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International Investment Agreements, Human Rights, and Environmental Justice: The Texaco/Chevron Case From the Ecuadorian Amazon

Lorenzo Pellegrini^{*,**,†}, Murat Arsel^{*,**}, Martí Orta-Martínez^{**,†,§}, and Carlos F. Mena^{**}

ABSTRACT

The Texaco/Chevron lawsuit, which started in November 1993 and is still being litigated in 2020, is a prominent example of the process of judicialization of environmental conflict. The Ecuadorian plaintiffs claim that the oil company's operations generated ruinous impacts on the environment and on the development prospects and health of nearby individuals and communities. The tortuous and lengthy judiciary process was further hindered by an arbitration process, an Investor–State Dispute Settlement mechanism nested in the Ecuador–United States Bilateral Investment Treaty. The significance of the case goes beyond the specifics of Ecuador and provides further arguments fuelling the protracted legitimacy crisis experienced by International Investment Agreements. The current praxis of Investor–State Dispute Settlement mechanisms is generating an asymmetrical system, protecting the interest of investors, and intruding into the space of human and environmental rights. These issues are resonating with social movements, activist scholars and policy makers who are reacting to the vulnerabilities engendered by International Investment Agreements through multipronged strategies. These asymmetries provide ammunition to resist the signing of new International Investment Agreements, support the inclusion of human and environmental rights safeguards in International Investment Agreements, and contribute to the rationale of pre-empting extractive projects that are likely to produce severe environmental liabilities. Some of the potential ways in

* International Institute of Social Studies (ISS), Erasmus University Rotterdam.

** Instituto de Geografía, Universidad San Francisco de Quito.

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‡ University of Vic–Central University of Catalonia.

§ Institute of Environmental Science and Technology—Autonomous University of Barcelona (ICTA–UAB).

which a somewhat more level playing field can be created include, in addition to denouncing investment agreements, transforming Investor–State Dispute Settlement mechanisms towards a format that can also accommodate the complaints of affected communities or enacting moratoria on extraction projects that are prone to adverse socioenvironmental impacts. Both strategies could prove to be productive avenues towards the achievement of justice.

INTRODUCTION

In November 1993, Ecuadorian plaintiffs filed a class action lawsuit against Texaco in the Southern District of New York on behalf of some 30,000 inhabitants of the Ecuadorian Amazon.¹ The plaintiffs argued that during its operations in Ecuador between 1964 and 1992, Texaco had caused massive environmental impacts, ultimately leading to several adverse effects on the local population, including higher-than-normal morbidity and mortality rates. The US court refused to admit the case and it was eventually handled in a provincial court in Ecuador and resulted in a 2013 decision that condemned Chevron (which had acquired Texaco) to a payment of 9500 million USD in compensation for the affected communities.

Fast forward to August 2018, an arbitration tribunal constituted under the auspices of the Permanent Court of Arbitration (PCA) in The Hague decided that the state of Ecuador has to act to render unenforceable the judgment of the Ecuadorian judiciary that condemned Chevron because it found that the corporation was not given a fair trial.² Although this decision will not be the final chapter in the quest for justice of the *Amazonian people v Texaco/Chevron*, it is a major setback and might be the final nail in the coffin for the hope of obtaining justice through the judiciary route.

By 2020, the case has been litigated for 27 years in various *fora*, including the USA, Ecuador, Argentina, Canada, and international courts, and came to represent one outstanding example of how protracted lawfare makes it difficult, if not impossible, to hold multinational companies accountable for their actions.³ This paper sketches the tortuous history of the Texaco/Chevron case, focusing on the role of a Bilateral Investment Treaty, which was signed by Ecuador and the USA in 1993 and entered into force in 1998, the associated investor protection clauses and arbitration enacted through the Investor–State Dispute Settlement (ISDS) mechanism. We discuss this episode of lawfare in light of the environmental justice literature and in particular of the judicialization of environmental policy.⁴ We also discuss investors' rights in relation

1 United States Court of Appeals, Second Circuit., *Aguinda 'B' 'C' 'D' v. Texaco Inc.*, 16 August 2002.

2 'Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009–23' (2019), *italaw* <https://www.italaw.com/cases/257> (visited 2 December 2019).

3 Sarah Joseph, 'Protracted lawfare: the tale of Chevron Texaco in the Amazon', *Journal of Human Rights and the Environment* 3 (2012), at 70.

4 Antonio Herman Benjamin, 'We, the Judges, and the Environment', *Pace Environmental Law Review* 29 (2011), at 582; Teresa Kramarz, David Cosolo and Alejandro Rossi, 'Judicialization of environmental policy and the crisis of democratic accountability', *1 Review of Policy Research* 34 (2017), at 31.

to environmental and human rights in the context of fragmentation and disintegration of legal regimes.⁵

The significance of these discussions goes far beyond the specific case of Ecuador. The current trends in international investment policies show an increase in the number of agreements and in 2018 40 new International Investment Agreements (IIAs) were concluded, adding to the total of 3317 existing agreements.⁶ At the same time there is an increase in agreements' terminations with at least 20 unilateral ones taking effect in 2019.⁷ These agreements have come under scrutiny for a number of reasons, including the ones corroborated by the Texaco/Chevron case, and are experiencing a protracted legitimacy crisis.⁸ However, allegedly comprehensive attempts to reform the institutional architecture of IIAs continue to fall short of addressing their most substantial deficiencies.⁹

The experience of the Texaco/Chevron case illuminates how the current praxis of ISDS mechanisms is generating an asymmetrical system, protecting the interest of investors and intruding into the space of human and environmental rights. These issues are resonating with the broad community of concerned people: social movements, activist scholars, and policy makers are reacting to the vulnerabilities engendered by IIAs through multipronged, and at times overlapping, strategies. The acknowledgement of these asymmetries provide ammunition to resist the signing of new IIAs, support the inclusion of human and environmental rights safeguards in these agreements, and can provide a decisive contribution to the rationale of pre-empting extractive projects that are likely to produce severe environmental liabilities in a context of corporate impunity.

