www.as-coa.org/articles/3040/Ecuador_Divided_over_Correas_Referendum/ (discussing a referendum proposed by Correa that would help combat corruption in the judiciary).

¹³¹ Grijalva, *supra* note 19, at 158.

¹³² *Id.*

¹³³ CONST. ECUADOR, *supra* note 5, at art. 429-440.

¹³⁴ In Ecuador, as in many Latin American countries, the Ombudsman functions independently from the government and represents citizen rights, not government interests. Grijalva, *supra* note 19, at 88. While the Attorney General represents the interests of the government, the Ombudsman possesses the political power to both denounce human rights violation and initiate legal actions, like *amparo* and habeas corpus. *Id.* at 72.

¹³⁵ U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *2009 Human Rights Report: Ecuador* (Mar. 11, 2010), <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136111.htm> (last visited February 21, 2011).

¹³⁶ CONST. ECUADOR, *supra* note 5, at art. 432.

¹³⁷ Grijalva, *supra* note 19, at 158. Critics of this new format, however, note that the new appointment procedure for the CC allows the government to easily appoint the CC majority. *Id.*

¹³⁸ *Id.*

constitutions, so environmental claims are more likely to receive fair adjudication. If this turns out to be accurate, it follows that the environmental provisions would carry more meaning and boast a higher chance of success.

2. *Recent Case Law Suggests That Ecuador's Constitutional Court May Now Be Capable of Independent Adjudication of Environmental Claims*

A recent CC decision proves that successful environmental litigation might now be possible. In December 2008, just a few months after the amendments passed, the CC ruled¹³⁹ on an environmental case that began a year before President Correa took office and two years before the new Constitution was passed.¹⁴⁰ In November 2006, Ecuador's Ministry of the Environment authorized construction of a new dam project.¹⁴¹ If completed, the Baba Dam Project (a series of dikes, dams and canals) would stretch from Quito to Guayaquil.¹⁴² A reservoir dam would be built alongside a hydroelectric generating plant, which would create a flood zone of 2,500 acres¹⁴³—thereby displacing several hundred people in the Los Rios province, including two indigenous communities.¹⁴⁴ Downstream, thousands could lose their fisheries and farms for lack of water. Riverside communities face an increased risk of malaria,¹⁴⁵ poor water quality and water shortages.¹⁴⁶ The project would also destroy the habitat of several endangered animal species and more than twenty endemic plant species.¹⁴⁷ Despite these threats, Ecuador's Ministry of Environment granted the project a license to proceed in November 2006.¹⁴⁸ Soon thereafter, Ecuadorean non-

¹³⁹ Resolution No. 1212-2007-RA, http://www.aida-americas.org/sites/default/files/Fallo%20BABA_12_2008.pdf

¹⁴⁰ Since this case began before the new environmental provisions took effect, the plaintiffs could not utilize the new provisions in their argument. However, the case nevertheless demonstrates improved independence in the judiciary, and thus supports this comment's conclusion that the new environmental provisions probably face increased chances of success under President Correa's new Constitutional scheme than under previous conditions.

¹⁴¹ *Constitutional Court Orders Change in Environmental License for Baba Dam, Ecuador*, FIAN (Jan. 8, 2009), <http://www.fian.org/news/press-releases/constitutional-court-orders-change-in-environmental-licence-for-baba-dam-ecuador> [hereinafter *Constitutional Court Orders Change*].

¹⁴² *A River in Peril: The Baba Dam Project*, AIDA (Aug. 2, 2010), <http://www.aida-americas.org/en/project/babadam> [hereinafter *A River in Peril*].

¹⁴³ *Constitutional Court Orders Change*, *supra* note 141.

¹⁴⁴ *A River in Peril*, *supra* note 142.

¹⁴⁵ *Victories in Chile, Ecuador and Russia*, ENVIRONMENTAL LAW ALLIANCE WORLDWIDE (June 13, 2007), <http://www.elaw.org/node/690>.

¹⁴⁶ *A River in Peril*, *supra* note 142.

¹⁴⁷ Resolution 1212-2007-RA, *supra* note 139; AIDA, *supra* note 142.

¹⁴⁸ AIDA, *supra* note 142.

profit ECOLEX¹⁴⁹ filed suit.

