I. Introduction: The Relationship between Investment Law and Human Rights Law

Investment and human rights law share some features, notably, the fact that are asymmetrical by nature, as both grant individuals rights and protection from State interference while referring virtually all treaty obligations to the State. But they also have important differences. Few human rights treaties provide access to international courts, and when they do, the exhaustion of local remedies is a precondition to bring a claim. Instead, in the majority of international investment agreements (IIAs), the investor often has immediate access to investor-State Dispute Settlement (ISDS) usually under the form of arbitration, a truly ‘anomaly’ in the general context of international law. While some legal research conceptualizes their relationship as opposing fields of law with colliding policy interests as well as contradictory rules and regulations, other argues that a human rights dimension can be recognized in international investment law.

In any case, the relationship between international investment and human rights represents a troublesome matter to the States, who must balance the compliance with their international obligations under human rights instruments, with the protection of the interest of the investors guaranteed by IIAs. In a fragmented international legal order, commitments to protect foreign investment can potentially interfere with the duty of the States to fulfill their obligations under human rights instruments. Moreover, it is claimed that international investment law may trigger a ‘regulatory chill’ for national legislation, particularly with respect to human rights.
This scenario can become even more complex when States face parallel cases in both human rights and investment jurisdictions, based on the same set of facts. The existence of such dual litigation put States in the position of having to justify compliance of their international commitments in both fields, and actually serve as a test to evidence if there is a tipping point in favor of one of them, not only through the examination of the State’s position as a respondent in each case, but most importantly, through the study of the interaction (or the lack of thereof) among both fora.

This paper examines certain questions that arise when international tribunals have to decide parallel investment and human rights cases brought against the same State. Is there any interaction between both type of tribunals? Do the decisions of one tribunal influence the other? Have the decisions a different interpretation of the law? Are there any consequences derived from the different role of the respondent State in both types of disputes?

The experience of Latin America can be useful to exemplify this dilemma for States, considering that is on the one hand, the region with more ISDS cases in the world, and on the other hand, a region with a dedicated court system for the protection of human rights. For that reason, this paper examines disputes that have been brought in parallel to both human rights an investment arbitration tribunals against Peru and Ecuador, analysing if the outcomes in both cases share certain legal principles, or are in contradiction by nature, and the consequent impacts on the State’s autonomy to develop a regulatory framework that protects both human rights and foreign investors. In order to provide a comparative perspective, parallel cases brought against Russia both before the European Court of Human Rights (ECtHR) and several investment arbitral tribunals will be briefly addressed.

The content of this paper is structured as follows: Section II illustrates the changing attitude of some countries of the region towards foreign investment and human rights. Section III studies the interaction between the investment and human rights cases against Peru, with a special
emphasis into the impacts on the State’s position on both cases, while Section IV applies the same focus to the cases against Ecuador. Section V deals with the comparative analysis with the ECtHR, and finally, Section VI presents the conclusions on the relationship between foreign investment and human rights dispute settlement in Latin America.

II. Foreign Investment and human rights in Latin America: a shifting sailboat

In 1971, the Uruguayan novelist Eduardo Galeano described Latin America as “the region of open veins”, in the light of the historically controversial relationship between the Latin-American countries and foreign powers, especially the United States of America (US) and Europe. Galeano depicted a negative interpretation of the impact of free trade and foreign investment on the region by stating that “everything, from the discovery until our times, has always been transmuted into European— or later United States— capital, and as such has accumulated in distant centers of power”.

There is ample evidence of the stormy connection between Latin American countries and foreign companies, since the arrival of the European colonialism in the late 15th century to these days. Yet, the position of the Latin American governments has been wavering from a complete support to the foreign investors to an intransigent opposition to its participation on their economies, characterized by several events of discrepancy and contradiction.

Indeed, this thorny relationship has a clear example on the attitude with respect to ISDS in the region. While in 1964, 19 Latin American countries voted against the establishment of the International Centre for Settlement of Investment Disputes (ICSID), in the 1990s, the majority of those countries concluded bilateral investment treaties (BITs) in large numbers and ratified the ICSID Convention (the most used forum for ISDS). At the same time, several countries of
the region also include investment chapters in the negotiation of free trade agreements (FTAs).¹¹

Today Latin America is the region with the highest number of ISDS cases, Argentina being the most frequent respondent State, followed by Venezuela, and with Ecuador also ranking within the top ten respondent States.¹² Claims against Latin American countries registered at ICSID represent around 30% of the total number of cases until December 2016.¹³

The reactions of Latin American countries to this reality have been diverse. Some countries like Bolivia, Ecuador and Venezuela, have taken a stronger stance against the system, denouncing the ICSID Convention and terminating IIAs.¹⁴ However, the large majority of Latin American countries are still an integral part of the ISDS system. That includes Argentina, the main respondent State on ISDS, although that country did not signed new investment treaties for the past fifteen years, a policy recently changed with the signature of a BIT with Qatar in November 2016.¹⁵ Other countries have confirmed their adherence to the system but promoted important improvements with respect to ISDS in the investment treaties they have signed in recent times. This is the case in Chile, Colombia, Mexico and Peru, where an investment chapter addressing these issues¹⁶ has been included in a regional trade bloc—the Pacific Alliance.¹⁷

In contrast, Latin American countries have been early adopters of human rights instruments. Eight months before the proclamation of Universal Declaration on Human Rights, the American Declaration of the Rights and Duties of Man (1968) was already adopted, becoming the first human rights instrument in the region. Later, the adoption of the American Convention on Human Rights (1969), also known as “Pact of San José”, established a regional system of human rights based on two institutions: the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). Collectively, these entities conform the Inter-American Human Rights System (IAHRS).
Most Latin American countries have undertaken reforms to ensure human rights at a domestic level, recognising not only the existence of civil and political rights (CPR) but also economic, social, and cultural Rights (ESCR), and even guarantee collective rights. But the effective exercise of ESCR is far from being reached, given the prevailing context of social inequalities and exclusion in the region. There is also still a debate between the nature of these rights in terms of states’ obligations, with CPR seen has negative obligations on the part of the state, while ESCR should be implemented through positive actions that require public funds.18 At the same time, some States of the region are questioning the external control on human rights protection that is provided by the IAHRS. While some countries have formally left the system, like Venezuela which denounced the Pact of San Jose,19 others have denied or limited the binding character of its decisions, like Argentina, Dominican Republic and Guatemala.20

Human rights issues have been relatively slow to emerge in investment law. Indeed, no explicit reference to human rights is found in most IIAs.21 In the region, the notable exception are six Cooperation and Facilitation Investment Agreements (CFIAs), concluded by Brazil in the past two years with Angola, Mozambique, Malawi, Chile, Colombia and Mexico, the Brazil-Peru Economic and Trade Expansion Agreement (2016), the Pacific Alliance Protocol (2014), and the Colombia-Costa Rica FTA (2013), which have expressly included the protection of human rights as part of the provisions on corporate social responsibility (CSR).22 On investor-state dispute settlement (ISDS) the reference to human rights has been occasional and limited to provide guidance to the arbitrator in order to interpret substantive protections established in favor of foreign investors.23

Similarly, there are few allusions to investment law in human right cases. One of the few that explicitly refers to investment law is Claude Reyes and others v. Chile, where the IACtHR decided on the international responsibility of the State for the refusal to provide information on a foreign investment contract related to a forest industrialization, as well as the lack of an
adequate and effective resource to challenge such a decision. It was also reported that in October 2005, a Chilean businessman presented a claim against Peru before the IACHR, derived from a contentious investment in that country (the ‘Lucchetti case’) that was abandoned in 2006.²⁴

In the next section we will examine some of the few cases that have been brought in parallel against countries of the region (Peru and Ecuador), on both human rights and investment international tribunals.