Overall, the paper argues that investment agreements, especially when they come with ISDS mechanisms, create structural barriers for the realization of social and environmental justice in Ecuador and beyond, including developed country contexts. This is because they limit the possibility of recourse to national courts by communities and individuals affected by an investment (which is often the only legal forum available to them) and also severely constrain the ability of nation-states to pass legislation that can be used to curb the excesses of multinational corporations. The paper also discusses some of the potential ways in which a somewhat more level playing field can be created. In addition to denouncing investment agreements, transforming ISDS mechanisms towards a format where they can also accommodate the complaints of affected communities or enacting moratoria on extraction projects that are prone to adverse socioenvironmental impacts could both prove to be productive avenues towards the achievement of environmental justice. The profound transformations that are necessary to address the shortcomings of the current investment regime could seem far-fetched,

5 See Federica Violi and Francesco Montanaro, in this issue.

6 UNCTAD, *World Investment Report 2019: Special Economic Zones*. (New York; Geneva: United Nations Conference on Trade and Development, 2019) <https://doi.org/10.18356/8a8d05f9-en>.

7 *Ibid.*, at 99–100.

8 David Schneiderman, 'International Investment Law's Unending Legitimation Project', *Loyola University of Chicago Law Journal* 49 (2017), at 229.

9 Alessandra Arcuri and Federica Violi, 'Human Rights and Investor-State Dispute Settlement: Changing (Almost) Everything, so that Everything Stays the Same', *Diritti umani e diritto internazionale* 3 (2019), at 579.

but they are on par with the challenge at hand and with the implications of the regime, exemplified by the Texaco/Chevron case. In fact, the ambition of these reforms is not dissimilar to reforms that have been successful in the past—abolition of slavery, gender rights, or the nuclear non-proliferation treaty, to mention a few. Although at first these changes appeared utopian, they did succeed in becoming the norm.¹⁰

The next section provides a brief outline of the Texaco/Chevron case. Section 2 introduces critically IIAs and the role played by international arbitration in this case. Section 3 presents a rights perspective showing how the protection of investor rights undermines competing rights and section 4 takes stock exploring various ways to take on the shortcomings of the current architecture of IIAs, especially for the extractive industry sector.

I. THE TEXACO/CHEVRON CASE

The civil lawsuit, *Aguinda v Texaco Inc* filed in 1993, focused on the socioenvironmental liabilities engendered by Texaco during operations in the Ecuadorian Amazon, known as the *Oriente*.¹¹ Texaco discovered the first commercially-viable petroleum deposit in 1967, and operated the first commercial oil well in 1972 after the construction of an approximately 500 km long pipeline. From 1977, Texaco was the operational partner of a joint venture with the state-owned Ecuadorian oil company (first CEPE, then Petroecuador).¹² Texaco drilled 339 oil wells, constructed 18 central production stations, 1000 km secondary pipelines, 600 km of roads, and extracted 1.5 billion barrels of crude. Oil operations produce large quantity of waste, mostly in the form of highly contaminating produced waters, also known as oil field brines, which contain a number of potentially toxic agents, including radioactive isotopes, dispersed hydrocarbons, heavy metals, high levels of salt, and come to the surface at high temperature.¹³ The untreated discharge of produced water is known since long as the cause of severe environmental and public health impacts.¹⁴ Texaco operations routinely discarded untreated produced

10 Peter Newell and Andrew Simms, 'Towards a fossil fuel non-proliferation treaty', *Climate Policy* (2019), at 1; Rutger Bregman, *Utopia for realists: And how we can get there* (Bloomsbury Publishing, 2017).

11 See above n 1.

12 The events and the timeline are based on Stacie Buccina, Douglas Chene and Jeffrey Gramlich, 'Accounting for the environmental impacts of Texaco's operations in Ecuador: Chevron's contingent environmental liability disclosures', 2 *Accounting Forum* 37 (2013), at 110; Judith Kimerling, *The Environmental Audit of Texaco's Amazon Oil Fields: Environmental Justice or Business as Usual* (HeinOnline, 1994). Details of the lawsuit are presented here: 'Texaco/Chevron lawsuits (re Ecuador)' (2019), *Business & Human Rights Resource Centre* <https://www.business-humanrights.org/en/texacochevron-lawsuits-re-ecuador> (visited 2 December 2019). For the Texaco/Chevron version of the facts, see 'Ecuador Lawsuit' (2019), *Chevron* <https://www.chevron.com/ecuador/> (visited 2 December 2019), the perspective of the claimants is available here: 'ChevronToxico: The Campaign for Justice in Ecuador' (2019), *Clean Up Ecuador campaign, Amazon Watch* <https://chevrontoxico.com/> (visited 2 December 2019).

13 Martí Orta-Martínez, Lorenzo Pellegrini and Murat Arsel, "'The squeaky wheel gets the grease'? The conflict imperative and the slow fight against environmental injustice in northern Peruvian Amazon', 3 *Ecology and Society* 23 (2018), at 1.