The initial judge rejected ECOLEX's claims that the project violated human rights to water, food, work, and a safe environment,¹⁵⁰ and that the project's environmental impact assessments were incomplete, inaccurate, and failed to meet national and international standards.¹⁵¹ ECOLEX appealed to the CC.¹⁵² This time, international human rights organizations submitted amicus briefs in support of ECOLEX; the briefs contained expert conclusions that serious flaws in the studies assessing the risks the dam posed to Ecuadorean biodiversity had contaminated the results.¹⁵³ Unlike the first judge, the CC concluded "the manner in which the Baba project had been authorized and implemented constituted a violation of human rights, including the rights to a healthy environment, to consultation and to citizen participation."¹⁵⁴ The CC halted the project, ordered the Ministry of the Environment to reevaluate the environmental impact statements and social impact studies, and ordered the Attorney General to audit the procedures and approval of the environmental impact evaluations.¹⁵⁵ ECOLEX called the decision "outstanding news," and expects the ruling to serve as precedent for other projects in Ecuador that affect environmental and human rights.¹⁵⁶

The significance of the CC's Baba Dam decision is complex, despite ECOLEX's optimism. On one hand, enforcement of the ruling is not secure: the Ecuadorean government is moving forward with the project even though the court-ordered revisions are not complete, and an audit by the Comptroller's Office showed that the project plans lacked measures to mitigate environmental harm.¹⁵⁷ As a result of the government's disobedience, ECOLEX has sought advice on strategies for ensuring the CC's ruling is actually enforced.¹⁵⁸ However, ECOLEX faces an uphill battle: although *amparo* laws in Ecuador ostensibly obligate a defendant to obey a ruling, the *amparo* judges "do not have the power to directly impose

¹⁴⁹ ECOLEX is an acronym for the Corporación de Gestión y Derecho Ambiental, an Ecuadorean NGO with legal status to advocate for the rights of people and nature.

¹⁵⁰ Because the plaintiffs filed suit in 2006 before nature received legal rights in the 2008 Constitution, the plaintiffs could not bring the claims under the new environmental provisions. Nevertheless, the suit provides an opportunity to observe the CC's reaction to environmental claims, since the CC issued its ruling after the amendments passed.

¹⁵¹ FIAN, *supra* note 141.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ AIDA, *supra* note 142; *see generally* Resolution 1212-2007-RA, *supra* note 139.

¹⁵⁵ FIAN, *supra* note 141.

¹⁵⁶ *Id.*

¹⁵⁷ AIDA, *supra* note 142.

¹⁵⁸ *Id.*

disciplinary or criminal sanctions [on] those that disobey their orders.”¹⁵⁹ Instead, the interested party must seek out the initiation in the criminal courts of a judicial criminal procedure against the disobedient party, which in this case is the government.¹⁶⁰

On the other hand, the CC's decision represents a huge step forward in its judicial independence. No data indicates that members voted based on their political ties, and the CC reprimanded the government (the Ministry of the Environment) by holding its procedures inefficient under the constitution. In sum, the Baba Dam decision may mean the new CC will finally serve as a fair forum for plaintiffs to bring their environmental claims, even if enforcement issues remain unresolved.

3. *President Correa's New Court is an Improvement, but Corruption Continues to Threaten Objectivity*

Despite this progress, grim realities persist, as a politically compromised judiciary is not a plaintiff's only problem. Even if judicial independence has improved under the 2008 Constitution, external corruption of Ecuador's judiciary has not.¹⁶¹ A 2009 Human Rights Watch Report concluded that, although the 2008 Constitution provided the Judicial Council with more oversight powers over the judiciary as well as prosecutors and private attorneys, “the judiciary continued to operate slowly¹⁶² and inconsistently. There were lengthy delays before most cases came to trial.”¹⁶³ Another 2009 report by the U.S. State Department reported that official corruption is “a serious problem” in Ecuador,¹⁶⁴ and that the judges often accepted bribes for favorable decisions.¹⁶⁵ The Ecuadorean media has often reported on judges “parceling out cases to outside lawyers who wrote judicial sentences on cases before the court and sent them back to the

¹⁵⁹ See BREWER-CARIAS, *supra* note 56, at 395.

¹⁶⁰ *Id.*

¹⁶¹ Ecuador is considered the second most corrupt Latin American nation, “with a level of corruption rivaling that of the Democratic Republic of the Congo, Iraq, Sierra Leone and Uganda.” CLARE RIBANDO, CONGRESSIONAL RESEARCH SERVICE, ECUADOR: POLITICAL AND ECONOMIC SITUATION AND U.S. RELATIONS 3 (2005); see also John Alan Cohan, *Environmental Rights of Indigenous Peoples Under the Alien Tort Claims Act, the Public Trust Doctrine and Corporate Ethics, and Environmental Dispute Resolution*, 20 U.C.L.A. J. ENVTL. L. & POL'Y 133, 160 (2001-2002).

¹⁶² A 2002 study found that the average commercial case in Ecuador takes eight years to reach verdict. Dam, *supra* note 79, at 11. Similar cases in Colombia and Peru averaged less than one year before reaching verdict. *Id.*

¹⁶³ U.S. DEP'T OF STATE, *supra* note 135.

¹⁶⁴ U.S. DEP'T OF STATE, BUREAU OF ECONOMIC, ENERGY, AND BUSINESS AFFAIRS, *2009 Investment Climate Statement: Ecuador* (Feb. 2009), <http://www.state.gov/e/eeb/rls/othr/ics/2009/117668.htm>.