III. La Oroya and Renco cases against Peru

A. La Oroya complex

Mining industry has become one of the important drivers of economic growth in Peruvian economy. However, the development of the mining in Peru has had many health and environmental costs for the communities where this activity is taking place. In 2012, a series of demonstrations in the cities of Cajamarca, Espinar, and La Oroya arouse national attention due to the violent response of the local authorities against civil society organizations protesting against harmful actions of the mining companies.²⁵

La Oroya is a city of over 33,000 inhabitants, located in the central Andean region of Peru, in the department of Junin, 176 km from Lima and 125 km from Huancayo (capital of the department). The city was built around a metallurgical smelter of copper, lead and zinc established in 1922 and operated by a US company (American Cerro de Pasco Corporation), until its nationalization by the Peruvian State in 1974. Centromin, a state-owned company operated the smelter from 1974 to 1997, which since then was run by the Doe Run Peru (DRP), a subsidiary of the Renco Group Inc, a holding company of a family office, owned by Ira Rennert, an American billionaire, which includes other subsidiaries in that countrz, like Doer Run Resources.²⁶
In 1996, Centromin presented its “Programa de Adaptación y Manejo Ambiental” (PAMA or “Adaptation and Environmental Management Program”), a ten-year plan designed to ensure the compliance of the activities of the company with Peruvian environmental rules. A year later, Centromin transferred the ownership of the metallurgic complex to DRP through a contract in which the Peruvian State agreed to clean the polluted soils where the complex operated from 1922 to 1997. According to that contract, DRP should execute most of the remaining obligations under the PAMA, which included the implementation of nine projects with a cost of 107.6 million dollars. In addition, DRP assumed the liability in case of any possible modification to the PAMA according to the Peruvian law during a period of ten years, which terminated in 2007.27

Specifically, DRP committed to build: three sulfuric acid plants in order to mitigate the sulphur dioxide (SO₂) emissions from the copper, zinc, and lead plants located in La Oroya; a water treatment plant for the copper refinery, a wall for the zinc plant to prevent acid spills, and new warehouses for arsenic, copper and lead residues to prevent any contamination to a nearby river. DRP agreed to complete the construction of that infrastructure in a period of 10 years.28

DRP obtained the modification of the PAMA in several occasions, as well as an extension of the period in which the projects should be completed. Thus, in 1999 the capacity of the sulfuric acid plant was reduced, and in 2005 a decree authorized the Peruvian Ministry of Energy and Mining (MEM) to grant extensions to DRP to comply with the requirements of the PAMA. However, neither the State nor the company fulfilled the obligations imposed by the PAMA. When the operation of the complex ceased in June 2009, DRP had only built one of the infrastructure comprised on the original PAMA.29 The Peruvian authorities did not fulfilled their obligation to clean up the soil, under the excuse that it would be a waste of resources as the company continues its polluting activities in the area. As a result of the
actions of the company and the permissive attitude of the State, La Oroya was ranked as one of the ten most contaminated cities in the world in 2006.30

The contract signed by Centromin and DRP for the transfer of the ownership of La Oroya complex in October 1997 stated that Centromin and the Peruvian State will assume “the liability for any damages, loss and claim by third parties for the activities of Doe Run Peru, Centromin or its predecessors”, while the new owners are working to improve the complex through the development of environmental projects.31 In other words, DRP was virtually immune from liability for the period of execution of PAMA, excluding only those claims that were attributable exclusively to its actions outside the framework of the PAMA and its extensions..

In 2009, DRP filled a voluntary bankruptcy under Peruvian law and initiated a liquidation process to comply with its financial obligations. The company argued that its negative balance was a result of the rejection of Peruvian authorities to extend the PAMA in 2009, as well as the effects of the financial crisis of the international markets in 2008-2010. After the judicial investigation, the Peruvian agency in charge of the bankruptcies (‘Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual’ – INDECOPI) recognized the Peruvian State as the first creditor in the liquidation process, for a debt of the company with the MEM of USD 163 million for breach of La Oroya complex’s PAMA.32 The second creditor in the liquidation process was the parent company of the Renco Group, Doe Run Cayman Limited.33

B. The harmful effects of La Oroya complex

The effects of lead are well known and range from subtle learning and behavior impairment to seizures, coma, and death. Lead can be carried from maternal to fetal circulation through the placenta and enter the growing fetal brain. Exposure of the fetus to lead, even at minimum
maternal blood levels, adversely affects brain development. Children are especially vulnerable to lead’s adverse health effects. At very high blood concentrations, lead can cause encephalopathy (brain damage), coma, or death. In adults, high levels of lead are related to hypertension and cardiovascular disease.34

Between 1999 and 2005, several important studies were conducted to measure the lead levels in the blood La Oroya’s population, conducted separately by a consortium of local NGOs (Consorcio Unión para el Desarrollo Sostenible - UNES), the Peruvian Environmental Health agency (DIGESA), DRP and a group of Peruvian medical scholars. With some variations, all studies concluded that the levels exceeded the World Health Organization (WHO) standards, especially for children. A technical study ordered by the Peruvian government concluded in 2004 that 99% of air pollution of SO₂, lead, arsenic and cadmium resulted from the operation of the metallurgical complex and the activities of DRP in the area.35

When the local population began to discuss the results of the studies with DRP, and to request the adoption of protective measures, the response was not just a flat denial and disinformation campaigns, but even more, stigmatization and attacks to those who dared to protest. DRP helped to build an atmosphere of distortion among the residents of La Oroya, threatening to fire any worker of the company that cooperated with the NGOs that lead the protests against DRP. The Ministry of Health, the Ministry of Interior and the Municipality of La Oroya, also initially denied the problem or attempted to discourage the protests against DRP and the operation of the smelter.36

C. The case of La Oroya community against the Republic of Peru

The harmful effects of La Oroya complex triggered a series of legal suits against the Peruvian State before domestic courts, that ended up with a 2006 decision of the Constitutional Court of Peru ordered to implement a series of measures in order to identify and address the environmental and health problems of La Oroya population in the short and long term.37
In 2007 and 2008, the legal battle also moved to the US courts, when a group of American and Peruvian lawyers filed a suit against Renco, Doe Run Resources and their affiliated entities and several executives of those companies in the Missouri State Court, where the headquarters of the parent company are located. \(^{38}\)

In parallel to the legal actions before Peruvian and US courts, on 21 November 2005, a consortium of local and international NGOs\(^{39}\) initiated legal actions against the Peruvian State in the IAHRS requesting precautionary measures in favour of 65 victims of the emissions of the smelter. A precautionary measure was granted on 31 August 2007, and the IACHR ordered the Peruvian State to “adopt relevant measures to establish a specialized medical diagnostic for the beneficiaries; provide specialized and adequate medical treatment for the persons for which the diagnostic will evidence a risk of irreversible damage for their physical integrity or their life; and coordinate with the complainants and the beneficiaries in the implementation of such measures.”\(^{40}\)

On 27 December 2006, the same group of NGOs filed a petition before the IACHR accusing the Peruvian State for the violation of the right to life, human treatment, privacy, freedom of thought and expression, right to a fair trial, and right to judicial protection of the ACHR. The petition also includes allegations of violation of article 19 of the Convention on the Rights of the Child, in consideration to the adverse effects on the child population of La Oroya.\(^{41}\)

The Peruvian State addressed these allegations by describing all the relevant activities and investments that Centromin conducted to enhance its environmental performance and to mitigate any potential impact on the health of the citizens of La Oroya, claiming fully compliance with the PAMA, and highlighting the State’s health service agencies implementation of a comprehensive strategy to face the problems arising from the toxic emissions. Moreover, the State declared that “after the verdict of the Constitutional Court, DIGESA conducted a full diagnosis, which included an inventory of the complex’s emissions,
the monitoring of the air quality close to the site, and epidemiologic studies that serves as the foundations of the Plan to Improve the Air Quality for the Atmospheric Basin of La Oroya”.

