STREAM READINGS

PRIVATE LAW AND GLOBAL POLITICAL ECONOMY

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Private Law and Global Political Economy

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Description

This stream will examine the role of private law – both nationally and transnationally – in structuring global political and economic affairs. We are particularly interested in the political choices embedded in private law regimes as they affect inequality and opportunities for development. We will also consider the relationship between formal or official entitlement schemes and the unofficial and often informal world of customary law and social norms for the economic life of both the global poor and the global elite.

TABLE OF CONTENTS

Private Law and Global Political Economy

COERCION AND DISTRIBUTION IN A SUPPOSEDLY NON-COERCIVE STATE

"And while the House of Peers withholds its legislative hand,
And noble statesmen do not itch
To interfere with matters which
They cannot understand,
As bright will shine Great Britain's rays
As in King George's glorious days."

—From W. S. Gilbert's *Iolanthe*.

THE so-called individualist would expand this philosophy to include all statesmen, whether noble or not, and to include all economic matters as among those which they cannot understand. The practical function of economic theory is merely to prove to statesmen the wisdom of leaving such matters alone, not to aid them in the process of interfering. And in foreign as well as in domestic affairs, they should make no effort to control the natural working of economic events. This would seem to be the general view of Professor Thomas Nixon Carver,[1] although he likewise speaks frequently as a nationalist. But a careful scrutiny will, it is thought, reveal a fallacy in this view, and will demonstrate that the systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom, and with restrictions, moreover, out of conformity with any formula of "equal opportunity" or of "preserving the equal rights of others." Some sort of coercive restriction of individuals, it is believed, is absolutely unavoidable, and cannot be made to conform to any Spencerian formula. Since coercive restrictions are bound to affect the distribution of income and the direction of economic activities, and are bound to affect the economic interests of persons living in foreign parts, statesmen cannot avoid interfering with economic matters, both in domestic and in foreign affairs. There is accordingly a need for the development of economic and legal theory to guide them in the process.

To proceed to an examination of Professor Carver's system. His "individualism" is not entirely orthodox, for he is conscious of a certain amount of restriction of liberty in the scheme he advocates.

[1] *Principles of National Economy*. By Thomas Nixon Carver. New York, Ginn and Company, 1921.—vi, 773 pp.

Indeed his statement on page 747 is altogether too pragmatic to please the doctrinaire disciple of Spencer. In each proposed case of governmental interference, he thinks, the question is to be asked, "Are the evils to be repressed greater than those that accompany the work of repression, and are the evils to be removed by regulation greater than those that accompany the work of regulation? The method of procedure must be to consider, appraise, and compare the evils on both sides." While this test might be accepted by the so-called paternalist, as well as by the so-called individualist, Mr. Carver's final conclusions as to governmental activity do not differ materially from those of the more orthodox of the latter. The government, he thinks, should exercise sufficient constraint to prevent destruction and deception, to standardize measures, qualities and coins, to enforce contracts, to conduct certain enterprises (like lighthouses) which cannot well be carried on otherwise, to regulate monopoly prices and to control the feeble-minded and the otherwise incompetent in their own interest. It should not coerce people to work, nor should it, with rare exceptions, undertake to direct the channels into which industry should flow. It should, however, prevent any private person or group from exercising any compulsion. The government must also impose taxes; it should restrict immigration and furnish educational opportunities. Such a scheme has the appearance of exposing individuals to but little coercion at the hands of the government and to none at all at the hands of other individuals or groups. Yet it does in fact expose them to coercion at the hands of both, or at least to a kind of influence indistinguishable in its effects from coercion. This will shortly appear more clearly, it is hoped. Meanwhile, let it be kept in mind that to call an act coercive is not by any means to condemn it. It is because the word "coercion" frequently seems to carry with it the stigma of impropriety, that the coercive character of many innocent acts is so frequently denied.

What is the government doing when it "protects a property right"? Passively, it is abstaining from interference with the owner when he deals with the thing owned; actively, it is forcing the non-owner to desist from handling it, unless the owner consents. Yet Mr. Carver would have it that the government is merely preventing the non-owner from using force against the owner (pp. 104–5 and 106). This explanation is obviously at variance with the facts—for the non-owner is forbidden to handle the owner's property even where his handling of it involves no violence or force whatever. Any lawyer could have told him that the right of property is much more extensive than the mere

right to protection against forcible dispossession. In protecting property the government is doing something quite apart from merely keeping the peace. It is exerting coercion wherever that is necessary to protect each owner, not merely from violence, but also from peaceful infringement of his sole right to enjoy the thing owned.

That, however, is not the most significant aspect of present-day coercion in connection with property. The owner can remove the legal duty under which the non-owner labors with respect to the owner's property. He can remove it, or keep it in force, at his discretion. To keep it in force may or may not have unpleasant consequences to the non-owner—consequences which spring from the law's creation of legal duty. To avoid these consequences, the non-owner may be willing to obey the will of the owner, provided that the obedience is not in itself more unpleasant than the consequences to be avoided. Such obedience may take the trivial form of paying five cents for legal permission to eat a particular bag of peanuts, or it may take the more significant form of working for the owner at disagreeable toil for a slight wage. In either case the conduct is motivated, not by any desire to do the act in question, but by a desire to escape a more disagreeable alternative. In the peanut case, the consequence of abstaining from a particular bag of peanuts would be, either to go without such nutriment altogether for the time being, or to conform to the terms of some other owner. Presumably at least one of these consequences would be as bad as the loss of the five cents, or the purchaser would not buy; but one of them, at least, would be no worse, or the owner would be able to compel payment of more. In the case of the labor, what would be the consequence of refusal to comply with the owner's terms? It would be either absence of wages, or obedience to the terms of some other employer. If the worker has no money of his own, the threat of any particular employer to withhold any particular amount of money would be effective in securing the worker's obedience in proportion to the difficulty with which other employers can be induced to furnish a "job". If the non-owner works for anyone, it is for the purpose of warding off the threat of at least one owner of money to withhold that money from him (with the help of the law). Suppose, now, the worker were to refuse to yield to the coercion of any employer, but were to choose instead to remain under the legal duty to abstain from the use of any of the money which anyone owns. He must eat. While there is no law against eating in the abstract, there is a law which forbids him to eat any of the food which actually exists in the community—and that law is the law of property. It can