¹⁶⁵ U.S. DEP'T OF STATE, *supra* note 135.

presiding judge for signature.”¹⁶⁶

This problem is not new to Ecuador or Latin America in 2001, the United Nations Centre for International Crime Prevention released a study of judicial corruption¹⁶⁷ in Ecuador, Argentina and Venezuela that revealed high frequency of both administrative¹⁶⁸ and operational¹⁶⁹ corruption in Ecuador.¹⁷⁰ According to a World Bank report, Ecuador’s percentile ranking for “control of corruption” has declined steadily since 1998, which suggests “that the political trajectory of the country is far from settled and that there are fundamental underlying issues that the society must address.”¹⁷¹

The significance of this data in the context of the 2008 amendments is that plaintiffs suing under constitutional provisions, such as the new environmental provisions, face a huge hurdle to fair adjudication of their claims, since “a vast majority of the population is not [financially] able to offer illicit payoffs to government officials, even when they are willing to do so.”¹⁷² This seems especially true for environmental plaintiffs, who are likely to be non-profits and NGOs operating on shoe-string litigation budgets. As a result, environmental plaintiffs, who are unwilling or unable to “supply illicit incentives will be excluded from the provision of a ‘public good’ (e.g., court services)” and constitutional mandates, and the constitutional mandates will cease to hold practical meaning. In summary, Ecuador’s history of judicial corruption and political entrenchment pose serious hurdles for environmental plaintiffs. The above history suggests plaintiffs cannot rely on the court system to enforce nature’s rights, and that the provisions could remain lip service until Ecuador’s constitutional tribunal proves it can function independently, reliably, and with integrity.

¹⁶⁶ *Id.*

¹⁶⁷ The directors of the study defined judicial corruption as “the use of public authority for the private benefit of court personnel when this use undermines the rules and procedures to be applied in the provision of court services.” Eduardo Buscaglia, *An Analysis of Judicial Corruption and its Causes: An Objective Governing-Based Approach*, 21 INTL. REV. L. & ECON. 233, 235 (2001).

¹⁶⁸ Administrative corruption is corruption that “occurs when court administrative employees violate formal or informal administrative procedures for their private benefit,” such as an administrative court employee accepting a bribe to alter files or discovery material, delay a case by “illegally altering the order in which the case is to be attended by the judge.” Buscaglia, *supra* note 167, at 235.

¹⁶⁹ Operational corruption usually involves political schemes where considerable economic interests are often at stake, such as a politically motivated court ruling or undue procedural change where the judge making the change stands to gain financially. *Id.*

¹⁷⁰ The sample in Ecuador was seven judges in seven pilot courts, 100 lawyers, and 200 firms who brought cases before the pilot courts. Between 1991 and 1999, 15% of judges, 36% percent of lawyers, and 29% of firms reported first-hand knowledge of operational corruption. Administrative corruption was more frequent: 24% of judges, 51% of lawyers, and 40% of firms reported it. Finally, 82% of judges reported first hand knowledge of courts’ abuse of discretion. Buscaglia, *supra* note 167, at 237 Table 1.

¹⁷¹ Jameson, *supra* note 37, at 4.

¹⁷² Buscaglia, *supra* note 167, at 247.

IV. POTENTIAL SOLUTIONS TO NON-ENFORCEMENT: ECUADOR'S CHANCES OF SUCCESSFUL IMPLEMENTATION WILL INCREASE IF THE COUNTRY IMPLEMENTS A NUMBER OF REFORMS

The world is watching to see how Ecuador will implement these novel constitutional amendments. As detailed above, several obstacles hamper implementation: 1) Ecuador's lack of a standing doctrine; 2) the amendments' textual vagueness; 3) dysfunctional politics; 4) corruption and manipulation of the judiciary; and 5) policy barriers like economic instability and doubts regarding President Correa's sincerity. This section proposes some potential solutions to the above factors.¹⁷³

First, Ecuador should grant its CC members life tenure. Permanent office for CC members will increase the judiciary's independence and boost the chances of fair adjudication of environmental claims. Second, Ecuador should codify an "open" standing doctrine to alleviate the procedural confusion surrounding litigation of the amendments. Finally, Ecuador should create an independent enforcement body and a specialized tribunal with criminal contempt powers.

A. *Ecuador's Constitutional Court Members Should Receive Lifetime Tenure to Improve Judicial Independence and Increase the Chances of Fair Adjudication of Environmental Claims*

Among the above factors hampering the amendments' implementation, the primary obstacle is Ecuador's pattern of judicial dysfunction.¹⁷⁴ The judiciary's functionality is acutely important to the success of these amendments because environmental disputes so often carry political and economic repercussions with the potential of sparking political backlash.¹⁷⁵ Courts assessing environmental claims often must weigh competing policy interests that affect political agendas because fashioning a remedy for a claimant often requires the court to choose between the environmental interests at issue and the community's present and future economic and social interests.¹⁷⁶ The stakes are particularly high in environmental disputes: a plaintiff's verdict can mean loss of political

¹⁷³ It should be noted, however, that Ecuador's political problems reflect years of turmoil, a political solution to which is beyond the scope of this article.