14 Martí Orta-Martínez et al., 'First evidences of Amazonian wildlife feeding on petroleum-contaminated soils: A new exposure route to petrogenic compounds?', *Environmental research* 160 (2018), at 514; Raúl Yustagarcía et al, 'Water contamination from oil extraction activities in Northern Peruvian Amazonian rivers', *Environmental Pollution* 225 (2017), at 370.

waters in 800–1000 unlined open waste pits—estimates suggest that approximately 19 billion gallons of production waters have been disposed without any treatment other than dilution.¹⁵ Another ‘waste’ product is gas that was in its large majority flared at the production stations leading to air as well as soil and water contamination since, because of imperfect separation, it contained oil residues. A total of 16.8 million gallons of crude is estimated to have been spilled by the Texaco operation in the Amazon basin, including accidental spills as well as the practice of spraying unpaved roads with oil to decrease dust and maintain them.¹⁶ Additional pollution was generated by the disposal of chemical compounds that are part of drilling and maintenance waste, air, and noise pollution generated at oil wells, production, and transportation sites. The deliberate and unplanned discharges of pollutants in the environment resulted in the contamination of superficial and underground water sources used by local population for human use and for fishing and affected soils used to produce crops, undermining subsistence practices of indigenous population, and ultimately affecting human health. Texaco operated with little oversight given the weakness of the Ecuadorian regulatory framework which nevertheless required to minimize impacts on the environment and human health.¹⁷ Moreover, even though by the 1970s principles in international law established human rights and the environment as focal areas (e.g. the Stockholm Declaration from 1972),¹⁸ also with reference to the rights of indigenous people, Texaco’s operations in the 1960s and 1970s ‘did not meet well-known and accepted industry standards’ and were substandard also compared to its own practices in the USA at the time.¹⁹

The oil operations were also marked by violent encounters with indigenous people and the company collaborated with the US-based protestant Summer Institute of Linguistic to pacify and relocate the Huaorani people who tried to resist the entry of outsiders into their territories.²⁰ Taken together, these developments contributed to the disappearance of several indigenous groups whose territories were affected by infrastructural development, encroachment by settlers and whose subsistence strategies were impacted by reduced access to territory and by contamination.

15 Judith Kimerling, ‘Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevron Texaco, and Aguinda v. Texaco’ (2006); New York University Journal of International Law and Politics 38 (2006), at 413, at 450; Sana Loue, ‘Forensic Epidemiology and Environmental Justice’, in *Forensic Epidemiology in the Global Context* (Springer, 2013) 99–119, at 102; Bill Powers and Mark Quarles, ‘Texaco’s waste management practices in Ecuador were illegal and violated industry standards. Chevron’s Sham Science: Illegal Waste Dumping (Report): Critical Analysis of Chevron’s Science: Submission 2’, E-Tech International 2 (2006).

16 See Kimerling, above n 12, *The Environmental Audit of Texaco’s Amazon Oil Fields*, at 205; See Kimerling, above n 15, *Indigenous Peoples and the Oil Frontier in Amazonia*, at 450.

17 Judith Kimerling, ‘Transnational Operations, Bi-National Injustice: Indigenous Amazonian Peoples and Ecuador, ChevronTexaco, and Aguinda v. Texaco’, (2008).

18 Louis B Sohn, ‘The Stockholm Declaration on the Human Environment’, *Harvard International Law Journal* 14 (1973), at 423.

19 See Powers and Quarles, above n 15, at 1.

20 See Kimerling, above n 15, *Indigenous Peoples and the Oil Frontier in Amazonia*, at 460–462; Laura M Rival, *Trekking through history: the Huaorani of Amazonian Ecuador* (Columbia University Press, 2002); David Stoll, ‘The Summer Institute of Linguistics and indigenous movements’, *Latin American Perspectives* 9 (1982), at 84, at 82–83.

Compounds associated with oil extraction can affect human health through inhalation, ingestion, and dermatological absorption and the practices of Texaco allegedly produced impacts through all of these channels. The first epidemiological studies produced in the area, which were also introduced by the plaintiffs in the lawsuit as probe of health impacts,²¹ provide circumstantiated evidence of increased morbidity and mortality associated with the oil operations.²² The population living in the proximity of oil wells has been found to be exposed to high levels of total petroleum hydrocarbons and experience a higher-than-normal incidence of cancer cases and childhood leukaemia,²³ and pregnancies are more likely to end in spontaneous abortions.²⁴ Given the dearth of reliable environmental monitoring and health data, a popular epidemiology approach has been developed to collect and analyse evidence.²⁵

Although the quality of forensic evidence is certainly less than perfect,²⁶ the lack of environmental monitoring and health data can also be attributed to the way Texaco disregarded, or purposely concealed, the impact of its operations and did not collect environmental, health, nor socioeconomic data. Although evidence of practices and awareness from the side of the company is rather sparse, during the proceedings of the lawsuit witnesses and the company itself produced evidence of use of substandard techniques in order to enhance the economic returns of the operations. For example, an internal memo from Texaco instructs that earthen waste pits should not be lined because the procedure that substantially decreases the spread of contaminants to the environment would be too expensive.²⁷ Another internal memo from Texaco (dating back to 1972) produced in court, instructed the managers in Ecuador to destroy all reports of oil spills and from that point onward to report only spills that already attracted the attention of the public, mass media, and/or regulatory authorities.²⁸ When leaving Ecuador, together with the transition of the operations that were taken over by Petroecuador, Texaco engaged in some remediation and compensation activities that remained highly contentious. Environmental remediation included the treatment

21 Anna-Karin Hurtig and Miguel San Sebastián, 'Epidemiology vs epidemiology: the case of oil exploitation in the Amazon basin of Ecuador', *International journal of epidemiology* 34 (2005), at 1170.