be lifted as to any specific food at the discretion of its owner, but if the owners unanimously refuse to lift the prohibition, the non-owner will starve unless he can himself produce food. And there is every likelihood that the owners will be unanimous in refusing, if he has no money. There is no law to compel them to part with their food for nothing. Unless, then, the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behests of some employer. It is the law that coerces him into wage-work under penalty of starvation —unless he can produce food. Can he? Here again there is no law to prevent the production of food in the abstract; but in every settled country there is a law which forbids him to cultivate any particular piece of ground unless he happens to be an owner. This again is the law of property. And this again will not be likely to be lifted unless he already has money. That way of escape from the law-made dilemma of starvation or obedience is closed to him. It may seem that one way of escape has been overlooked—the acquisition of money in other ways than by wage-work. Can he not "make money" by selling goods? But here again, things cannot be produced in quantities sufficient to keep him alive, except with the use of elaborate mechanical equipment. To use any such equipment is unlawful, except on the owner's terms. Those terms usually include an implied abandonment of any claim of title to the products. In short, if he be not a property owner, the law which forbids him to produce with any of the existing equipment, and the law which forbids him to eat any of the existing food, will be lifted *only* in case he works for an employer. It is the law of property which coerces people into working for factory owners—though, as we shall see shortly, the workers can as a rule exert sufficient counter-coercion to limit materially the governing power of the owners.

Not only does the law of property secure for the owners of factories their labor; it also secures for them the revenue derived from the customers. The law compels people to desist from consuming the products of the owner's plant, except with his consent; and he will not consent unless they pay him money. They can escape, of course, by going without the product. But that does not prevent the payment being compulsory, any more than it prevents the payment of the government tax on tobacco from being compulsory. The penalty for failure to pay, in each case, may be light, but it is sufficient to compel obedience in all those cases where the consumer buys rather than go without. On pages 620–621, Mr. Carver attempts

to distinguish on the ground that in the case of the tax the government "did not produce the tobacco but only charges the manufacturer or the dealer for the privilege of manufacturing or selling." But this is equally true of the owner of the factory, if he is an absentee owner. Whether the owner has rendered a service or not bears only on the question of the justification of the income which he collects, not on whether the process of collecting it was coercive.

As already intimated, however, the owner's coercive power is weakened by the fact that both his customers and his laborers have the power to make matters more or less unpleasant for him—the customers through their law-given power to withhold access to their cash, the laborers through their *actual* power (neither created nor destroyed by the law) to withhold their services. Even without this power, it is true, he would have to give his laborers enough to sustain them, just as it is to his own interest to feed his horses enough to make them efficient. But whatever they get beyond this minimum is obtained either by reason of the employer's generosity and sense of moral obligation, or by his fear that they will exercise the threat to work elsewhere or not at all. If obtained through this fear, it is a case where he submits by so much to their wills. It is not a "voluntary" payment, but a payment as the price of escape from damaging behavior of others. Furnishing food to one's slaves is essentially different; the owner may do it reluctantly, but if there is any "coercion" it is the impersonal coercion by the facts of nature which account for the slaves' labor being less efficient without the food; he is not influenced by the will of any human being. In paying high wages to wage-earners, on the other hand, he is. But for their will to obtain the high wages, and their power of backing up that will, he has no reason for paying them. Yet he does. What else is "coercion"?

There is, however, a natural reluctance so to term it. This can be explained, I think, by the fact that some of the grosser forms of private coercion are illegal, and the undoubtedly coercive character of the pressure exerted by the property-owner is disguised. Hence the natural reaction to any recognized form of private coercion is, "forbid it." One who would not wish to take from the laboring man his power to quit the employer, or to deny him the wages that he gets for *not* quitting, is apt to resent the suggestion that those wages are in fact coercive. But were it once recognized that nearly all incomes are the result of private coercion, some with the help of the state, some without it, it would then be plain that to admit the coercive nature of the process would not be to condemn it. Yet popular thought undoubtedly does require special justification for any conduct, private or governmental, which is labeled "coercive", while it does not require such special justification for conduct to which it does not apply that term. Popular judgment of social problems, therefore, is apt to be distorted by the popular recognition or non-recognition of "coercion". Hence it may be worth while to run down into more detail the distinctions popularly made between coercion and other forms of influence over people's conduct.

"Threats" are often distinguished from "promises". If I tell a man I will do some positive act whose results will be unpleasant to him, unless he pays me money, and if as a result he pays it, I would usually be said to be collecting it by means of a "threat." If, on the other hand, I tell him I will do some positive act, whose results will be pleasant to him, *if* he pays me money, and he does, it would be said more commonly that I collected it by means of a "promise". Partly as a result of the moral connotation generally given to these terms, partly as its cause, the law more frequently interferes to prevent the doing of harmful acts than it does to compel the doing of helpful ones. Many (but not all) positive acts which are disadvantageous to others are forbidden; not so many positive acts that are advantageous to others are compelled. In other words, most torts and crimes consist of positive acts. Failure to help does not as a rule give rise to legal punishment or a right of action. Yet there are exceptions. Certain acts not in themselves actionable at law, may give rise to legal duties to perform positive acts. If I start an automobile in motion, I have committed no legal wrong; but if subsequently I fail to perform the act of stopping it when "reasonable care" would require me to do so, the victim of my failure to act can recover damages for my non-performance.[1] Again, and more significant, if I have promised to do certain things (with certain formalities or "consideration"), my act of promising was not a legal wrong. But if I subsequently fail to perform at the time specified, the promisee has a right of action for my failure to act. It is significant of the reluctance to admit the existence of positive legal duties, that in both cases language is used which makes my wrong conduct seem to consist of wrongful acts instead of wrongful *failure* to act. It is said, in the one case, that I "ran over" the victim, in the other that I "*committed* a breach of contract." Yet in neither was the wrong an act, but a failure to act: in the first case, my failure to make the requisite motions for stopping the car; in the second, my failure to perform the act promised.