¹⁷⁴ See *supra* Part III.C.

¹⁷⁵ May & Daly, *supra* note 105, at 425.

¹⁷⁶ Environmental decisions "require a court to engage in significant policy decisions . . . [and] require the allocation of resources toward one set of goals, invariably at the expense of other social needs . . ." *Id.* at 428.

station or, in some parts of the world, death for jurists and litigants alike.¹⁷⁷ For example, in 2000, a former Ecuadorean Supreme Court Justice noted the reasonable likelihood that the Ecuadorean military, which is funded by oil revenues, would harass the *Texaco* plaintiffs if they brought suit in Ecuador.¹⁷⁸ Thus, lifetime tenure would allow the judiciary to decide cases on the merits, rather than fears of political or personal ramifications.

1. *Lifetime Tenure Will Increase Judicial Independence and Improve the Economy*

As a general rule, where the judiciary is ineffective, advancements in substantive law may make little difference.¹⁷⁹ Furthermore, research shows that independent judiciaries correlate with economic growth: strong judiciaries lead to improved credit markets and the growth of both big and small business because firms trust those courts to enforce agreements.¹⁸⁰ Ecuador's business sector currently distrusts the courts. Surveys reveal that investment firms in Ecuador are "reluctant to switch suppliers, even if offered a lower price, for fear [that] they could not turn to the courts" for enforcement of their contracts.¹⁸¹ Thus, a stronger judiciary in Ecuador will aid implementation of the new environmental provisions in two ways—by allowing for more consistent application of substantive law and by improving Ecuador's economy so that the government has more money to implement environmental protection programs, policies, and legislation. The solution of granting CC members lifetime tenures therefore helps solve the problem of how Ecuador can simultaneously protect natural resources and sustain the economy.

As Alexander Hamilton¹⁸² stated, "nothing can contribute so much to . . . firmness and independence as permanency in office."¹⁸³ Thus, to improve the judiciary and increase judicial independence, Ecuador must protect its CC Justices from executive and legislative impeachment by granting lifetime tenure.¹⁸⁴ Lifetime tenure is critical if Ecuador is to restore stability and eliminate corruption from its judiciary. Plaintiffs must be able bring constitutional claims before a fair and efficient judiciary that rules on

¹⁷⁷ *Id.* at 433.

¹⁷⁸ Cohan, *supra* note 161, at 161.

¹⁷⁹ Dam, *supra* note 79, at 3.

¹⁸⁰ *Id.* at 1-2.

¹⁸¹ *Id.* at 2.

¹⁸² A "founding father" of the United States.

¹⁸³ THE FEDERALIST No. 78 (Alexander Hamilton), available at <http://www.foundingfathers.info/federalistpapers/fed78.htm> (last visited March 18, 2011).

¹⁸⁴ Lifetime tenure should be codified and then included in the next constitutional amendment.

the case's merits—not the politics of the moment. Throughout the CC's history, the length of members' tenure has varied with different constitutional amendments. Between 1945 and 1992, members served two- and four-year terms.¹⁸⁵ Since 2008, CC justices have served nine-year terms, and one-third of the CC is replaced every 3 years.¹⁸⁶ Though nine-year terms are certainly an improvement, nine years are still insufficient, as "experience has demonstrated that an independent judiciary rests on a permanent corps of judges who can be removed only for cause."¹⁸⁷

The need for lifetime tenure is especially strong in developing countries with historically weak judiciaries, like Ecuador.¹⁸⁸ Lifetime tenure cultivates judicial independence in these developing nations "because it gives [judges] economic security and frees them from undesirable pressures, whether from government, politicians, or private parties."¹⁸⁹ Thus, given the history of political entrenchment in Ecuador's judiciary (detailed above in Part II.C.) this solution is especially appropriate. Such a reform would allow CC Justices the freedom to eliminate all political influences from their decisions without fear of financial, professional, or political repercussions. Further, this job security would increase the prestige of Ecuador's judiciary by making it a more dependable career path. This increased prestige can in turn increase the CC's independence because "a judiciary without independence is likely to lack prestige in the legal profession, and law graduates may in turn avoid a career in a judiciary lacking independence."¹⁹⁰

Statistics of judicial dependence from other parts of Latin America support this solution of lifetime tenure. In Peru, for example, President Fujimori kept more than half the country's judges on temporary appointment between 1992 and 2002; not surprisingly, Peru's judiciary is consistently rated as the least independent in Latin America.¹⁹¹ Argentina's situation is not unlike Ecuador's. Between 1946 and 1994, Argentina's Court was completely replaced six times by successive Presidents.¹⁹² Research shows that this cycle contributed to Argentina's decline from one of the world's ten wealthiest countries to one of the world's poorest.¹⁹³

¹⁸⁵ Grijalva, *supra* note 19, at 31 (t. 2-1).