Despite the efforts of the Peruvian State to prove its diligence to act and protect the environment and the health of the citizens of La Oroya, the IACHR ruled that “the facts described by both parties could be declared as a violation of the ACHR [American Convention on Human Rights]” and on 5 August 2009, declared the complaint admissible. Petitioners are now waiting for the final report on the merits from the Commission, a process that has been severely delayed, due to the fact that the IACHR has been affected by years of budget restrictions due to the lack of enough funding from the States.

On 3 May 2016, the IACHR decided to extend the scope of the precautionary measure granted in 2007 to an additional group of 10 women and 4 men of La Oroya. The IACHR requested Peru to adopt the necessary measures to preserve the life and personal integrity of those 14 persons, carrying out the necessary medical assessments to determine the levels of lead, cadmium and arsenic in blood, in order to provide adequate medical attention, in accordance with international standards; and to provide information on the actions adopted to investigate the facts in order to avoid repetition.

In this IACHR decision and in the one that declared the complaint admissible there is a no mention of the existence of investment disputes between Doe Run and Peru, neither under Peruvian and US Courts, nor under ISDS, as it will be explained in the following section.

D. The ISDS case against Peru

On April 2011, the Renco Group, Inc., on its own behalf and of its affiliate DRP, submitted a complaint against Peru and its wholly-owned mining company Activos Mineros S.A.C. under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), for claims arising out of Renco’s investment in La Oroya complex, claiming
full reparation for Peru’s alleged violations of the US-Peru Trade Promotion Agreement (TPA), and of the Stock Transfer Agreement (STA) signed in October 1997 between the Peruvian State and DRP, which qualify as “investment agreement” under the provisions of the TPA.

According to the company, “Peru’s unfair refusal to timely grant reasonable PAMA extensions and its disparaging public campaign against Renco and DRP have created a hostile investment environment and have prevented DRP from securing new financing necessary to resume operations of the Complex. [...] Peru and Activos Mineros refused to honor their commitment to appear in and defend and assume responsibility and liability for the lawsuits”, in a direct reference to the lawsuits filed against Renco and Doe Run in Missouri.

Renco Group claimed no less than 800 million USD in damages alleging that it has been victim of unfair and inequitable treatment and that the government of Peru has failed to afford them full protection and security and national treatment, and to observe any obligations into which it entered. The company also asked for a declaration that Renco and DRP have no responsibility or liability for any damages that the plaintiffs in the lawsuits filed against them in the US, or any similar lawsuit, and that Peru is required to appear in and defend those lawsuits and to assume responsibility and liability for any damages that may be recovered.

On 15 July 2016, the ISDS arbitral tribunal dismissed Renco’s claims based on lack of jurisdiction, declaring that Renco failed to comply with formals requirement of the US-Peru TPA, and therefore the case was decided in favor of the Republic of Peru.

Possibly because this decision is not about the merits of the dispute, the Renco award on jurisdiction does not acknowledges La Oroya case before the IACHR. Interestingly, the decision includes comments on human rights case law of the ECtHR while pondering on the application of the principle of severability of an arbitration agreement from the main contract in which such an agreement is contained. However, the arbitral tribunal finally did not rule on
this issue, after concluding that no arbitration agreement ever came into existence as a result of Renco’s non-compliance with the US-Peru TPA.51

As we can see, although a group of parallel cases against Peru have been initiated under the same set of facts – the harmful effects of La Oroya complex – before a human rights regional system (IACHR) and an ISDS arbitral tribunal, there is virtually no relationship between the human rights and the investment cases pending at international fora. In contrast, the domestic litigation against Doe Run in US Courts proved to be not only aware of the ISDS case, but its mere existence affected substantially the applicable jurisdiction and the overall procedure, as in 2011, Doe Run successfully removed the cases from the Missouri State Court to the federal level, based the fact that were related to a pending arbitration between the company and the Peruvian State.

IV. The Chevron/Texaco and the Kichwa Peoples of the Sarayaku Community cases against Ecuador

A. Texaco oil operations and Ecuadorian indigenous communities

In 1964 Ecuador signed a contract with Texaco Petroleum Company (TexPet), an affiliate of the American company Texaco, to exploit oil fields in the Northeastern region of the country. TexPet entered into a joint-venture with the Ecuadorian state-owned company, PetroEcuador, which was the majority shareholder, while TexPet was the deemed the “operator” of the entity and was authorized to design, procure, install, manage, and operate the infrastructure for the operation.52

The company began full-scale production in 1973 in almost a nonexistent regulation of the social and environmental effects of the oil extraction. However, the 1971 Ecuador’s Law of Hydrocarbons did require field operators to “adopt necessary measures to protect flora, fauna and other natural resources” and “prevent contamination of water, air, and soil”.53 This
requirement was included in the contract signed with TexPet in August 1973 and in an additional agreement signed in December 1977. Additionally, other generally applicable laws on pollution control were in force around the same time, like the Law of Waters (1972), the Law of Fisheries (1974) and the Law for the Prevention and Control of Environmental Contamination (1976).

During more than two decades of drilling in Ecuador, TexPet ran a profitable business drilling 339 wells and built 18 central production stations in over a million-acre concession and extracted approximately 1.4 billion barrels of crude oil. As counterpart of this, the oil extraction had a disastrous outcome for the water and the biodiversity of the region.

The main sources of environmental damage from TexPet operations were the leakage or discharge of contaminated water and drilling wastes held in unlined pits, the accidental discharge from the trans-Ecuadorian pipeline and subsidiary pipelines operated by Texaco; and, the deliberate dumping and spraying of oil and drilling wastes. Additionally, the operations of the company intervened ecosystems and the ancestral land of several tribes and indigenous population from the Amazonian region of Ecuador.