[1] *Cf.* an article by Leon Green in 21 *Michigan Law Review*, 495 (March, 1923).

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Now suppose that instead of actually refraining from doing the acts which the law requires, I say to a man, "Pay me a thousand dollars, and when I meet you on the road walking I will use sufficient care to stop my car or to steer it so that it will not hit you; otherwise I will do nothing about it." Is that a "threat" or a "promise"? Or if I say, "Pay me a thousand dollars and I will perform the acts I have already contracted to perform"? I believe most people would call these statements threats rather than promises. Why? It may be partly due to the misleading language which speaks of the *act* of running over and the *act* of breaking a contract. But even were the fact recognized that payment were demanded as the price of *not abstaining*, I believe the demands would still be called threats. The reason, I believe, is partly because to abstain is contrary to legal duty, partly because it is adjudged to be contrary to moral duty. Popular speech in this case seems to apply the term coercion to demands made as a price of not violating a legal or moral duty, whether the duty consists of acting or of letting alone. But this criterion will not do, either.

If an act is called "coercion" when, and only when, one submits to demands in order to prevent another from violating a legal duty, then every legal system by very definition forbids the private exercise of coercion—it is not coercion unless the law does forbid it. And no action which the law forbids, and which could be used as a means of influencing another, can fail to be coercion—again by definition. Hence it would be idle to discuss whether any particular legal system forbids private coercion. And if an act is called "coercion" when, and only when, one submits to demands in order to prevent another from violating a *moral* duty, we get right back to the use of the term to express our conclusion as to the justifiability of the use of the pressure in question; with the ensuing circular reasoning of condemning an act because we have already designated it "coercive." One is likely, that is, to have a vague feeling against the use of a particular form of economic pressure, then to discover that this pressure is "coercive"—forgetting that coerciveness is not a ground for condemnation except when used in the sense of influence under pain of doing a morally unjustified act. And obviously to pronounce the pressure unjustified because it is an unjustified pressure is to reason in a circle. Hence, it seems better, in using the word "coercion", to use it in a sense which involves no moral judgment.

But popular feeling sometimes makes another distinction. If I plan to do an act or to leave something undone for no other purpose than to induce payment, that might be conceded to be a "threat." But if

I plan to do a perfectly lawful act for my own good, or to abstain from working for another because I prefer to do something else with my time, then if I take payment for changing my course of conduct in either respect, it would not be called a threat. If a man pays me to keep out of a particular business, or if he pays me to work for him (when I am not legally bound by contract to do so), then it seems absurd to many to say that he paid me under threat of coercion—unless, in the first case, my sole motive in entering the business was to bring him to terms, and unless in the second I preferred working for him to any other occupation of my time, and my sole motive in abstaining was again to bring him to terms. For purposes of ordinary conversation, some other word than coercion may be preferred to describe payments made to a man who makes a sacrifice to "earn" them. But can a line be drawn? I believe the popular distinction along these lines is based on moral judgment. If a man gives up a job he likes, or if he works for another man, why shouldn't he be paid for it?—it will be asked. Perhaps he should. But unless the term "coercion" is applied only to conduct adjudged immoral, does the justifiability of the receipt of payment prevent it from being coercive?

If those distinctions are all invalid, then, which seek to remove the term "coercive" from some of the influences exerted to induce another to act against his will, it seems to follow that the income of each person in the community depends on the relative strength of his power of coercion, offensive and defensive. In fact it appears that what Mr. Carver calls the "productivity" of each factor means no more nor less than this coercive power. It is measured not by what one actually *is* producing, which could not be determined in the case of joint production, but by the extent to which production would fall off if one left and if the marginal laborer were put in his place—by the extent, that is, to which the execution of his threat of withdrawal would damage the employer.[1] Not only does the distribution of income depend on this mutual coercion; so also does the distribution of that power to exert further compulsion which accompanies the management of an industry. Some extremely interesting suggestions of the likelihood of control by capitalists, cooperative buyers, cooperative sellers and laborers are to be found on pages 222–225. This power is frequently highly centralized, with the result that the worker is frequently deprived, during working hours and even beyond, of all choice over his own activities.

[1] *Cf.* the statement on p. 530.

MARXISM AND LEGAL PLURALISM

Peter Fitzpatrick

Legal pluralism is indicative of persisting social fields that cannot be accounted for adequately in totalising Marxist explanation. Althusser's contribution and its relation to the family, is explored as one example of inadequacy — a provocative example because of its attempts to accommodate a plurality of social fields. Yet legal pluralism also illustrates the limits of partial explanation. The first half of the article concludes in the argument that historical materialism has to accommodate particular social fields, has to accord them a particular materiality. These fields interact integrally with a totality but cannot be reduced to that totality. The second half of the article lends some concreteness to this argument in exploring particular social fields as conditions for the emergence and maintenance of modern law. Science (the operation of the science of man and of society) is presented here as a representation of many particular social fields. Both science and law are taken as elements in a total explanation of modern society. Particularist oppressions, sited in particular social fields and organised in science, are seen as conditions for the existence of bourgeois legality in its elements of universalism and equality. Modern law depends on science and cannot enter some of science's realms. But science itself depends operatively and integrally on law. Law and science are mutually supportive and interdependent, yet the maintenance of their effectuality in this requires them to be significantly independent of and opposed to each other.

This article[1] deals with the so-called first world of advanced capitalism but it follows on from my work on the third world. Much of this work tries to show that the third world reality cannot be reduced to totalising types of explanation seen in terms of modernisation or of the capitalist mode of production. Here I have drawn on and extended theories in the tradition of historical materialism that begin to accommodate the specificity, diversity and plurality of and within third world societies. In this, state law is seen as integrally dependent on a plurality of specific particularist orders, yet it also constitutively acts on and reacts back on these particularist orders (Fitzpatrick 1980a, 1980b and in press). The present article is something of a complement to this for the first world in that its basic concern is with a plurality of "semi-autonomous social fields" (Moore 1978:ch 2) as conditions for the emergence and maintenance of state law.