¹⁸⁶ CONST. ECUADOR, *supra* note 5, at art. 432

¹⁸⁷ Dam, *supra* note 79, at 23.

¹⁸⁸ *Id.* ("Today a developing country, especially where political parties do not regularly alternate in power, would be well advised to adopt procedures and practices, such as life tenure, that encourage judges to be independent.").

¹⁸⁹ Dam, *supra* note 79, at 23.

¹⁹⁰ *Id.* at 25.

¹⁹¹ *Id.* at 11.

¹⁹² *Id.* at 24.

¹⁹³ *Id.* at 24 (citing Alston, Lee J. & Andrés A. Gallo, *The Erosion of Checks and Balances in*

2. *Criticisms of Lifetime Tenure Do Not Apply to Ecuador*

Of course, the life tenure approach has its critics. Some argue that appointments for life have often served as “an opportunity for patronage,” as seen in the United States.¹⁹⁴ Consequently, judicial appointments in the United States often end up serving a political purpose, and Congress is more likely to appoint new federal judges when the President’s party holds a Congressional majority.¹⁹⁵ Life tenure actually appears to counteract judicial independence, the argument goes, because judges can become political pawns for life.

However, patronage concerns are less likely to apply in Ecuador because the country’s party system is so fragmented. Studies show that between 1979 and 2004, Ecuador had the second most fragmented political system in Latin American after Brazil,¹⁹⁶ with some twenty-two political parties jostling for power.¹⁹⁷ During that period, the President’s political party controlled, on average, only 26% of the legislative seats, and no president ever held a congressional majority.¹⁹⁸ This fragmentation means that lifetime appointments pose little risk of patronage in Ecuador, since it is unlikely that future presidents will hold enough power in Congress to manipulate judicial appointments. In fact, the party system was so highly

Argentina and the Rise of Populism in Argentina: An Explanation for Argentina’s Economic Slide From the Top Ten, (Univ. of Co. Institute of Behavior Science, Research Program on Pol. & Econ. Change, Working Paper No. PEC2005-0001, 2005)). The fact that Argentina’s economy and judiciary declined in tandem highlights the financial advantages of an independent judiciary. Research shows that judicial independence correlates with economic growth because investors are more willing to spend money in a country where they trust the judiciary will uphold their rights. Dam, *supra* note 79 at 3 (citing Jonathan Wheatley, “Brazil’s Judicial Nightmare Brings Gridlock for Growth,” *Financial Times*, May 24, 2005). Further, surveys show that investment firms in Ecuador “would be reluctant to switch suppliers, even if offered a lower price, for fear they could not turn to the courts to enforce the agreement.” Dam, *supra* note 79, at 2. Thus, since money Ecuador spends on its judiciary will ultimately improve its entire economy, Ecuador should not hesitate to transition to a lifetime tenure appointment system and prohibit any decrease in judges’ salaries. Salaries are a critical issue because top legal professionals will not seek appointment—and the judiciary will therefore not gain prestige and independence—unless CC justices receive lifetime appointment with fair salaries. Research shows that Mexico, for example, pays low judicial salaries, pushing the most talented graduates toward more lucrative careers in private practice. See Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT’L & COMP. L. 3, 742 (2004).

¹⁹⁴ Judith Resnik, *Judicial Selection and Democratic Theory: Supply, Demand and Life Tenure*, 26 CARDOZO L. REV. 579, 580 (2005).

¹⁹⁵ *Id.* (citing John M. De Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of the Expansion of the Federal Judiciary*, 39 J. L. & ECON. 435 (1996)).

¹⁹⁶ Grijalva, *supra* note 19, at 20-21.

¹⁹⁷ J. Andrés Mejía Acosta, *Ghost Coalitions: Economic Reforms, Fragmented Legislatures and Informal Institutions in Ecuador (1979-2002)* (unpublished Ph.D. dissertation, University of Notre Dame).

¹⁹⁸ Grijalva, *supra* note 19, at 21.

fragmented at the time President Correa took office that it is a virtual certainty that he will not achieve a majority in Congress.¹⁹⁹

B. Ecuador Should Codify an “Open” Standing Doctrine to Give Effect to the Amendments’ Purpose

As discussed above in Part III.C., a major obstacle for plaintiffs suing under the new environmental provisions is that environmental rights, even the most anthropocentric ones, are difficult to implement and enforce. The absence of a clear standing doctrine in Ecuador makes this already difficult task even more complicated. Before the new provisions can have bite, Ecuador must codify standing guidelines upon which plaintiffs could rely.²⁰⁰