22 See Loue, above n 15, at 102–103; Miguel San Sebastián et al., 'Exposures and cancer incidence near oil fields in the Amazon basin of Ecuador', *Occupational Environmental Medicine* 58 (2001), at 517; Miguel San Sebastián, B Armstrong and C Stephens, 'Outcomes of pregnancy among women living in the proximity of oil fields in the Amazon basin of Ecuador', *International Journal Occupational Environmental Health* 8 (2002), at; Miguel San Sebastián and Anna Karin Hurtig, 'Oil development and health in the Amazon basin of Ecuador: the popular epidemiology process', *Social science & medicine* 60 (2005), at 799.

23 Anna-Karin Hurtig and Miguel San Sebastián, 'Incidence of childhood leukemia and oil exploitation in the Amazon basin of Ecuador', *3 International journal of occupational and environmental health* 10 (2004), at 245; See San Sebastián et al, above n 22.

24 See San Sebastián, Armstrong, and Stephens, above n 22.

25 See San Sebastián and Hurtig, above n 22.

26 Cristina O'Callaghan-Gordo, Martí Orta-Martínez and Manolis Kogevinas, 'Health effects of non-occupational exposure to oil extraction', *Environmental Health* 15 (2016), at 56.

27 See, Tom Knudson, 'Chevron in Ecuador: Testimony Ends in Oil Giant's Ecuador Trial' (30 October 2003), *Sacramento Bee/Chevron in Ecuador* <https://chevronecuador.org/news-and-multimedia/2003/1030-testimony-ends-in-oil-giant-s-ecuador-trial> (visited 2 December 2019).

28 See, 'Texaco Ordered Destruction of Oil Spill Documents' (2008), *Chevron in Ecuador* <https://chevronecuador.org/news-and-multimedia/2008/1015-texaco-ordered-destruction-of-oil-spill-documents> (visited 3 December 2019).

and backfilling of approximately 250 waste pits and several spill sites were investigated, leaving the large majority of the contaminated sites out of the remediation activities. Also, remediation activities have been performed without supervision and, based on reports from several eyewitnesses, it has been argued that the practice was substandard and might even have spread further contamination in the environment.²⁹ Compensation involved rushed procedures to disburse payments to indigenous federations (representing only a part of the indigenous nationalities) for a total of 1 million USD, payment for the construction of educational facilities for another 1 million USD, the provision of an aircraft to be managed jointly by four indigenous federations and funds to four municipalities and the Sucumbíos Province, totalling to approximately 6.7 million USD.³⁰ The hurried nature of these disbursements and the lack of transparency on the agreements and on the way the monies were to be managed have been a source of continued contention in the area.

When Texaco and Chevron merged in 2001, the lawsuit continued with the surviving company, Chevron. In 2001, the US District Court for the Southern District of New York dismissed the lawsuit on grounds of *forum non-conveniens*, on the condition that Chevron agreed to litigate the issues in Ecuador, a decision upheld in 2002.³¹ Since then, the lawsuit has moved through the Ecuadorian judiciary and in 2013 the National Court of Justice finally decided that the defendant is responsible for socio-environmental damages.³² The claimants obtained a substantial award of approximately 9500 million USD for environmental remediation (treatment of waste, restoration of soil quality, and aquatic and terrestrial fauna and flora), provision of water services, implementation of mitigation measures for irreversible damage to human health and culture, community reconstruction and ethnical reaffirmation, compensation for public health problems and funding for the organization representing the claimants.³³ The decision is enforceable under Ecuadorian law, but Chevron refused to disburse the funds and, since the company has no assets left in Ecuador, the plaintiffs have had to initiate new legal proceedings in other countries to access the funds.³⁴

Before providing further detail on the international legal contentions around this case, it would also be important to contextualize it within broader national political

29 See Kimerling, above n 15, *Indigenous Peoples and the Oil Frontier in Amazonia*, at 501–506.

30 *Ibid.*, at 506–512.

31 The decision was taken on the basis of the *forum non conveniens* doctrine that empowers courts to decline jurisdiction if they consider that another court can hear a case more conveniently. See above n 1. See Joseph, above n 3, *Protracted lawfare*; See Kimerling, above n 15, *Indigenous Peoples and the Oil Frontier in Amazonia*, at 625.

32 Corte Nacional de Justicia, *Maria Aguinda Salazar y otros v. Chevron Corporation*, 11 December 2013.

33 Judith Kimerling, 'Oil, contract, and conservation in the Amazon: Indigenous Huaorani, Chevron, and Yasuni', *Colorado Journal Intentional Environmental Law & Policy* 24 (2013), at 43, at 75–76.