B. Litigation before US and Ecuadorian courts

In November 1993, a group of claimants representing more than 30,000 people from eighty communities in the Ecuadorian Amazon, including five indigenous nationalities: Siona, Secoya, Cofán, Waorani, and Kichwa, inhabitants of the areas where TexPet conducted its operations in Ecuador, filed a class action suit against Texaco before the federal courts of New York, under the Alien Tort Claims Act (‘Aguinda v. Texaco’). The plaintiffs alleged that they had suffered personal injuries and “are at a significantly increased risk of developing cancer as a result of exposure” to the disposal of untreated hazardous wastes resulted from the operation of the company. Texaco moved to dismiss the action, among other grounds,
based on *forum non conveniens* – the idea that any suit related to its operation in Ecuador should be filed in an Ecuadorian court, declaring that those courts were a fair and adequate alternative forum.\(^{61}\)

In 2002, the case was finally dismissed on the grounds of *forum non conveniens*. The Second District Court of New York decided in favor of litigation in Ecuador, stating that the lawsuit had “everything to do with Ecuador and nothing to do with the United States”.\(^{62}\) The Second Circuit Court of Appeals affirmed, considering that Ecuadorian courts would be a more appropriate jurisdiction for the trial.\(^{63}\) Finally, in 2003, the case was filed in Ecuador, where the Court of Justice in Nueva Loja accepted it on 14 May 2003.\(^{64}\)

In an attempt for prevent the consequences of the lawsuit that would be filed before the Ecuadorian courts by the plaintiffs of the Aguinda case, Texaco made a settlement agreement with the Ecuadorian government to remediate any environmental damage resulted from the activities of the oil extraction in the areas close to the exploitation sites. Texaco also agreed to implement remediation work on certain waste pits and make payments for socioeconomic compensation projects. As counterpart, the Ecuadorian government agreed to release TexPet and Texaco from any from all claims, obligations, and liability related to contamination from its operations. In 1998, the government of Ecuador released TexPet from future clean up obligations after it cleaned up more than 100 sites.\(^{65}\)

In May 2003, a small group of the original Aguinda plaintiffs filed a new lawsuit against Chevron (which absorbed Texaco in 2002) before the Superior Court of Justice of Nueva Loja in Lago Agrio, Ecuador. Following the arguments presented during the proceeding before the US courts, the plaintiffs asked the court to determine the cost of full remediation to be borne by Chevron, and additionally alleged fraud in the Texaco’s conduct of the voluntary remediation and release for liability with the Ecuadorian government, according to the
agreement signed by those parties referred before.66

The case stir up national attention in Ecuador as the plaintiffs found in the government of President Rafael Correa a main supporter. He repeatedly sided with the plaintiffs, calling Chevron “shameless scoundrels who knew they had contaminated, but with their millions wanted to go unpunished”.67 Texaco alleged for the politicization of the case and the biased behaviour at the Ecuadorian courts.68 After a seven-year trial, the Court of Nueva Loja found Texaco-Chevron liable for pollution caused and issued a US$ 8.6 billion judgement against the company, plus 10% compensation to the plaintiffs, which would be increased to US$19 billion if Texaco-Chevron did not promptly issue a public apology to the communities.69 The decision was ratified by a court of appeals and later, in November 2013, the National Court of Justice of Ecuador affirmed the judgement, but reversed awarding punitive damages and reduced the total amount of the judgement against Texaco-Chevron to a total of US$9.5 billion.70

After the publication of the final decision of the Aguinda case in Ecuador, the focus of the discussion between the plaintiffs and Chevron turned into the enforceability of the award before the US courts. From early on, some analysts had concluded that the verdict of the Ecuadorian Courts was probably unenforceable outside Ecuador given the lack of local assets of the company.71 Moreover, already in 2011, Chevron initiated a strategy to delay any kind of enforcement of the award and even filed a lawsuit against the lawyers that represented the victims in the case before the Ecuadorian courts.72

In 2011, Chevron initiated an action under the Racketeer Influenced and Corrupt Organizations (RICO) Act, against the Lago Agrio plaintiffs and their counsel Steven Donzinger and his law firm, alleging that the plaintiffs procured the Lago Agrio Judgment by a variety of unethical, corrupt, and illegal means. On 4 March 2014, the U.S. District Court
for the Southern District of New York ruled that the $9.5 billion Ecuadorian judgment was procured through, *inter alia*, defendants’ bribery, coercion, and fraud, finding it unenforceable. On 8 August 2016, the US Court of Appeals for the Second Circuit unanimously affirmed the lower court ruling and declared that the plaintiffs, Donziger and other members of the legal team committed fraud and RICO violations.

C. *The Kichwa Peoples of the Sarayaku Community and its Members v. the Republic of Ecuador*

On 19 December 2003, the Association of Kichwa Peoples of Sarayaku, the Center for Justice and International Law (CEJIL), and the Center for Economic and Social Rights filed a petition before the IACHR alleging the responsibility of Ecuador to the detriment of the Kichwa people of the Sarayaku community and its members. The petitioners submitted that Ecuador was responsible for a series of acts and omissions harming the Kichwa because it had allowed an oil company to carry out activities on the ancestral lands of the Sarayaku community without its consent, persecuted community leaders, and denied judicial protection and legal due process. Moreover, the petitioners argued that the State allowed third parties to systematically violate the rights of the Sarayaku community.

On 26 July 1996, the State Oil Company of Ecuador PetroEcuador and the consortium formed by two companies related to Chevron, signed a partnership contract for hydrocarbon exploration and exploitation of crude oil in the Amazonian Region. The territory granted for that purpose in the contract covered an area of 200,000 hectares, inhabited by several indigenous associations, communities and peoples. Sarayaku is the largest of these indigenous settlements in terms of population and land area, since its ancestral and legal territory accounted for around 65% of the territory included in the contract.

The petitioners alleged that by virtue of such contract, the State was responsible for violating the fundamental individual and collective rights of the Sarayaku community and its members.
protected by the ACHR, specifically the right to life, property, judicial protection, due process, freedom of movement, personal integrity, personal liberty and security, freedom of association, political participation, freedom of expression, juridical personality, freedom of conscience and religion, rights of the child, equality, health and culture. 80

After four years of proceeding, on 25 July 2012 the IACtHR declared that Ecuador was responsible for the violation of the rights to consultation, to indigenous communal property, and to cultural identity, and that it was responsible for severely jeopardizing the rights to life and to personal integrity, in relation to the obligation to guarantee the right to communal property. The decision also ruled that Ecuador was responsible for the violation of the right to judicial guarantees and to judicial protection, to the detriment of the Kichwa Indigenous People of Sarayaku. 81

The IACtHR also ordered Ecuador to adopt the necessary legislative, administrative or any other type of measures to give full effect, within a reasonable time, to the right to prior consultation of the indigenous and tribal peoples and communities and to amend those that prevent its free and full exercise. For that purpose, the Ecuadorean government should consult the Sarayaku People in a prior, adequate and effective manner, and in full compliance with the relevant international standards applicable, in the event that it seeks to carry out any activity or project for the extraction of natural resources on its territory, or any investment or development plan of any other type that could involve a potential impact on their territory. At the same time, the government should implement, within a reasonable time and with the respective budgetary allocations, mandatory training programs or courses that include modules on the national and international standards concerning the human rights of indigenous peoples and communities, for military, police and judicial officials, as well as other officials whose functions involve relations with indigenous peoples.82
Neither in the IACHR application nor in the IACtHR decision there is a reference to the investment treaties or the investment arbitration case that was being litigated in parallel against Ecuador, as it will explained on the following section. Only Ecuador’s domestic legislation on the promotion of investments and contractual investment agreements were considered at this stage.83

D. ISDS against Ecuador

On 21 December 2006, Chevron and TexPet instituted arbitration claiming that Ecuador was liable for the damage they suffered due to unacceptable delay in the decision of seven breach-of-contract cases brought by TexPet against Ecuador before Ecuadorian courts. Under the agreements signed in 1973 and 1977 between TexPet and Ecuador, the former had to provide a percentage of its crude oil production to the Ecuadorian Government to help meet domestic consumption needs. The plaintiff alleged that the Government overestimated Ecuador’s true domestic consumption needs, and later took additional barrels of oil that belonged to TexPet and exported them. In neither case the Ecuadorian Government did pay the international price that it was contractually and legally required to pay.84