Legal pluralism can serve as an initial representation of this plurality of social fields. One could use instead the revived theories of 'dualism' and 'marginalisation' including theories of the specificity of sexual and racial oppressions (see *eg* Barrett 1980; Berger and Piore 1980; Gilroy 1981). But the choice of legal pluralism serves a purpose of introducing this significant body of scholarship to historical materialism.

"In political thought and analysis," says Foucault, "we still have not cut off the head of the king" (Foucault 1981a:88-9). Exceptionally, legal pluralists have sought to "escape the system of Law-and-Sovereign" (Foucault 1981a:97). Ehrlich is perhaps the great originator here with his historically sensitive "sociology of law" (Ehrlich 1936). For him the very basis of state law was a prior "social law" or "living law" which was the "inner order of associations" (Ehrlich 1936:chs III and IV). The effectiveness of state law depended on its being in accord with this living law. What would happen if associations or bodies of living law were in conflict? What is the outcome of interactions between them? How does one explain the original effectiveness and the effect on living law that state law sometimes does seem to have? These questions Ehrlich recognised but did not answer. They are also questions which dog legal pluralism, as we shall see. One line of resolution was provided by Gierke in his so-called realist theory of corporations. Like Ehrlich he saw associations or corporate organisations having a life, a reality, of their own. The state did not create corporations; it could but recognise them. But the state wins in the end for, with Gierke's organic theory of society, the state is a corporation which includes in itself all other corporate organisations and has ultimate authority over them (Hallis 1930:140-65). A broadly similar resolution afflicts the sociologically more sophisticated theorising of those thinkers usually called the French Institutionalists (see Broderick, ed 1970). They saw society as made up of a plurality of institutions, of which the state is but one. Each institution has its own distinctive law. Coherence between institutions is secured in the realm of natural law. There is a little-recognised but potentially significant Italian branch of the institutionalist enterprise in the work of Romano (Stone 1966:ch 11). He did not find an easy coherence of legal and institutional orders in an all-encompassing state or in the convenient resolutions of natural law. Relations between institutions, including the state as one such, took diverse forms such as subordination, partial incorporation and mutual interaction. There was no grand resultant, no persistent resolution emerging from these relations.

Anthropological theories of legal pluralism have either emphasised the secondary or derivative nature of state law or been satisfied with seeing state law as one type among many without confronting questions of conflict and precedence. Hence Bohannan's famed theory where state law results from a "double institutionalisation of norms" in which some "customs" operative within "social institutions" are "reinstitutionalised at another level" as state law (Bohannan 1967:47-48). So, Pospisil contests the adequacy of seeing law and society in terms of interacting individuals and the state. He argues that society is made up of a collection of "sub-groups" with their own legal systems and law is not just the property of society or the nation as a whole (Pospisil 1971:ch 4). There are other anthropological theories but these can be taken as representative enough for present purposes (see also Moore 1978:ch 2 and Smith 1974:ch 4). Thus far, it could be said

that accounts of the legal pluralists are persistently partial or the plurality of parts is subordinated in arbitrary totalities as with the organicist and natural law offerings of Gierke and the French Institutionalists.

More complex is the recent efflorescence of work on legal pluralism, mainly in the United States. This is partly a matter of the rediscovery of legal pluralism (see Galanter 1980,1981a). But it is also a matter of current developments in legal regulation that give a particular salience to legal pluralism — the recognition and emergence of informal alternatives to courts, varieties of delegalisation, schemes of decarceration and various so-called community adaptations of penal and psychiatric control (see Abel ed.1982). This recent work has added totalising perspectives to the study of legal pluralism or added, at least, perspectives that transcend the partial. Thus, this work has greatly elaborated and refined the ways in which different legal orders, including state law, interact (see *eg* Galanter 1980,1981b and Griffiths 1981). Abel's acute demystifications show that in this interaction the apparent shift from state law to informal ordering can mask an extension of state control through the state's supervision or constitution of these other orders (Abel 1980,1982). There is also some concern to explain why this legal plurality emerges. It is sometimes seen as a response to fiscal and legitimacy crises supposedly afflicting countries of advanced capitalism; informal ordering emerges because it is cheaper or, less dubiously if somewhat ambivalently, because it is a means of engendering some popular participation and thus serving to make up the deficit in legitimation (see *eg* Matthews 1979, Santos 1980 and *cf* Habermas 1976:72-3). In a related vein, involvement through informal ordering is seen in terms of the containment by the state of potentially disruptive elements (*eg* Hofrichter 1982). Or informal justice is seen as existing in some cyclical alternation with formal justice (Abel 1980). It is impossible in a brief account to do justice to such a rich and diverse literature but it is fair to say that this work does not resolve or mean to resolve questions of the coherence of a plurality of social fields. The social field is seen only in terms of some function attributed to it, such as class containment or legitimation. Or social fields are seen in terms of persistent plurality, persistent diffusion. So, to take one of Galanter's titles, the search is for "justice in many rooms" (Galanter 1981a) — in many mansions (*John* xiv, 2). But, in Noddy terms, we have to ask where is the house? What the rooms are, what they do must be affected by the total structure and operation of the house in which they are located.[2]

It should be immediately and fairly asked whether totalising explanation can do better. So far, the summary account of the legal pluralists has served to set plurality as a persistent question and to suggest a need for some totalising explanation. My sympathetic concern here will be with historical materialism as totalising explanation. Because it is provocatively apt, I will use as an example a strand of historical materialism that has sought to accommodate a plurality of social fields. In the broad strokes being used here, Althusser's contribution can be taken as representative (*cf* also Cain in press and Poulantzas 1978:28-34). Althusser's Marxism accommodates several dimensions of plurality. The dimension considered here is his grappling with institutions. Somewhat in the tradition of Gramsci, Althusser sees the state as divided between a "Repressive State Apparatus" and a collection of "Ideological State Apparatuses" (ISAs) (Althusser 1971:124-149). The ISAs function basically as ideology. They comprise a variety of institutions —

educational and religious institutions and the law and the family, for example (although law also functions in the Repressive State Apparatus). These institutions sustain and cohere in the ideology of the ruling class and ultimately function to reproduce relations of production. The state, in turn, is placed integrally within a social totality (a "structure in dominance") where it is ultimately, if sometimes obliquely but of course never vulgarly, determined by the economy.