34 Supreme Court of Canada, *Chevron Corp. v. Yaiguaje*, SCR, 4 September 2015. The outcome of the case was unfavourable for the plaintiffs. On the accusations of unfair practices in the US courts levied against Chevron, see Marco Simons, 'What you Think you Know About Chevron and Steven Donziger is Wrong' (2015), *EarthRights International* <https://earthrights.org/blog/what-you-think-you-know-about-chevron-and-steven-donziger-is-wrong/> (visited 20 April 2020); James North, 'How a Human Rights Lawyer Went From Hero to House Arrest', 31 March 2020, <https://www.thenation.com/article/activism/steven-donziger-chevron/>.

processes. Ecuador has a vibrant civil society, in which indigenous people play a prominent role. The emergence of oil extraction as a presumed engine of national economic development has changed their relationship with the Ecuadorian state, moving them and their Amazonian territories from the sidelines to the centre of national debates.³⁵ Whereas up until the 1950s the Ecuadorian state treated them with (benign) neglect, the decision to capitalize on the rich natural resources in the Amazon has resulted in a more direct and often conflictive relationship. Although they have often been sidelined from national decision-making processes, they have nevertheless proven to be efficacious organizers in periodic uprisings that have in the past caused major national crises, even leading to the fall of governments.³⁶ Grievances arising from extractive processes are an increasingly important theme in the conflicts between indigenous groups and the state.³⁷

The growth of the environmental civil society in Ecuador has taken place simultaneously at the local and national level. In the Amazon, for example, affected (indigenous and *mestizo*) communities have formed local non-governmental organizations (NGOs) such as *Frente de Defensa de la Amazonía* (Amazon Defense Coalition) and the *Unión de Afectados y Afectadas por las Operaciones Petroleras de Texaco* (Union of People Affected by the Petroleum Operations of Texaco). These have been supported by entities operating out of Quito such as *Acción Ecológica*. These, in turn, were able to connect with international NGOs such as the Amazon Watch and legal campaigners such as Steven Donziger from the USA, who has played a leading role in formulating and executing the legal strategy discussed below. This multilayered network of civil society organizations has been effective in putting and maintaining the ChevronTexaco case in national and international consciousness. Celebrities such as Sting, Roger Waters, Brad Pitt, Trudie Styler, and Angelina Jolie have expressed their support. Local activists Pablo Fajardo Mendoza and Luis Yanza, who played important roles in the Texaco/Chevron case, were recognized with the prestigious Goldman Environmental Prize in 2008.³⁸

II. THE ECUADOR—UNITED STATES INVESTMENT TREATY AND THE CHEVRON ARBITRATION

IIAs in general, and bilateral investment treaties in particular, are arrangements between countries that are set up in order to promote and protect investment. The treaties' concrete aim is to create a stable and favourable institutional environment that facilitates the flow of investment across borders by way of reducing 'risks' for foreign investors.³⁹

35 Murat Arsel, Barbara Hogenboom and Lorenzo Pellegrini, 'The extractive imperative in Latin America', *The Extractive Industries and Society* 3 (2016), at 880.

36 Marc Becker, 'Ecuador's Social Movements, Electoral Politics, and Military Coups', *Oxford Research Encyclopedia of Politics*.

37 Lorenzo Pellegrini and Murat Arsel, 'Oil and Conflict in the Ecuadorian Amazon: An Exploration of Motives and Objectives', *July–December European Review of Latin American and Caribbean Studies* 106 (2018), at 209.

38 Alexander Zaitchik and Alexander Zaitchik, 'Sludge Match: Inside Chevron's 9 Billion Dollar Legal Battle in Ecuador' (28 August 2014), *Rolling Stone* <https://www.rollingstone.com/culture/culture-news/sludge-match-inside-chevrons-9-billion-legal-battle-with-ecuadorean-villagers-71779/> (visited 8 May 2020); Elizabeth Day, 'Trudie Styler: why I had to use my celebrity to try to save the rainforest', *The Observer*, 22 March 2009, <https://www.theguardian.com/environment/2009/mar/22/trudie-styler-environmentalist>.

The underpinning rationale justifying the existence of these agreements rests on the assumption that investment flows are conducive to socioeconomic development of sending and receiving countries—although any such straight and unqualified positive relationship between investment and development has been convincingly questioned.⁴⁰ The process of development, which should be stimulated through international investment, would then trickle down to benefit the population at large, which is also a highly disputed proposition even in the experience of rich countries.⁴¹ In the extractive industries, in particular, even focusing only on economic growth as a measure of success, the relationship between the extractive sector and the economy is elusive at best as demonstrated by the extensive literature on the ‘resource curse.’^{42,43} In fact, a political economy analysis of the socioenvironmental liabilities associated with the extraction of non-renewable resources indicates that increased extraction can produce episodes of ‘immiserizing growth’, where the increasing size of the economy contributes to phenomena of dispossession, lowered socioeconomic standards and narrowed down prospects of broadly conceived socioeconomic development for already marginalized sections of the population.⁴⁴

Although support for the adoption of IIAs is somewhat paradoxical, since their rationale rests on disputed and (in part) fallacious premises, these agreements allow for investors’ interests to prevail over other concerns since they create an asymmetrical litigation mechanism, the ISDS mechanism. Investor–state disputes are asymmetrical and redistribute power in favour of investors, since they allow companies to bring states to arbitration tribunals but not vice versa. As a result, they compress the policy space of the state and can undermine the rule of law.⁴⁵ Even more importantly in relation to the Texaco/Chevron case, this mechanism undermines competing rights that are potentially also affected by investment decisions—such as human and environmental rights.⁴⁶ Thus, concerned parties that are affected by investors’ operations experience a contraction of multiple rights: they have no access to arbitration tribunals, litigation

39 See Schneiderman, above n 8.

40 Dani Rodrik, ‘Populism and the Economics of Globalization’, 1–2 *Journal of International Business Policy* 1 (2018), at 12; Joseph-E Stiglitz, *Globalization and its discontents* (New York and London: Norton, 2002).

41 Daphne T Greenwood and Richard PF Holt, ‘Growth, inequality and negative trickle down’, 2 *Journal of Economic Issues* 44 (2010), at 403.