I. Codifying a Liberal, or “Open,” Standing Doctrine Will Reassure Plaintiffs That Environmental Litigation Is Worth It

Standing doctrines are essential because they give procedural teeth to substantive rights, hence creating procedural rights that promote the transparency and accountability that are indispensable in effective environmental governance.²⁰¹ Without clear standing requirements, plaintiffs could spend years on a lawsuit only to have a judge toss it out for lack of standing. It is reasonable to conclude that few plaintiffs will take this risk until Ecuador’s standing doctrine is less vague. Indeed, standing is difficult for environmental plaintiffs in general,²⁰² and even more so for Ecuadorean plaintiffs suing under the new provisions, since they cannot know what the provisions require them to prove. Additionally, Ecuador’s new amendment is somewhat of a puzzle because the legal community has little experience conceptualizing “how to enforce a right that is, by its very definition, not connected to a human concern.”²⁰³ In short, Ecuador must codify its standing doctrine before the amendments can mean anything.²⁰⁴

a. Open standing would effectuate the amendments’ aims

To achieve the purpose of the amendments, Ecuador should codify an open standing doctrine as opposed to a more restrictive doctrine that imposes

¹⁹⁹ Conaghan, *supra* note 20, at 271.

²⁰⁰ Bassi, *supra* note 46, at 463.

²⁰¹ See World Resources Institute, Carl Bruch, Wole Coker, & Chris VanArsdale, *Working Paper Series: Environmental Governance in Africa: Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protections in Africa* (Apr. 2001), pdf.wri.org/eea_bruch.pdf.

²⁰² Bruckerhoff, *supra* note 59, at 627.

²⁰³ *Id.* at 635.

²⁰⁴ See Bassi, *supra* note 46, at 464.

strict requirements on plaintiffs. An open standing doctrine will aid the amendments' enforcement because "the broader or more lenient the standing requirements . . . the more likely that a constitutional right will be enforced."²⁰⁵ Under open standing, any individual could defend nature's rights, regardless of whether that plaintiff could demonstrate any direct personal harm.²⁰⁶

An open standing doctrine makes the most sense for an amendment that purports to grant a remedy to non-human entities. Under this doctrine, plaintiffs would not be bound to the stringent standing requirements employed by U.S. courts, as those requirements could not realize the aim of providing a remedy to the environment itself. Thus, despite criticisms of an open standing doctrine, which warn of frivolous claims and bad precedent,²⁰⁷ open standing would best implement the amendments' aims.

In codifying "open" standing, Ecuador would be following in the footsteps of countries that have already found success with such a doctrine in the adjudication of environmental claims. For instance, the Supreme Court of Chile held in a 1997 decision known as the *Trillium* case that the Chilean government violated the country's constitutional right to live in an environment free from contamination when it approved a project allowing 270,000 hectares of forests to be logged.²⁰⁸ The Court granted standing to the plaintiffs (individuals²⁰⁹ and environmental groups²¹⁰) despite the fact that none had suffered any personal injury, explaining that the constitutional right to a clean environment was owed to all citizens.²¹¹ The Supreme Court of Peru likewise granted open standing to a group of citizens in the environmental case *Proterra v. Ferroaleaciones San Ramon S.A* in 1992.²¹² India, South Africa, and the Philippines also grant liberal standing in environmental cases.²¹³

²⁰⁵ May & Daly, *supra* note 105, at 416.

²⁰⁶ Bassi, *supra* note 46, at 465.

²⁰⁷ See, e.g., Bassi, *supra* note 46, at 465.

²⁰⁸ May & Daly, *supra* note 105, at 392 (citing The "Trillium Case," Decision No. 2.732-96, at 8, Supreme Court, Mar. 19, 1997 (Chile), available at <http://www.elaw.org/node/1310>).

²⁰⁹ Oliver A. Houck, *A Case of Sustainable Development: The River God and the Forest at the End of the World*, 44 TULSA L. REV. 275, 307 (2008).

²¹⁰ Gideon Long, *Saving Chile's Southern Wilderness*, BBC NEWS (Feb. 25, 2009), <http://news.bbc.co.uk/2/hi/7853076.stm>.

²¹¹ May & Daly, *supra* note 105, at 392-93. The benefit of Chile's grant of open standing and accepting the case was the preservation of some of the world's last remaining cold-climate virgin forests. *Id.*

²¹² *Id.* at 393 (citing *Proterra v. Ferroaleaciones San Ramon S.A.*, Judgment No. 1156-90, Supreme Court, Nov. 19, 1992 (Peru)).

²¹³ May & Daly, *supra* note 105, at 398, 405-406, 416. South Africa's court, however, has not yet enforced the right. *Id.* at 406.

b. *Ecuador should also adopt the “precautionary principle” as part of its standing doctrine*

Furthermore, Ecuador could strengthen the effect of the new environmental provisions and help effect the meaning and aim of the amendments by embracing the “precautionary principle.” The precautionary principle holds that “where there is a threat of significant reduction or loss [to the environment], lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.”²¹⁴ If courts in Ecuador applied this principle, plaintiffs could earn standing even if they could not demonstrate that tangible harm to the environment had already occurred. This concept of precautionary standing is connected to the concept of future generations. In other words, plaintiffs could sue before harm occurs because an inability to do so would threaten the constitutional rights to a safe environment that the constitution grants future generations.