How much can this kind of totalising explanation tell us about a plurality of social fields? To lend some concreteness to the argument, I will explore the family, one of Althusser's ISAs, in its relation to that social totality integral to the capitalist mode of production.[3] The argument could, I hope, be generalised.

Hartmann's pithy observation on feminism could be adapted here: "the 'marriage' of marxism and feminism," she says, "has been like the marriage of husband and wife depicted in English common law:marxism and feminism are one, and that one is marxism" (Hartmann 1979:1). In relation to the capitalist mode, Marxism, when it has accommodated the family, has seen it as a functional adaptation to an existent totality, a totality which not only was conceived without incorporating the family but which entailed its disappearance.[4] This is not to deny that the Marxist or neo-Marxist explanation has not told us vital things about the family in its interrelation with the capitalist mode of production, even if these things do not always transcend the banal or are not always exclusive to Marxism. Thus, to take overlapping examples, the family functions in class division in various ways; it is as well that "haven in a heartless world", that "prison of love" which mitigates the psychic injuries inflicted by capitalism; it serves in the reproduction of relations of production; it is a conduit for dominant ideology; and it creates a specific, female social identity which in turn is constitutive of a segment in the reserve army of labour (see *eg* Collins 1978). The list could go on but it would contain statements of the same type — that is, statements which describe a function that the family serves for the capitalist mode of production. Doubtless this functionality can be supportive of the family and can result in measures aimed at its conservation. But all this does not amount to an explanation of the existence of the family. Ultimately, all we are given is an explanation of an aspect of the modern family which may be partly constitutive of it.

Totalising explanation has not here accounted for the specificity of the family. But the family can only serve these functions if it remains crucially separate or apart from the capitalist mode. It cannot, for example, be a haven in a heartless world if it is absorbed indistinguishably into that heartless world. This specificity and apartness are underscored in the incompatibilities, even the antagonisms, between the family and capitalism in which the family has served as a site of resistance to capitalism (see *eg* Lasch 1977,1979). And, even granted the obvious problem with continuity in change, there is much evidence that in its specificity and separation the family must be seen as having its own particular materiality or its own history, a history that pre-dates the emergence of the capitalist mode (see *eg* Macfarlane 1978:197-198, and Middleton 1981). Further, it is not only a matter of the family being specific and apart from the social totality integral to the capitalist mode of production; it is also specific *and* a part of that totality. It is not, for example, so much that family relations function in support of relations of reproduction within the totality; family relations *are* some of those relations of reproduction. That is,

in short, the family cannot be reduced to this totality or seen as only subordinate to it. There is an interaction between the two in which the family has a structured and an historically based autonomy. The modern family is doubtless dependent in significant part on the capitalist mode of production but the capitalist mode is also dependent in significant part on it. This theme of unity with opposition is the main leitmotif of the article.

Are we left with an impasse? The exploration of legal pluralism suggested a need for some totalising or, at least, some overarching explanation.[5] Yet instances of totalising explanation we considered did not seem to accommodate plurality. The impasse points to two strands of work in, or emerging out of, historical materialism. One in descent from Marx, in descent from Hegel, emphasises totalising explanation. Lukacs provides a statement that is apt here:

> the total context of the complex in question takes precedence over its individual constituents. The latter can only be understood from their concrete interaction within the complex of being involved, whilst it would be futile for us to try theoretically to reconstruct the complex of being itself from its constituents (as translated in Varga 1981:163).

There has been some dissatisfaction with this position but the dominant thrust of Marxist scholarship has been to support it. Even if it means going through an Althusserian loop or discovering a "relative autonomy" in constituent parts, the position is ultimately upheld. These journeys are never undertaken without the resolve to end up in the same place. The other strand emerges out of, or even away from historical materialism and is usually associated with Hindess and Hirst (see *eg* Hindess and Hirst 1977). It entails isolating social entities and establishing their conditions of existence. This strand poses problems of overall structuring and coherence similar to those I have raised in connection with legal pluralism.

The short point I want to make here is that the two strands should not be seen as mutually exclusive. The view from the totality can only accord essence to constituent parts in its own terms. These terms, operatively, can only be limited, unless we are laying claim to an achieved absolute totality which finally encompasses all. If we are not, then these terms can only be open, unless we are satisfied with some premature closure and the resulting totemic transformation of the parts. If we are not so satisfied then the parts cannot be wholly accommodated in the totality but have to be particularly constituted even whilst being in essential interaction with the totality. (Loosely, we can say the totality will be less than the sum of its parts.) Indeed, it will be a condition of its continued identity or particularity that the part in some ways be set against the totality. The relation between part and totality is contradictory in the sense that, to borrow Giddens' formulation, they "operate in *terms of each other* but at the same time *contravene one another*" — another Hegelian intrusion (Giddens 1979:141 — his emphasis). Historical materialism, after due exploration, has to accord particular materiality to parts often suppressed in or through Manichean totalising explanation, parts with their own histories, traditions and rationalities (*cf* Pocock 1971:234). Persisting with the family as an example, Middleton's recent historical work and Godelier's recent anthropological analysis can be taken as instancing this concern with particular materiality (Middleton 1981; Godelier 1981).