42 See Arsel, Hogenboom, and Pellegrini, above n 35.

43 Elissaios Papyrakis and Lorenzo Pellegrini, ‘The Resource Curse in Latin America’, in *Oxford Research Encyclopedia of Politics* (2019); See UNCTAD, above n 6, at 91–96; F Van der Ploeg, ‘Natural resources: Curse or blessing?’, *Journal of Economic Literature* 49 (2011), at 366.

44 Murat Arsel, Lorenzo Pellegrini and Carlos Mena, ‘Maria’s paradox and the misery of missing development alternatives in the Ecuadorian Amazon’, in Shaffer, P, R Kanbur, and R Sandbrook (ed), *Immiserizing Growth: When Growth Fails the Poor* (Oxford: Oxford University Press, 2019) 203–225; Lorenzo Pellegrini and Murat Arsel, ‘Oil and Conflict in the Ecuadorian Amazon: An Exploration of Motives and Objectives’, July–December *European Review of Latin American and Caribbean Studies* 106 (2018), at 209.

45 Alessandra Arcuri, ‘The Great Asymmetry and the Rule of Law in International Investment Arbitration’, *Yearbook on International Investment Law and Policy* (2018), at; See Rodrik, above n 40.

46 Lorenzo Cotula and Nicolás M Perrone, *Reforming investor-state dispute settlement: what about third-party rights?* (London: IIED, 2019) <https://pubs.iied.org/17638IIED/?a=Lorenzo+Cotula>. See also Lorenzo Cotula, ‘(Dis)integration in global resource governance: commercial pressures, human rights and investment treaties’ in this issue.

through domestic courts can be overturned by arbitration and, their influence on policy making is constrained since the states' policy space is limited in turn.

Another relevant issue for the Texaco/Chevron lawsuit is that protection on investment offered through IIAs is motivated by the desire of attracting new investment. Cognizant of the stable and safe institutional environment, investors acting in anticipation of the protection provided by the IIA are more likely to invest, or more likely to retain existing investment, in a country that is signatory to IIAs. In the specific case, the Ecuador—United States Bilateral Investment Treaty was concluded in 1993 after Texaco had already ceased to operate in Ecuador.⁴⁷ That is, the application of the treaty is offering protection to investors *a posteriori*. From the perspective of the Ecuadorian state and citizens, the Bilateral Treaty is creating an asymmetric system, bound to generate liabilities vis-à-vis foreign investors, without counterpart. In fact, the retroactive application of the treaty is devoid of substantive rationale since the Ecuadorian state is abdicating rights without any benefit in exchange.

The Ecuador—United States Bilateral Investment Treaty is germane to the Texaco/Chevron case since, although the case was still being litigated in Ecuador, Chevron used the ISDS mechanism under the investment treaty to initiate a case leading to a binding arbitration award. In 2009, the company brought the case to a tribunal constituted under the auspices of the PCA, located at The Hague in the Netherlands, claiming that the judiciary procedures in Ecuador engaged in 'unfair conduct'. In an odd twist, after arguing in the late 1990s and early 2000s that the US courts should dismiss the case since Ecuador was the appropriate and convenient forum to litigate, the company argued that the 'judiciary now lacks the necessary independence and institutional stability to adequately adjudicate highly politicized cases.'⁴⁸

Although the arbitration is divided in different tracks and the litigation continues, the partial award of the second track decided in 2018 ordered the Ecuadorian state to 'take immediate steps, of its own choosing (*sic!*), to remove the status of enforceability' of the court decision against Texaco/Chevron.⁴⁹ The assessment of compensation that the Ecuadorian state might have to pay to Chevron for the damage caused by the Ecuadorian judgment is part of the third track of the arbitration and not decided at the time of writing.⁵⁰ Effectively, the ISDS mechanism brought the focus on procedural issues related to the Ecuadorian judgment and away from the practices and impact of the Texaco operations. The arbitration might represent the last nail in the coffin for the quest of the Ecuadorian plaintiffs to obtain redress through the courts and hold Texaco/Chevron accountable.

III. RIGHT AND 'RIGHTS'

The Texaco/Chevron lawsuit initiated first in the US and then in Ecuador is a prominent attempt on the part of the affected stakeholders to use litigation as one of the

47 See, above n 2.

48 See Kimerling, above n 33, Oil, contract, and conservation in the Amazon, at 81.

49 Details of the international arbitration proceedings are available above n 2.

50 *Ibid.*, para 10.14.

strategies in environmental justice struggles.⁵¹ The recourse to the courts is part of an early wave of cases of judicialization of environmental conflict, itself part of a broader trend to bring to the courts and try to resolve via judicial means cases pertaining an ever-growing range of issues of political nature.⁵² In view of limited results that can be obtained through dialogue, the judiciary route has been adopted as one way to get redress related to environmental justice concerns and disputes over the socioecological distributive effects of extractive industries.⁵³ The Texaco/Chevron case shows how difficult it is to obtain effective redress through the courts and the investment arbitration process, based on the ISDS mechanism, played a crucial role in further obstructing the process.