Furthermore, the fact that courts in other countries such as Hungary and Pakistan already apply the precautionary principle to environmental rights cases shows that courts properly apply the principle to “help head off the problems associated with having to prove causation in environmental rights cases.”²¹⁵ Proving causation is often legally complex, time-consuming, and expensive.²¹⁶ Legal services agencies in developing countries like Ecuador often lack the resources to do so because environmental litigation is almost always scientifically and administratively complex.²¹⁷ In short, Ecuador’s ability to implement these new environmental provisions would greatly improve if the legislature codified guidelines for suits that included an explanation and requirement of the precautionary principle.

C. *Given Problems with Both National and Local Implementation in Developing Countries, Ecuador Should Create an Independent Enforcement Body and a Specialized Tribunal*

Another threshold issue is which organized body should lead enforcement on the ground once the CC issues environmental rulings; essentially, the question is whether national or local government should call

²¹⁴ Bruckerhoff, *supra* note 59, at 643 (citing TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS 104 (2005)).

²¹⁵ Bruckerhoff, *supra* note 59, at 644.

²¹⁶ May & Daly, *supra* note 105, at 435

²¹⁷ *Id.* at 417. Environmental litigation often involves all branches of government, plus a multitude of private and public sector actors. *Id.* at 437.

the shots. Unfortunately, the answer seems to be neither, as both local and national implementation management will struggle in Ecuador because of its weak legal and political systems. Ecuador should therefore implement an independent body of enforcement.

1. Neither Local Nor National Implementation Is Likely to Succeed Because of Ecuador's Fragile Political and Legal Structures

Research shows that environmental problems in developing countries often stem from institutional problems,²¹⁸ and Ecuador is no exception. Research shows that Ecuador's "weak tenurial regimes...induce a cycle of excessive land clearing and inadequate resources conservation."²¹⁹ Although national governments tend to efficiently tackle certain objectives, like military organization and urban development, they often lack motivation to spend the amount of money necessary to protect the environment.²²⁰ This seems especially true in low-income nations like Ecuador, where debt is high and poverty is rampant.²²¹ Consequently, many scholars feel that the "fences-and-lines" approach, where authority over natural resources falls to central government, usually does not work in low-income countries.²²² Ecuador might be the rare exception because President Correa may be politically motivated to conserve resources since indigenous groups comprise a large portion of his constituency.²²³ Nevertheless, "corrupt and inefficient bureaucracies can undermine conservation on the ground."²²⁴ Herein lies Ecuador's problem: it has made big promises that are hard to implement.

Unfortunately, local resource management may not be a solution either. Current research shows that "most [communities] are probably too

²¹⁸ Ortega-Pacheco & Manzano-Torres, *supra* note 14, at 7 (citing Edward Barbier, *Explaining Agricultural Land Expansion and Deforestation in Developing Countries*, 86 AM. J. AGRIC. ECON. 5, 1347-1353 (2004)); C. Ford Runge & Douglas Southgate, *The Institutional Origins of Deforestation in Latin America* (Univ. of Minnesota Dep't of Agric. & Applied Econ., Staff Paper No. P90-5, 1990); Laura Brown, Rodrigo Sierra & Douglas Southgate, *A Statistical Analysis of the Causes of Deforestation in Eastern Ecuador*, 19 WORLD DEVELOPMENT No. 9, 1145, 1145-51 (1991).

²¹⁹ Ortega-Pacheco & Manzano-Torres, *supra* note 14, at 7.

²²⁰ Christopher B. Barrett, Katrina Brandon, Clark Bigson, & Heidi Gjertsen, *Conserving Tropical Biodiversity Amid Weak Institutions*, 51 BIOSCIENCE 6, 499 (2001).

²²¹ Ecuador entered a financial crisis in 1999 after its banking and financial sectors collapsed, oil prices dropped sharply, and inflation rates rose along with political tensions. The country's debt reached ninety-seven percent of its Gross Domestic Product by the end of the year. WORLD BANK, *supra* note 4, at 1. Unemployment rates rose to double digits. Ribando, *supra* note 161, at 4. Currently, almost half of Ecuador's population lives below the poverty line. The Associated Press, *supra* note 3.

²²² Barrett, Brandon, Bigson & Gjertsen, *supra* note 220, at 497.

²²³ Jameson, *supra* note 37, at 20.