The rest of the article attempts to lend some concreteness to this argument in an

exploration of parts, or particular social fields, as conditions for the emergence and maintenance of modern law. This is done *via* the contribution of people called here "the radical institutionalists" — although some could well reject the label (see Foucault 1981b:5). The radical institutionalists would include Ignatieff and Foucault in their works on the penitentiary (Ignatieff 1978; Foucault 1979a), Donzelot in his analysis of the modern family (Donzelot 1980), Doerner with his history of psychiatry (Doerner 1981) and Rothman in his "Discovery" of the insane asylum, the penitentiary and the almshouse (Rothman 1971).

The radical institutionalists chart a change from a type of power and social control marked by law, centralised sovereignty and occasional or discontinuous interventions in society to a type of power and a type of social control that is disciplinary and continuously regulative and which pervasively, intimately and integrally inhabits society. It is a type of power and control not just, or so much, grounded in prohibition but more in the positive constitution of norms and the positive shaping of individuals to fit these norms. To appropriate Milton: "discipline is not only the removal of disorder, but if any visible shape can be given to divine things, the very visible shape and image of virtue" (Hill 1958:225). This change is effected in and through institutions that either emerged or took on radically new functions in the late eighteenth and early nineteenth centuries such as the penitentiary (Foucault 1979a; Ignatieff 1978), the psychiatric asylum (Doerner 1981) and monitorial schooling (Jones and Williamson 1979). Part of the concern in this is to erect a counter to those mainstream historical accounts which see these institutional changes as humane, reforming products of the Enlightenment, or some such. Perhaps this revisionist aspect has chronologically too much compressed the explanatory basis of the radical institutionalists' work. With some justification their work has been criticised as oversimplified and as overdrawn (see *eg* Bailey ed 1981). Doubtless the change was not so sharp and dramatic (see Arthurs forthcoming). Doubtless also developments central to their thesis occurred before and after this period (Ignatieff in press; Trilling 1972). Indeed the rationalisation of political rule and the bureaucratisation of state administration were integral conditions for the operation of disciplinary power (Foucault 1979b). Also, whilst "reforms" and aspects of the great change were advocated and intimated during the period, the change in its massive operation did not come, by and large, until much later in the nineteenth century. Yet it can still be allowed that the period remains pivotal and the perception of change basically valid. If chronological restraints are somewhat loosened, then necessary account can be taken of a broad range of disciplinary institutions concerned with, for example, crime, health, urban regulation, the control of mobility and migration, recreations, morality, the operation of the factory, sexuality and race.[6] The relevant effect here is the intimidating, massively shaping effect of the interacting sum of these institutions (Ignatieff 1978:215). If one did not work another could. Thus the notes of one prison chaplain from the mid-nineteenth century observe: "No.920. George Thomas. Does not read scriptures; has no wish to repent. Says he is a free man, obviously deranged" (as quoted in Melossi and Pavarini 1981:155).

This effect has to be seen not just in terms of those immediately contained by institutions but also seen as a generalised effect operative throughout the whole of society. "We are only a few steps removed from society. After us, comes you"

(Abbott 1982:21). The institutions serve as original sites and justifications for techniques of wider-ranging inspection and control. Also, by defining and containing what is unacceptable, the institution defines what is acceptable and hence provides also guides for self-regulation. Reactively, they support wide powers of prevention, of ensuring that people do not come within their domain. In this, and generally, techniques of control and their justifications can be so formulated that they could apply or could be made to apply to anyone. Thus Samuel Johnson foreshadowed many a radical critique of psychiatry when he wrote that: "of the uncertainties of our present state, the most dreadful and alarming is the uncertain continuance of reason . . . No man will be found in whose mind airy notions do not sometimes tyrannise, and force him to hope or fear beyond the limits of sober probability. All power of fancy over reason is a degree of insanity" (as quoted in Doerner 1981:58). Integral to the emergence of disciplinary institutions were the co-emergent sciences of man and of society, sciences that were means and justifications for observing, measuring, controlling and modifying human behaviour.

I would suggest that the work of the radical institutionalists could be seen as a positing and an exploration of particular materialities. Something akin to this is not infrequently asserted by them — the materiality of, for example, technologies ordering social relations being seen as no less significant than technologies of material production (see *eg* Donzelot 1979 and *cf* Giddens 1981). There is a tendency to give precedence to the particular and on occasion some radical institutionalists reject totalising explanation. Particulars are drawn together in such terms respecting the partial as nets, grids and rhizomes. More abstracted totalising elements are involved in Foucault's somewhat mysterious notion of power and in his almost perversely provocative idea of (generalising) strategies. This idea of strategies is tied to particular social fields in a way that is evidently apt here when he formulates a "rule of double conditioning" (Foucault 1981a:99-100). This rule has it that no specific and localised exercise of power can be effective without its being incorporated into an overall or general strategy of power and, conversely, the strategy cannot work unless supported by specific or localised exercises of power. These two elements are integral yet not homogenous. One cannot be reduced to the other. Thus he provides the following instance: "the father in the family is not the 'representative' of the sovereign or the state; and the latter are not projections of the father on a different scale. The family does not duplicate society, just as society does not imitate the family" (Foucault 1981a:100).

Let me now draw on these, to me, heady insights of the radical institutionalists in exploring particular social fields as conditions for the existence of modern law. It would be impossible to accommodate any number of fields here. To lend generality to the argument I use science as a representation of a great number of particular social fields. Science is seen as the main mode of the exercise of disciplinary power in modern society and includes its constitutive fields of knowledge in various sciences of man and of society. Somewhat arbitrarily, I take science and law to be generalising strategies in Foucault's terms and, in terms of the first part of this article, I take them to be elements in a totalising explanation of modern society. In both these sets of terms, particular social fields are significantly a part of science which organises them, endowing them with a generality, uniformity and coherence of effects.