The Texaco/Chevron case shows how ISDS mechanisms generate a number of conundra that go well beyond the specifics of the case. First of all, the investor–state dispute operated in a case where investor rights intersect human rights, but the arbitration mechanism did not reflect the importance of the latter and the fact that the protection given to investors would detract from human rights of individuals and communities affected by the way the investors operated. In fact, investor rights have been treated as insulated from and privileged if compared to other rights, which is highly problematic. The arbitration also undermined the right of access to justice of the claimants in the Texaco/Chevron case, since it rendered unenforceable a final judgment of the Ecuadorian judiciary and by so doing effectively deprived the claimants of a judiciary forum to decide on their claim. Also problematic is the effect that the ISDS mechanism has on the basic feature of modern states: division of powers. The arbitration award orders the Ecuadorian state to render unenforceable a final judgment creating a conflict of competence between the executive and the judiciary. In fact, the 2008 Ecuadorian Constitution prohibits entering into ‘treaties or international instruments where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities’.⁵⁴ The Ecuadorian state, following the constitutional mandate, unilaterally denounced the Ecuador—United States Bilateral Investment Treaty in 2018 and the agreement is currently terminated.⁵⁵ However, the survival clauses included in the treaty provide for a sunset period of one decade and the arbitration clauses will continue to be effective

51 Joan Martínez-Alier, *El caso Chevron Texaco en Ecuador: una muy buena sentencia que podría ser un poco mejor* (ALAI, América Latina en Movimiento, 2011).

52 Ran Hirschl, ‘The judicialization of politics’, in *The Oxford handbook of political science* (Oxford: Oxford University Press, 2008); Rachel Sieder, Line Schjolden and Alan Angell, *The judicialization of politics in Latin America* (Dordrecht: Springer, 2005).

53 See Orta-Martínez, Pellegrini, and Arsel, above n 13, ‘The squeaky wheel gets the grease’?

54 Republic of Ecuador, *Constitution of the Republic of Ecuador* (Quito, 2008), art. 422.

55 In fact, the 2008 Ecuadorian Constitution has many advanced provisions to protect nature and transition away from an economic structure centre on extractive industries Alberto Acosta, *El Buen Vivir en el camino del post-desarrollo Una lectura desde la Constitución de Montecristi* (Quito: Fundación Friedrich Ebert, FES-ILDIS, 2010); Eduardo Gudynas, ‘La ecología política del giro biocéntrico en la nueva Constitución de Ecuador’, 32 *Revista de estudios sociales* (2009), at 34. Although these provisions did not have a direct bearing on the Texaco/Chevron case they, together with the activities of the environmental and indigenous movements, are constitutive of the current zeitgeist of the country.

till 2028.⁵⁶ The Ecuadorian government is currently in an impossible position, between an arbitration decision, the due respect of judiciary independence, the constitution and the duty to further the interest of Ecuadorian citizens.

IV. TAKING STOCK AND MOVING FORWARD

The Texaco/Chevron case is a prominent, and in many ways bold, attempt of people affected by a multinational company to use the judiciary to hold the corporation accountable and obtain justice in relation to the impacts of its operations on human and environmental rights. The claimants initiated the litigation in 1993 in the USA where it was dismissed in 2002, on the basis of a *forum non-conveniens* decision, and then the suit moved to Ecuador. The final judgment by the Ecuadorian judiciary was issued in 2013 and awarded approximately 9.5 billion USD to compensate and, as far as possible, remediate the socioenvironmental impacts of Texaco's operations in the Ecuadorian Amazon. Meanwhile an arbitration process, initiated through the ISDS provision included in an investment agreement between the USA and Ecuador, resulted in a decision ordering the Ecuadorian state to render the judgment unenforceable. Further arbitration decisions on compensation are pending and could generate large liabilities for the Ecuadorian state, imposing the payment of substantial damages to Chevron.

Although it is always challenging to hold corporations accountable, especially in countries characterized by weak governance,⁵⁷ the Texaco/Chevron case shows how companies can leverage upon ISDS mechanisms to undermine the few existing opportunities to effectively appeal to the judiciary for individuals and communities whose rights are violated by corporations. Effectively, the arbitration process between the Ecuadorian State and Chevron focused on procedural aspects of the judgment in Ecuador, but produced effects on the rights of Ecuadorian claimants, who were not parties to the arbitration process. The ultimate result is that the Ecuadorian plaintiffs now have no forum to further their interests in the courts and they have been denied access to justice.

Although the Texaco/Chevron case might be an outstanding example of the political economy of corporate impunity, there are a number of corporations that used similar strategies to shy away from their responsibilities.⁵⁸ Considering the asymmetrical power relations that are engendered by the use of arbitration mechanisms, social movements and especially human rights and environmental activists are asking for ISDS

56 'Ecuador—United States of America BIT' (1993), *UNCTAD Investment Policy Hub* <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1337/ecuador---united-states-of-america-bit-1993> (visited 16 April 2020).

57 Catherine Coumans, 'Alternative accountability mechanisms and mining: the problems of effective impunity, human rights, and agency', 1–2 *Canadian Journal of Development Studies/Revue canadienne d'études du développement* 30 (2010), at 27.