In this arbitration, Ecuador was ordered to pay damages of US$77,739,696.94, plus interests, based on the decision of the tribunal that Ecuador had breached the Ecuador-US BIT (1993) for not providing effective means of asserting claims and enforcing rights.85 Ecuador sought the setting aside the award, but on 2 May 2012, the District Court of The Hague denied this petition,86 a decision that was later upheld by the Court of Appeal of The Hague on 18 June 2013, and by the Dutch Supreme Court by judgment of 26 September 2014.87

The decisions taken in this arbitration take note of some issues related to human rights but do not base the award on them. An interim award on jurisdiction (2008) submit the arguments put forward by the parties in favour and against the retroactive application of the Ecuador-US
BIT and the exhaustion of local remedies, that include a comparison on the approach to retroactivity in the human rights and investment context, and on the issue whether a lack of judicial independence or unwarranted delay demonstrates the futility of pursuing local remedies, citing the IACtHR case *Las Palmeras v. Colombia*. The partial (2010) and final award (2011) on merits point out that a new mechanism to appoint judges to the Ecuadorian Supreme Court between 2005 and 2008 raised some criticisms about the impartiality of the new judges, notably by the Organisation of American States (OAS) and the UN Special Rapporteur on the independence of judges and lawyers. The ACHR is cited by the claimants as guaranteeing the right to a hearing in a reasonable time, by a competent, independent, and impartial tribunal for the determination of rights and obligations of a civil or any other nature. In support of their position, the claimants quote several human rights cases on excessive judicial delay and lack of judicial independence, citing case law from both the IACtHR and the ECtHR, which was in turn contested by the respondent State.

A second ISDS case against Ecuador sought declaratory relief that Chevron was released from all environmental liability for Texaco’s operations in Ecuador, being that country responsible for any remaining remediation work. The plaintiffs alleged that Ecuador breached investment agreements signed between 1994 and 1998, and that Ecuador had also breached the Ecuador-US BIT, including its obligation to afford national and most favored nation treatment, fair and equitable treatment, full protection and security, non-arbitrary treatment, and generally non-discriminatory treatment and the effective means of enforcing those rights.

Several interim awards issued by the arbitral tribunal between 2012 and 2013 provided indications on the criteria that the arbitrators would use to decide this case. In a First Interim Award on Interim Measures of 25 January 2012, the arbitral tribunal decided that Ecuador should take “all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgement against [Chevron] in the Lago
Agrio Case”. Furthermore, in a Second Interim Award on Interim Measures of 16 February 2012, the Tribunal ordered to Ecuador to suspend the enforcement against Chevron in the Ecuadorian legal proceedings known as “the Lago Agrio Case”. In a Third Interim Award on Jurisdiction and Admissibility of 27 February 2012 the Tribunal rejected jurisdictional defences submitted by Ecuador and in a final Fourth Interim Award on Interim Measures of 7 February 2013, the Tribunal declared that Ecuador has violated the First and Second Interim Awards, pursuing the execution of the Lago Agrio Judgement within and outside Ecuador, including Canada, Brazil and Argentina.94

On 17 September 2013, the arbitral tribunal decided that Chevron and TexPet were both “releasees” in accordance to the agreements signed with Ecuador, and they can exercise those rights both defensively and offensively in proceedings seeking relief under Ecuadorian law for environmental liability.95 No mention to the Sarayaku case before the Inter-American system is found in this decision. However, the influence of the Aguinda/Lago Agrio cases in the award is pondered, with the arbitral tribunal declining to decide whether or not the claims pleaded by the Lago Agrio plaintiffs rest upon individual rights, as distinct from “collective” or “diffuse” rights (in whole or in part) and whether or not those claims are materially similar to the claims made by the Aguinda Plaintiffs in New York. Yet, the tribunal decided that the scope of the releases made by Ecuador does not extend to any environmental claim made by an individual for personal harm in respect of separate individual’s rights, but it does have legal effect under Ecuadorian law precluding any “diffuse” claim against the claimants under the Ecuadorian Constitution made by the State or any individual not claiming personal harm (actual or threatened).96

On a later decision that complements the 2013 award, in March 2015 the arbitral tribunal decided that the Lago Agrio Complaint of 2003, included individual claims resting upon individual rights under Ecuadorian law, not falling within the scope of the 1995 Settlement
Agreement and therefore not wholly barred at its inception by *res judicata*, under Ecuadorian law, as invoked by the Claimants. Finally, the arbitral tribunal also decided that the Lago Agrio Complaint included individual claims materially similar, in substance, to the individual claims made by the Aguinda plaintiffs in New York.97

In January 2014, Ecuador sought to set aside the interim and partial awards rendered by the arbitral tribunal. Finally, in a decision dated 20 January 2016, the District Court of The Hague upheld the arbitral tribunal’s awards, rejecting all of Ecuador’s grounds for setting them aside, ordering Ecuador to pay the costs of the proceedings.98

As we can see, although a group of parallel cases against Ecuador have been initiated under the same set of facts – the harmful effects of oil exploitation in that county – before a human rights regional system and ISDS arbitral tribunals, there is limited relationship between them. In contrast, in the domestic litigation against Chevron and Texaco in Ecuadorian and US Courts, both aspects have been directly connected, with decisions from US judiciary on both the most appropriate forum to decide the dispute – Ecuadorian courts – and a later rejection of the enforcement of the decision issued by those courts, on the grounds of having been obtained through corrupt, and illegal means. Both the human right court and the ISDS arbitral tribunals, make explicit reference and even based some decisions on the *Aguinda* and *Lago Agrio* cases before domestic courts.

**V. The Yukos Cases**

Parallel cases involving investment arbitral tribunals and human rights courts are also found outside Latin America. One of the most recent and notorious examples are the *Yukos* cases, which have involved protracted litigation both at arbitral tribunals constituted on the one hand, under BITs and the Energy Charter Treaty (ECT), and on the other hand, at the ECtHR. These cases can help to illustrate the interplay between human rights and investment adjudication outside Latin America.
Both groups of cases originated from the same set of facts. OAO Neftyanaya Kompaniya Yukos (“Yukos”), was a holding company established by the Russian Government in 1993 to own and control a number of entities specialised in oil production. Yukos remained fully State-owned until 1995-1996 when, through a different tenders and auctions, it was privatised mainly to companies controlled by Mikhail Khodorkovsky, which included the Group Menatep Limited (GML), and became a publicly-traded private open joint-stock company incorporated under the laws of Russia. By 2002, Yukos was Russia’s largest oil and gas company, and it was listed as one of the world’s top ten firms in that sector. According to the claimants in all these cases, from 2002 to 2006, the Russian government took a series of illegal measures, inter alia, retroactive tax assessment, imposition and calculation of penalties for underpayment of taxes, seizure of shares and corporate property, and the trial and imprisonment of Yukos and GML CEOs, Mr Khodorkovskiy and Platon Lebedev, that resulted in Yukos being declared bankrupt in August 2006. In November 2007, Yukos was dissolved and its assets nationalized or acquired by Russian state-owned companies (Gazprom and Rosneft).

Russia contested the allegations of the claimants on the grounds that the measures taken against Yukos and its owners were based on their involvement in tax frauds, tax evasion and embezzlement, accusations which in turn were rejected by the claimants as being politically motivated. The outcome of these cases provided the largest ever compensation in both ISDS and ECtHR systems.