Doubtless it is an exaggeration, but modern law can be seen as one side of a great divide (*cf* Redfield 1968:32-34). Medieval law was integral to a moral order and a traditional community (see *eg* Habermas 1974:50-62). In distinctive contrast, modern law neither depends on nor contains any necessary substantive morality and is based on private, isolated legal subjects with their lonely wills — Hegel's "son of civil society" (Wellmer 1971:76).[7] "In the midst of strangers, law reaches its highest level" (Black 1976:41 and see also Dumont 1965:22). Furthermore, modern law serves to effect the divide: so Habermas says that "*bourgeois formal law* . . . made it possible to release norm-contents from the dogmatism of mere tradition and to determine them intentionally" (Habermas 1976:86 — his emphasis). Prynne's assertion that "Parliament . . . is not tied to precedents" is but a counterpart to Milton's that "all men were born free" (see Hill 1969:200 for the quotations).[8] Crudely, the modern system is one of rule through law and sovereignty over isolated or individualised legal subjects, the old order, or the moral order, having disappeared. In the resulting void, as it were, law has also an enormous "function of legitimacy" (Poulantzas 1978:87). Indeed,theorising about modern law has had to put much emphasis on consensus without ever being happy with the notion (Hunt 1981). There are, of course, qualifications. Elements of the old order lived on, often serving in ways to legitimate the new (see *eg* Pocock 1967). Nor has the bourgeoisie ever been prepared to let justice be done 'though the heavens fall' and has been known to depart from its own standard of legality. But even with these qualifications, the work of the radical institutionalists reveals this simple picture as far from complete. Put another way, this work would give some more complex content to the element of so-called consensus (hegemony and so on).

Science served fundamentally to effect the transition from particularistic, solidary bonds to universalistic, individually-based relations — or served to account for or render inescapably factual the persistence of particularistic bonds.[9] Science served in the creation of that post-feudal individual who is the basis of the modern legal order. Science not only provided the actual or immediate controls — through psychiatric or medical science for example — but provided also and inseparably those techniques of measurement, survey and classification whereby the individual, any individual, could be rendered notable (Foucault 1979a:191-193). It is because of such particularistic and pervasive powers that law can be maintained in its aspects of universality and equality and seen as marking out fields for free action.[10] Bourgeois legality would prove too delicate for a society founded on inequality and coercive authority were not individuals pre-adapted, as it were, through science.[11] Science is the necessary "dark side" of law (Foucault 1979a: 222 and see also *ibid*:194). Given this dependence of law, and given the incompatibility in the constitutive and operative definitions of science and law, science and law have to be kept significantly separate, have to stand in a certain mutual autonomy or inviolability, unless science is to prevail at the expense of law (*cf* Thomson 1981).

Just so, at a time seen by most theorists as its beginning and incipient apotheosis, bourgeois legality seems to have been declining in the face of science's advance. "Our historical gradient," says Foucault, "carries us further and further away from a reign of law that had already begun to recede into the past when the French Revolution and the accompanying age of constitutions and codes seemed to destine it for a future that was at hand" (Foucault 1981a:89). The scenario is conveniently,

if somewhat too tritely encapsulated by Lasch:

> Social science owed its very existence to the rise of new modes of social control. In former times, power surrounded itself with elaborate apologetics, philosophical defenses of the status quo. As religion gave way to law as the principal source of social cohesion, and law to social therapy, the governing classes no longer attempted to mediate their pretensions with appeals to legitimacy. They appealed only to the unmediated authority of fact. They asked not that the citizen or worker submit to legitimate authority but that he submit to reality itself (Lasch 1977:23).

Law, it would seem, could not fundamentally resist the advance of science. It was dependent on science. It had no necessary substantive content to pit against the dictates of science. It was far from a closed system resistant to isomorphic infiltration from science. Tending to undercut law's resistance to science was the unity of law and science as linked instrumental apparatuses in the institutional milieu of the modern administrative state (Foucault 1979b). Further, science was a jealous god: it was a total view, one that claimed to render everything in political life explicable or potentially explicable in its terms, leaving room for law only as technique in its cause or as one of its branches (*cf* Habermas 1974: 60-61; see *eg* Horwitz 1977:254,257-259).[12]

So law, even in its own apparent expansion, seems to serve increasingly as agent, accessory and support in the advance of science. Law, it seems, comes to be regarded as a mere technique of control (Lasch 1977:187). In this situation law can be seen as increasingly marginalised, confined to some largely symbolical or procedural oversight of the operation of science or of other orders of authority (*cf* Galanter 1980:19-22; Mayhew 1971). Although this oversight serves to mark boundaries restraining science — preserving the 'rule of law' yet legitimating science — such oversight also and thereby serves to secure boundaries within which science can operate with impunity. Let me take as an example a batch of recent English cases dealing with law's supervision of prisons (*cf* also Zdenkowski and Brown 1982: 64-88 and ch 8). The two cases first decided were hailed as an advance in prisoners' rights. They held that courts could supervise internal disciplinary proceedings to ensure prisoners got a fair hearing (*R v Hull Prison Board of Visitors, ex parte St Germain* [1979] 2 WLR 42; *R v Hull Prison Board of Visitors, ex parte St Germain and others (No.2)* [1979] 3 A11 ER 545). The limited, merely procedural nature of this intervention was more eloquent about what law could not cover than about what it could. This point was dramatised in a following case where it was held that procedural natural justice did not oblige a Parole Board to give reasons for its refusal of a prisoner's application to be released on licence *(Payne v Lord Harris of Greenwich and another* [1981] 2 A11 ER 842). This was because of "the interests of society at large, including the due administration of the parole system" (*per* Lord Denning at 846).[13] If, with Foucault, we accept that secrecy is indispensible to the operation of disciplinary power (Foucault 1981a:86), this case can be seen as one precise marker of where law gives way before science. The more general necessity for science to win out emerged in a recent interview with the governor of Winchester prison. To follow legalistic procedures for internal discipline would, he pointed out, result in "lots of acquittals". This would undermine discipline. The machinery of justice should be used as a tool of social control "because, in a prison, ultimately,