58 Robin Broad, 'Corporate Bias in the World Bank Group's International Centre for Settlement of Investment Disputes: A Case Study of a Global Mining Corporation Suing El Salvador', *U Pa J Int'l L* 36 (2014), at 851; Lora Verheecke et al, *Red Carpet Courts* (Friends of the Earth Europe and International, the Transnational Institute (TNI) and Corporate Europe Observatory (CEO), 2019) <https://www.tni.org/en/redcarpetcourts>.

mechanisms to be abolished as well as working to prevent the signing of new IIAs that include ISDS provisions.⁵⁹

The lack of legitimacy of IIAs also leads to calls for the radical transformation of investor–state arbitration in order to make them functional to the effective promotion of socioeconomic development. Thus, IIAs could gain legitimacy if the ISDS mechanisms are transformed into symmetric tools, in such a way that states and third parties could use arbitration tribunals to obtain redress for the impacts of investors' operations. On the one hand, given the financial implications of hiring law firms and the expertise necessary to navigate ISDS, the intricacies and duration of the arbitration process would hardly make for a level playground for stakeholders taking on multinational companies. A particular concern is the close-knit nature of the arbitrator profession and the organic relationship of law firms with corporate interests.⁶⁰ In fact, arbitrators, law firms and academics have been identified as the ultimate beneficiaries of the current arbitration system and as constituting an 'oligarchy'.⁶¹ On the other hand, when it comes to providing venues to address the impacts of investment operations, such a system would still provide an opportunity to address the shortcomings of weak domestic institutions—such as an ineffective judiciary.⁶² In fact, arbitration mechanisms could become a venue for starting litigation in countries whose institutions, especially the judiciary, are irresponsive to the citizens' rights. In other words, arbitration mechanisms could be turned over their heads and become a significant accountability mechanism and a stimulus for investors to operate responsibly. In any case, arbitration processes should take into account options to allow participation of third parties, dismissal of claims in case third parties cannot participate and reframing of claims when needed.⁶³

Meanwhile, taking stock of the current level of corporate power exercised by multinational corporations who hold sway over states and bar them from effectively enacting policies that establish certain citizens' rights to the disadvantage of investor rights, several social movements have been arguing that national governments should act preemptively. In fact, some countries have set moratoria on extractive industries' projects, in part due to the risks associated with corporate impunity and investors' power to constrain human and environmental rights and because of the associated financial liabilities that could be generated for the states—the establishment of mining moratoria in El Salvador and Costa Rica are cases in point.⁶⁴ The concern is not limited to the developed world, as exemplified by the case *Rockhopper v Italy* that started in 2017

59 See, 'Stop ISDS: Rights for People, Rules for Corporations' (2019), *Stop ISDS* <https://stopisds.org/> (visited 17 December 2019).

60 Florian Grisel, 'Marginals and Elites in International Arbitration', in *Oxford Handbook of International Arbitration* (Oxford: Oxford Handbook of International Arbitration, Forthcoming, Forthcoming).

61 Muthucumaraswamy Sornarajah, *Resistance and change in the international law on foreign investment* (Cambridge: Cambridge University Press, 2015), at 383.

62 Erasmus Institute for Public Knowledge, 'Open Letter on the Asymmetry of ISDS' (2019), <https://www.eur.nl/en/news/erasmus-institute-public-knowledge> (visited 16 December 2019).

63 IISD, 'UNCITRAL and Reform of Investment Dispute Settlement' (2019), *IISD* <https://www.iisd.org/project/uncitral-and-reform-investment-dispute-settlement> (visited 16 December 2019).

64 See Broad, above, n 58. Robin Broad and John Cavanagh, 'Poorer countries and the environment: friends or foes?', *World Development* 72 (2015), at 419; Rose J Spalding, *Transnational Activism and National Action: El Salvador's Anti-Mining Movement* (Tulane University, 2011).

because the state decided not to award an offshore oil concession to the company.⁶⁵ The latter case is based on the Energy Charter Treaty and is being litigated before an International Centre for Settlement of Investment Disputes (ICSID) tribunal. ICSID is an international arbitration institution, based in Washington, D.C, that is part of and funded by the World Bank Group.⁶⁶ The Ombrina Mare Concession⁶⁷ at the root of the litigation has been particularly contentious because of the potential socioeconomic and environmental impacts of the operation ultimately leading the state to block the concession after the exploration phase. Rockhopper is using a specialist arbitration funder (a third-party funder) on a non-recourse ('no win – no fee') basis, leveraging on the asymmetrical power distribution to essentially seek an advantage and be compensated for the loss of prospective profits at no cost—potentially leading to a compensation of up to 350 million USD.⁶⁸ The liability claim caused a public outcry and on the basis of this claims and following widespread opposition to specific oil concessions, the Italian Parliament enacted in 2019 a temporary moratorium on oil prospecting.⁶⁹

Although currently the international institutional architecture is contributing to a regime of systematic corporate impunity, the situation is also adding to the legitimacy crises of international investors' protection mechanisms – a process akin to Polanyi's 'double-movement': a push to extend market forces disembedding them from society followed by social reaction against the push.⁷⁰ Cognizant of the issues associated with investors' protection, a range of strategies are being put in place by coalitions of concerned citizens, social movements, activist scholars, and state authorities. These strategies include attempts to radically revise the IIAs, transforming them into symmetrical mechanisms, or at least into mechanisms that do not affect third-party rights. Simultaneously, the shortcomings are fuelling resistance to the signing of new IIAs and contribute to moratoria pre-empting investments in extractive industries that are most prone to generating human and environmental rights violations. Taken together, these strategies are contributing to calls for a long-overdue radical revamping of the current international architecture protecting international investors to the detriment of competing rights.

65 See Verheecke et al, above n 58.

66 See, 'Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14' (2019), *italaw* <https://www.italaw.com/cases/5788> (visited 6 December 2019).

67 See, 'Ombrina' (2019), *Coordinamento nazionale No Triv* <https://www.nostriv.com/tag/ombrina/> (visited 6 December 2019).

68 See Verheecke et al, above n 58.

69 See, (*Decreto Semplificazioni, dalle trivelle alle assunzioni*, 2019)

70 K Polanyi, *The great transformation: the political and economic origins of our time* (Beacon Hill: Beacon Press, 1944).