A. The investment cases

With a view to obtaining compensation from the allegedly illegal measures described before, several cases were brought up by Yukos’s shareholders against Russia, in different investment arbitral tribunals.
In 2005, a group of foreign-registered claimants initiated three parallel investor-state arbitration cases against Russia under the ECT, filed according to the UNCITRAL Arbitration Rules, requesting a total compensation amounting to around USD 114 billion. The same arbitrators were appointed in the three cases and rendered three parallel Awards on Merits on 18 July 2014, upholding many of the claimants’ allegations and ordered Russia to pay compensation of approximately USD 50 billion – the largest amount ever awarded in ISDS – distributed between the claimants according to their participation in Yukos. On 20 April 2016, the Hague District Court set aside these awards and held that the arbitral tribunals did not have jurisdiction over the dispute, after considering that the provisional application of the ECT by Russia under article 45 of the ECT was contrary to Russian law. In July 2016, the claimants have appealed that judgment seeking to reinstate the original award, and a new decision by Dutch Courts is still pending.

In 2006, RosInvestCo UK Ltd., a former minority shareholder of Yukos initiated arbitration based on the Russia – United Kingdom BIT (1989), claiming that Russia had expropriated Yukos, for no reason of public interest, and did not provide compensation considered for the loss of their investment and the damage suffered by the value of the shares of Yukos. On 12 September 2010, an arbitral tribunal constituted at the Stockholm Chamber of Commerce (SCC) decided that the Russian state’s measures constituted an unlawful expropriation and understood them as “steps in a common denominator in a pattern to destroy Yukos and gain control over its assets”, awarding USD 3.5 million in damages in favour of the claimants. Russian efforts to set aside this award have been unsuccessful.

In 2007, Spanish minority investors in Yukos (“Quasar de Valores”) filed an arbitration proceeding against Russia under the Russia-Spain BIT (1990). An arbitral tribunal ruled that Yukos’ tax delinquency was “a pretext for seizing Yukos assets and transferring them to Rosneft”, and awarded to the Spanish shareholders around USD 2 million plus interests.
Russia sought several ways of quashing this decision, and finally on 18 January 2016, a Swedish appeals court issued a declaratory ruling finding that the arbitral tribunal wrongly took jurisdiction over the claims. A separate procedure is still pending in the Swedish courts to set aside the final award.\textsuperscript{108}

\textbf{B. The human rights cases}

Before the ISDS cases by Yukos shareholders even started, it was the same company that on 23 April 2004, brought up a case against the Russian Federation before the ECtHR (“OAO Neftyanaya Kompaniya Yukos v. Russia” – application no. 14902/04), alleging several violations to the European Convention on Human Rights (ECHR), that had resulted in considerable pecuniary losses and the dissolution of the company.

On 20 September 2011, the ECtHR issued a chamber judgment finding partially in favour of the claimants. The decision found that Yukos’ rights to a fair trial and its property were violated due to the “arbitrariness and speed of tax debt enforcement proceedings conducted by Russian authorities, the unfairness of domestic proceedings challenging the tax assessments, and the retrospective application of fines for non-payment of taxes”.\textsuperscript{109} At the same time, the Court found that Russia did not misuse legal proceedings to destroy Yukos.

Complementing the previous decision, on 31 July 2014, in a chamber judgment, the ECtHR issued a decision on just satisfaction,\textsuperscript{110} awarding its largest compensation to date, ordering Russia to pay around €1.9 billion to the shareholders of Yukos at the time of its liquidation, and to pay costs for €300,000.\textsuperscript{111} On 15 December 2014, an ECtHR Grand Chamber panel of five judges decided to reject the referral request submitted by Russia, and now the decision is final.\textsuperscript{112} This award is significantly lower than the ISDS arbitrations referred before, and only pecuniary damage was awarded, as the Court considered that, the findings of a violation of the ECHR, constituted sufficient just satisfaction for the company of non-pecuniary damage.\textsuperscript{113}
Russia had to submit a plan for distribution of the award of just satisfaction within six months from the date on which the judgment became final. However, at the time of this writing, such compensation has not been paid, pending a decision by the Russian Constitutional Court (RCC), which since 14 December 2015 has express jurisdiction to deny enforcement of international human rights judgments that deem incompatible with the Russian Constitution.114

Claims relating the trial and imprisonment of Mr Khodorkovskiy and Mr Lebedev were dealt on a separate ECtHR case. In July 2013, the Court decided that there was no lack of impartiality of Russian trial judges, that criminal proceedings against the applicants were not politically motivated, and that the study of large volumes of evidence in difficult prison conditions by the applicants was no violation of the ECHR, as they were supported by highly qualified legal team. Yet, the same Court considered there was a violation of that ECHR on the systematic perusal by prison authorities and trial judge of communications between accused and their lawyers, the refusal to allow defence to cross-examine expert witnesses called by the prosecution or to call their own expert evidence, and in the imprisonment in penal colonies thousands of kilometres from prisoners’ homes. Just with respect to Mr Lebedev, the Court also found a violations of the ECHR because he was at his trial in a metal cage, faced a lengthy pre-trial detention and delays in the review of his detention. However, the Court granted EUR 10,000 to Mr Khodorkovskiy in respect of non-pecuniary damage, and rejected Mr Lebedev pecuniary claims in full.115 Mr Khodorkovskiy was released from prison on 20 December 2013 and Mr Lebedev on 24 January 2014, after serving more than ten years in prison.116

C. Relationship between these investment and human rights cases

The Yukos cases are relevant for the analysis of the interplay between investment and human rights tribunals, not only because they both provide compensations under the same set of
facts, but also because of the reasoning behind those decisions. Although ISDS arbitral tribunals and the ECtHR have divergent assessment of some claims, there is a dialogue between some of their decisions, as they expressly refer to each other.

The arbitral tribunal in the Quasar de Valores case, explicitly addressed the ruling in the Yukos case before the ECtHR, largely dissenting from that Court’s views and aligning with the RosInvest arbitral tribunal, although it also states that it is not bound by either of these decisions.\textsuperscript{117} For the Quasar de Valores tribunal there is a “fundamental difference” between both cases, as the ECtHR resolved claims about Russia’s compliance with specific provisions of the ECHR, without deciding whether or not Russian’s measures amounted to an uncompensated expropriation of foreign investments as forbidden by the applicable BIT in that case. The difference is also explained by the “wide margin of appreciation” a State enjoys under Protocol No. 1 to the ECHR.\textsuperscript{118}

In fact, the Quasar de Valores award is explicitly critical of the approach taken by the ECtHR in the interpretation on a number of issues, notably by the rejection by the ECtHR of the argument that the Russian Tax Ministry knew of Yukos’ tax “optimisation” arrangement.\textsuperscript{119} Both tribunals have also a different take on the provisions regarding domestic tax haven, having the ECtHR the position that there was no fault with Russia’s actions (finding the domestic law “vague”), while the ISDS arbitral tribunal found a violation of the applicable investment treaty.\textsuperscript{120} Another point of disagreement was in the auction process of some of Yukos’ assets, where the ECtHR had not been persuaded that Russia acted with an ulterior motive and the ISDS arbitral tribunal saw it as rigged to deliberately destroy Yukos. Finally, both tribunals had different evaluations of Russia’s tax delinquency measures, as the ECtHR did not find “incontrovertible and direct proof” of an intended expropriation and the ISDS arbitral tribunal concluded that those measures went beyond its legitimate power of taxation, and amounted to expropriation.\textsuperscript{121}
The different take of both systems is also explained by the Quasar de Valores tribunal by the fact that foreign investors are not part of the community that benefits from a *bona fide* regulation in the public interest. Thus, investment protection treaties “might not allow a host state to place such a high individual burden on a foreign investor to contribute, without the payment of compensation, to the accomplishment of regulatory objectives for the benefit of a national community of which the investor is not a member”.