²²⁴ Barrett, *supra* note 220 at 499.

weak to resist the temptation to overuse their resources or to overcome outsiders seeking to exploit or control the resources.²²⁵ In short, in much of Latin America, both national and local government systems are weak and undependable.²²⁶

2. *Ecuador Needs an Independent Enforcement Body to Implement the Amendments and Prevent Future Corruption*

Ecuador should implement an independent enforcement body, separate from both national and local government, lead enforcement of the amendments on the ground, and finally, bring the government into compliance with its own constitution. An independent body is an appropriate solution to the enforcement problem because the Ecuadorean public distrusts the political system.²²⁷ Public opinion polls show that the public has felt alienated from politics for the past decade: in three successive audits, Ecuadoreans expressed a profound lack of confidence in the 'central nucleus' of the political system: the national government, congress, and political parties. Not surprisingly, the lack of confidence went hand in hand with a widely shared view that politicians were corrupt.²²⁸ Since Ecuadoreans lack confidence in the political system's ability to act on its promises, an independent body would be the appropriate vehicle to restore the public's trust in government and to encourage plaintiffs to bring environmental claims when they are warranted.

This independent body would need legal standing to trace a ruling from the CC to the communities and to ensure that Ecuador adhered to the CC's mandates. The people comprising this body would need to possess a professional background in environmental law and ideally constitutional law. More importantly, they would need to lack any political affiliations that would compromise their objectivity, in order to effectively enforce the CC's environmental rulings and avoid the entrenchment that corrupted the judiciary. This new body will increase the effectiveness of the environmental provisions because Ecuadoreans will see that their lawsuits

²²⁵ *Id.*

²²⁶ There is general agreement that "successful conservation institutions at whatever scale, must possess (1) the authority, ability, and willingness to restrict access and use; (2) the wherewithal to offer incentives to use resources sustainably (which in some cases may mean no use at all); (3) the technical capacity to monitor ecological and social conditions; and (4) the managerial flexibility to alter the array of incentives and the rules of access so as to cope with changes in the condition of the resources or its users." Conservation programs by both national and local governments tend to have trouble meeting all of these conditions. Barrett, Brandon, Bigson & Gjertsen, *supra* note 220, at 499.

²²⁷ See Conaghan, *supra* note 20, at 271.

²²⁸ *Id.*

matter, have a lasting effect, and are not a waste of their time and money.

3. *Ecuador Should Create a Specialized Environmental Court with Power of Criminal Contempt to Aid Enforcement*

In light of Ecuador's fickle judicial setting, Ecuador should create a specialized environmental tribunal to implement the amendments. These specialized courts could develop their own requirements for both standing and the admission of evidence, both of which tend to cause problems for plaintiffs for reasons discussed elsewhere in this comment.²²⁹ If staffed by judges with environmental or scientific expertise, these tribunals could give a more fair trial to parties on both sides of the litigation. Additionally, "with added expertise, the courts would benefit from increased social legitimacy, and would thereby have the power to issue broader, more creative orders to remedy environmental violations."²³⁰ A specialized court is also better able to avoid the entrenchment and dysfunction characteristic of the constitutional court; by deciding only environmental cases, the court would dodge pressure from other branches of government that the constitutional court must battle when deciding politically-charged cases.

To maximize its effectiveness, this court must have criminal contempt power—or the power to impose criminal sanctions for violations of its rulings. Criminal contempt is considered one of the most important features of an injunctive relief system.²³¹ In the United States, criminal contempt power is part of what makes an injunction effective; the same court that issues a ruling can also punish violations of that ruling with imprisonment or fines.²³² *Amparo* judges in Ecuador do not have this power,²³³ so disobedient parties, like the government in the Baba Dam case, have no incentive to obey a ruling because they face no sanctions. As Justice Brewer of the United States Supreme Court said, to compel obedience, courts "must have the right to inquire whether there has been any disobedience...To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceedings of half its efficiency."²³⁴ In sum, granting the power of criminal contempt to this independent environmental court will give the amendments teeth because violators will actually have a motivation to comply with court rulings.

²²⁹ See Part II.A; see also Part IV.B.1.b.

²³⁰ May & Daly, *supra* note 105, at 437.

²³¹ BREWER-CARIAS, *supra* note 56, at 394.

²³² *Id.* at 394-95.

²³³ *Id.* at 394.

²³⁴ *In Re Debs*, 158 U.S. 564, 595 (1895).

V. CONCLUSION

Ecuador's 2008 constitutional amendments may have accomplished something historic. No other country has gone so far to protect the environment. If the amendments are enforced, they could transform legal treatment of the environment. Unfortunately, Ecuador's President seems more focused on the economy than the constitution.²³⁵ Additionally, procedural confusion and half a century of political chaos mean that these amendments will likely linger in the constitution without any real bite. This comment argues that Ecuador's amendments are more likely to have an impact if Ecuador implements structural and procedural changes. These changes may not take hold for several generations, if ever. Regardless, Ecuador's new Constitution paves the way for potentially transformative environmental change in the future.

²³⁵ *See supra* Part II.B.