The findings of the three ISDS arbitral panels established under the ECT also have several differences with the ECtHR, especially on the question of expropriation. These awards considered that the treatment that Russian subjected to Yukos and its key company officials amounted to an indirect appropriation, breaching Russia’s obligations under Article 13 of the ECT. In contrast to the findings of the ECtHR, the investment arbitral tribunals of the ECT cases specifically concluded that “the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets”.

Substantial differences are also in the quantum of the compensation finally awarded, something that can be explained by the different bases for liability before the ECtHR and the arbitral tribunals and the Yukos ECT arbitral tribunals. Where the ECtHR decision was issued as a compensation for particular acts that caused interference with property rights, the arbitral tribunals awarded compensation for the expropriation of Yukos, in respect of the value of the company.

It is not necessarily surprising that the ECtHR and the ECT Tribunals reached different conclusions. Besides the different standards of proof and margin of appreciation that we have referred before, the process of adjudication was very different. While the Yukos ECT arbitral tribunals functioned much more like a full civil trial, including written evidence and cross-examined witnesses, the ECtHR proceedings were mostly based on written pleadings and little procedural testing of evidence.
It is interesting to note that although the ECtHR is mindful of various parallel proceedings brought by some of the applicant company’s shareholders against Russia in other international fora under BITs, both with final and pending awards, the ECtHR does not engage in an express discussion of their different approaches or merits, as the investment arbitral tribunals did.\textsuperscript{127} The basis of this attitude is explained in the 2011 judgment of the ECtHR as a way “to avoid the situation where several international bodies would be simultaneously dealing with applications which are substantially the same”. However, following a formalistic criterion, the same Court finally decided that the parties in the both proceedings are different and therefore the two matters are not “substantially the same”.\textsuperscript{128}

\textbf{VI. Conclusion}

The interaction between investor state dispute settlement (ISDS) and human rights courts has been under-researched. In a seminal work, Petersmann concluded that both ISDS and human rights regime share one fundamental communality: the development of legal rules and institutions to compensate the asymmetric legal relationship between individuals and sovereign states, enhancing the legal protection at international level of investors and individuals to compensate their inferior position vis-à-vis the State.\textsuperscript{129} But, this commonality does not seem to be acknowledged by investment and human rights tribunals in Latin America.

While it is true that ISDS tribunals are generally reluctant to examine human rights arguments, either submitted directly by the parties or by non-parties \textit{via amicus curiae},\textsuperscript{130} something similar happens at the IAHRS, which has not acknowledged the influence that parallel claims under the same set of facts could have or not in their decisions, as the cases examined in this paper clearly show. It seems that in Latin America human rights and investment disputes are seen has separate tracks. Decisions of one tribunal do not seem to
influence the other, and neither an acknowledgement of such decisions is deemed to have an authoritative effect.

This situation contrasts with the extensive interplay that investment tribunals and the ECtHR have had in similar situations, as it has been explained over the analysis of the *Yukos* cases. In the European system, even if the outcomes of the proceedings have a different interpretation of the same set of facts – largely based on the different law that is applied to the dispute – there is a clear acknowledgement of the parallel dispute (both at the investment tribunal and the human rights court) and we can perceive the ‘need’ of justifying different interpretations in each case, what it might be considered as the recognition of their authoritative effect.

Certain lessons could be learned from this interplay, especially in Latin America. Lixinski has analysed the issue of treaty interpretation by the IACtHR, and has found that the IAHRS has a more limited standing than most ISDS tribunals, as only investors who are natural persons affected are able to bring claims, mostly when it comes to the right to property, while companies are perceived as beyond human’s right protection. This is in stark contrast with the ECtHR, as it can be derived from the Yukos cases, where the same company was considered as the applicant.

The cautious approach of IACHR and the IACtHR in this regard may be explained because the IAHRS is not seen as the forum to protect business activities against arbitrary acts of the State. Although the IACtHR case law consider that property damage arises more from facts than from forms – which would tacitly imply the acceptance of the notions of “indirect” or “creeping” expropriation found in ISDS jurisprudence, the IACtHR has resisted mixing economic interests with human rights protection, even if property is in the centre of the dispute.

However, this does not mean that the ECtHR is a complete alternative to ISDS. As Kriebaum points out, the European Human Rights system has some “disadvantages” for the investors, as
in principle, the ECtHR has the compulsory requirement to exhaust local remedies, and does not offer the same type of protection in case of expropriation, not granting indirect damages to shareholders, with the possibility of awarding less than full compensation in case of violation of the ECHR. The same “shortcomings” are also valid for the Inter-American system.

Furthermore, human rights violations, cannot be excluded per se from the jurisdiction of ISDS tribunals, “if and to the extent that the human rights violation affects the investment, it becomes a dispute ‘in respect of’ the investment and is hence arbitrable”. However, the existing case law seems to limit the scope of the jurisdiction of ISDS tribunals to the subject-matters explicitly included in the investment treaties. A claim brought on January 2016 by Al Jazeera against Egypt arose out of the alleged destruction of the claimant’s media business in Egypt, by means of arrest and detention of employees, attacks on facilities, interference with transmissions and broadcasts, closure of offices, cancellation of claimant’s broadcasting licence and compulsory liquidation of its local branch. In a case brought against Yemen by a construction company, the arbitral tribunal awarded USD 1,000,000 as moral damages, after concluding that physical duress exerted on the executives of the claimant was malicious and constitutive of a fault-based liability. In Biloune v. Ghana, a Syrian investor who managed the remodelling of a restaurant situated in Accra, was arrested and held in custody for 13 days, and eventually deported from Ghana to Togo, later claiming damages for expropriation, denial of justice and violation of human rights. The award held the Government of Ghana expropriated Mr. Biloune’s interests and was under an obligation to compensate him, but decided that it had no jurisdiction over claims for denial of justice or violation of human rights, as an independent cause of action.

On the other hand, compliance with the obligations derived from human rights instruments may serve as a context for the interpretation of the obligations of States with respect to foreign investors contained in IIAs. In a recent award in Urbaser v. Argentina, the arbitral
tribunal developed an exhaustive analysis of the relationship between the human right to water and the protection of foreign investment, as a result of a counterclaim brought by Argentina against the investor. Although the counterclaim was ultimately rejected, the tribunal ruled that the BIT “has to be construed in harmony with other international law of which it forms part, including those relating to human rights.”

Finally, there are several conclusions we can draw with respect of the “dual” role of the respondent State, in fulfilling its obligations under human rights and investment law regimes.

First, the relationship between foreign investment and protection of human rights entails a complex scenario for States that have to be respondent in two different forums defending interests that in most of the cases could be described as irreconcilable. For example, the Chevron v. Ecuador case shows us the evident change in the position of the Ecuadorian State on oil drilling throughout time, from pro-investor to pro-communities stance. While in Renco v. Peru, the Peruvian State has lacked a response to its responsibility to extend the PAMA multiple times to the company Doe Run.

Second, there is also a potential use of litigation in foreign investment as a tool for defence in cases of human rights or social and environmental damage, as it is especially evident in cases like Chevron and Renco. In both cases, the use of international investment arbitration by the companies has allowed them to avoid accountability for their operations in Latin America. Consequently, compensation or remediation to the environment or communities affected by their operations in Ecuador and Peru is still pending.

Third, the existence of parallel claims both under human rights courts and investment tribunals, urges coordination for the respondent States both ex ante and ex post in both different fora.

---

1 On investment treaties, see: Tarcisio Gazzini, ‘Bilateral Investment Treaties’ in Tarcisio Gazzini and Eric De Brabandere (eds), International Investment Law: The Sources of Rights and Obligations (Martinus Nijhoff Publishers 2012) 107; and on


16 Pacific Alliance Additional Protocol (signed 10 February 2014, entered into force 01 May 2016) ch 10.

17 The Pacific Alliance was established in April 2011, and formalized by a Framework Agreement signed in Paranal, Chile on 6 June 2012. An additional protocol including an investment chapter was signed on 10 February 2014 and entered into force 01 May 2016. Current members are Chile, Colombia, Peru, and Mexico. Organization of American States (OAS), Foreign Trade Information System, ‘Pacific Alliance’ (Trade Policy Developments, 20 June 2014) <http://www.sice.oas.org/TPD/Pacific_Alliance/Pacific_Alliance_e.asp> accessed 10 October 2016.


27 Federación Internacional de Derechos Humanos (FIDH) (n 26) 8.

28 ibid 7.
39 ibid.
41 Federación Internacional de Derechos Humanos (FIDH) (n 26) 7.
45 Federación Internacional de Derechos Humanos (FIDH) (n 26) 11.
46 Suraj Patel (n 69) 10.
48 ibid 53–54.
49 ibid 84.
51 ibid 53–54.
52 ibid 84.
55 Judith Kimberling (n 70) 449–450.
56 Suraj Patel (n 69) 10.
57 During 1960s and 1970s, the company supported Ecuador’s national integration policy which sought evangelization of the indigenous population (such as the Huaorani or Aucas) by the relocation of homes and families into “Christian towns”. As

34
the company expanded its operations and advanced into Huaorani territory, their warriors tried to drive off the workers of the company. In response, “Ecuador, Texaco, and Christian missionaries collaborated to pacify the Huaorani and end their way of life. Using aircraft supplied by Texaco, the missionaries intensified and expanded its program to contact, settle, and convert the Huaorani. Missionaries cruised the skies searching for Huaorani homes, dropping ‘gifts’ and calling out to people through radio transmitters hidden in baskets lowered from the air.” The conjunction of the little awareness and public concerns for environmental and social issues, the irresponsible behaviour of the company, a nonexistent regulation, and the lack of State’s action, converged in an irreversible damage on the environment of the Oriente region of Ecuador and a historic disruption to the social peace among the local communities. Judith Kimerling, ‘Oil, Contact, and Conservation in the Amazon: Indigenous Huaorani, Chevron, and Yasuni’ (2013) 24 Colorado Journal of International Environmental Law and Policy 49-51 <http://papers.ssm.com/sol3/papers.cfm?abstract_id=2323782> accessed 14 November 2016.

The ATCA (28 U.S.C. §1350) was originally part of the Judiciary Act of 1789. It was usually used for crimes such as piracy; the law now acts as a tool for holding human rights violators liable to victims seeking redress when options in their own countries are limited.

Suraj Patel (n 69) 15.


Suraj Patel (n 69) 24.


Suraj Patel (n 69) 29–33.


Inter-American Commission on Human Rights, ‘Application to the Inter-American Court of Human Rights in the Case of Kichwa People of Sarayaku and Its Members against Ecuador (Case No. 12.465)’ (n 95) paras 115, 131. Inter-American Court of Human Rights (n 94) paras 76, 82.

Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador, UNCITRAL, PCA Case No 34877 Interim Award, 1 December 2008 [2008] Invest Treaty Arbitr (UNCITRAL, PCA) 1–2.
85 Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador, UNCITRAL, PCA Case No 34877 Final Award, 31 August 2011 [2011] Invest Treaty Arbitr (UNCITRAL, PCA) 141–142.
87 The Republic of Ecuador v Chevron Corporation (USA) and Texaco Petroleum Company Case Number C/09/477457 / HA ZA 14 - 1291 Judgement of 20 January 2016 (2016) Investment Treaty Arbitration (District Court of The Hague) [2.14].
88 Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877. Partial Award on the Merits, 30 March 2010 [2010] Invest Treaty Arbitr (UNCITRAL, PCA) [146–148]. Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877. Final Award, 31 August 2011 (n 103) [226–231].
89 Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877. Final Award, 31 August 2011 (n 103) [35].
90 Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877. Partial Award on the Merits, 30 March 2010 (n 108) [170, 174, 182, 287, 312].
93 Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador, UNCITRAL, PCA Case No 2009-23 First Partial Award on Track I, 17 September 2013 [2013] Invest Treaty Arbitr (UNCITRAL, PCA) [91, 112].
94 ibid 93, 95, 112.
95 Chevron and Texaco and Russia v. The Republic of Ecuador, UNCITRAL, PCA Case No 2009-23 Decision on Track 1B, 12 March 2015 Invest Treaty Arbitr (UNCITRAL, PCA) [186].
98 Several other cases were brought up in domestic jurisdictions (including domestic courts) and private arbitration (including the International Chamber of Commerce), but the cases described here are only those base don IIAs.
100 Several other cases were brought up in domestic jurisdictions (including domestic courts) and private arbitration (including the International Chamber of Commerce), but the cases described here are only those base don IIAs.
101 Hulley Enterprises Limited (Cyprus) v. The Russian Federation (PCA Case No. AA 226); Yukos Universal Limited (Isle of Man) v. The Russian Federation (PCA Case No. AA 227); and Veteran Petroleum Limited (Cyprus) v. The Russian Federation (PCA Case No. AA 228), from now on ‘the Yukos ECT cases’.
102 Martin Dietrich Brauch (n 117) 6.
103 The Russian Federation v Veteran Petroleum Limited (C/09/477160 / HA ZA 15-1); the Russian Federation v Yukos Universal Limited (C/09/477162 / HA ZA 15-2); and the Russian Federation v Hulley Enterprises Limited (C/09/481619 / HA ZA 15-112) [2016] http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230 (The Hague District Court). The Hague District Court was the competent forum for Russia’s quashing applications, as it was the place of the ECT’s arbitrations.
110 Oao Neftyanaya Kompaniya Yukos v. Russia (application no. 14902/04), adopted on 24 June 2014 and delivered 31 July 2014
112 European Convention of Human Rights, Art. 43 and 44.
113 Oao Neftyanaya Kompaniya Yukor v. Russia §47.
115 Khodorkovskiy and Lebedev v. Russia - 11082/06 and 13772/05, Judgment 25.7.2013.
118 Quasar de Valores, Award, § 42, 125 and 158.
119 Id, paragraph 51
120 Id, paragraph 55.
121 Jarrod Hepburn (n 135).
122 Quasar de Valores, Award, paragraph 23.
124 Yukos ECT cases, Award, paragraph 756.
125 Conor McCarthy (n 141) 145.
126 ibid 144.
134 Clara Reiner and Christoph Schreuer, ‘Human Rights and International Arbitration’ in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), Human rights in international investment law and arbitration (Oxford University Press 2009) 84.
135 Al Jazeera Media Network v. Arab Republic of Egypt (ICSID Case No. ARB/16/1).
136 Desert Line Projects LLC v. The Republic of Yemen ICSID Case No ARB/05/17, Award, 6 February 2008 (International Centre for Settlement of Investment Disputes (ICSID)) [290–291].
137 Antoine Biloune (Syria) and Marine Drive Complex Ltd. (Ghana) v. Ghana Investment Centre and the Government of Ghana, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 188.
138 Ubraser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 8 December 2016, §1200.
139 Clara Reiner and Christoph Schreuer (n 156).