authority has to win" (Phillips 1981: 13 and *cf* Zdenkowski and Brown 1982:72, 115). In an earlier case the irresistable Lord Denning had said: "If the courts were to entertain actions by disgruntled prisoners, the governor's life would be made intolerable" (*Becker v Home Office and another* [1972] 2 QB 407 at 418). The final case in the batch (*Guilfoyle v Home Office* [1981] 1 A11 ER 943) further illustrates another key aspect of law's support for the ultimate inviolability of science. This entails the infiltration of law by science. In this case the prisoner had complained of assaults on him by prison officers. These are also subject to internal proceedings. He had not succeeded in such proceedings and as a last resort wished to complain to the European Commission on Human Rights. The governor prevented the prisoner corresponding with his lawyer to this end. The Court of Appeal, on an exceedingly pedantic interpretation of the prison rules, held that the governor was entitled to do this. What is significant here is the robust humanity of Lord Denning, which appears to have informed the whole decision; he considered that the prisoner had next to nothing to complain of in any case for "it looks as if they [he and "his companions in crime" (at 944)] did get a little bit of rough handling by someone or other. They were bruised and received black eyes, but nothing more" (at 945). Thus, practical rationalities of discipline are sympathetically and protectively absorbed into the legal domain.

So far we have seen that science provides conditions for the existence of modern law. In this way law is dependent on and restrained by science and hence is vulnerable. Law can be displaced or marginalised by science. Areas of science are impervious to law — domains in the despotism that is the prison were taken as an example. If law were to overrule science in such domains, law would undercut conditions of its own existence. Law's dependence on science is thus set in their interaction. I now, and finally, want to explore the contrary perspective and, in the interaction of law and science, establish the dependence of science on law. For Foucault, as we saw, law's beginning was its end. But law was not emptied of substantive morality and rendered an instrument of science in a falling down before science's advance. Law changed rather because of science's dependence on it.

Enough has been said to show that, for the radical institutionalists, science does not flow inexorably from fact but is ultimately constituted politically. Thus Binet's I.Q. test results, not from a discovery in some pure realm, but from historically specific demands of administration (Rose 1979:50). Yet it is of the essence of science in the cause of state administration that it be perceived as 'objective' and apolitical (Habermas 1971:ch 6). But science is perpetually subject to self-revelation in particular political aspects through the application of its own epistemological standards. Even in its own terms, its particular claims to the autonomous constitution of fact must be considered contingent. Further, if science were to go beyond the voluntary adherence of its subjects — that is, go beyond the continually provisional — and if it had yet to present itself and secure its own operative effects, it could not for long avoid the revelation of its political or, especially, its coercively regulatory nature. Even short of these types of limiting revelation, there would remain areas where the dominance of science is not accepted and recalcitrants not prepared to submit to the necessity of fact.

So law, as independent of fact, empowers science, and serves to constitute it operatively. It also serves to incorporate and maintain particular social fields, such

as the family, as sites for the operation of science, social fields in ways often opposed to science's intervention (see *eg* Allott 1980:ch 8). It defines the abnormalities justifying science's intervention or empowers some practitioner of science to define them. It empowers officials and practitioners to intervene coercively to subordinate the legal subject to science and to override other authorities, such as the family head. It provides mechanisms of ultimate enforcement of science's dictates if the scientific subject proves less than cooperative. With convenient necessity, bourgeois legality would require that these coercive interventions and restraints be justified in law and apparatuses of legal supervision exist to enforce law's apparent primacy in all this. Thus science is invested with an aura of right and draws support from the general effects of law. Power is presented through law generally as a negative constraint leaving a measure of freedom intact and so the coercive operation of science is masked and the exercise of disciplinary power rendered acceptable (Foucault 1980:104; 1981a:86,144). Law has also to deal with the failures of science and for some of science's branches failure which, in the terms of science, is endemic. Take the now close to egregious case of the failure of the penitentiary. For that branch or constellation of science to operate, for it to be and remain a site and justification for a diversity of general social controls, it needs its basis in crime, and so not only does it fail to eliminate criminality but it goes further and positively creates and sustains criminality (Foucault 1979a:264-92; Igantieff 1978:210-11). Because of its pervasive necessity for science, law serves also as a field of cohesion and coalescence for the general operation of science. In somewhat abrupt summary, law and science are mutually supportive and interdependent, yet the maintenance of their effectuality in this requires them also to be significantly independent of and opposed to each other.

I will end with some few practical suggestions arising out of the relation between law and science and out of the wider theme of contradiction that has run through this article. These are suggestions only because more is involved in them than this relation and contradiction. We should reject, I suggest, the common perceptions and foretellings of the demise of law in the advance of science. We should also reject the common view that law is intrinsically a foe and potential tamer of science which should be readily resorted to if we wish to reform, transform, or counteract science or its effects.[14] Law is supportively at one with science, integrated into a "scientifico-legal complex" (Foucault 1979a:23). Yet law is significantly independent and controlling of science (and not, as Foucault would have it, utterly subordinated in the "scientifico-legal complex" (Foucault 1980:107-108)). Law is at once both these opposed things, hence the complexity in all this and the need, in practice, for a difficult discrimination. We could, I think, develop our discrimination in this by further exploring the vision of the radical institutionalists that, in the complex of science and law, so much of what has been presented over the last 200 years as humane or even liberating reforms have been intimations of an increasingly refined repression. Perhaps above all we should more closely seek the origins for modern society of that power we call legal and try to render these origins palpable: "...the struggle of man against power is the struggle of memory against forgetting" (Kundera 1980:3; and *cf* Pocock 1971:291).

Endnotes

1. Earlier versions of this article were presented at Osgoode Hall Law School in the lecture series "Law and Society" on 27 January 1982 and at the Law School, Macquarie University on 8 October 1982. I very much appreciate the valuable comments made on those occasions. Of great benefit also was the discussion following my "Protest and the Limits of Historical Materialism" (which drew considerably on the present paper), when it was presented on 18 February 1982 in the series of Political Sociology Research Seminars on "Protest and Legitimacy" organised by Chris Rootes at the University of Kent at Canterbury. In addition to all that I am indebted in an interesting lot of ways to a lot of interesting people, being Harry Arthurs, Sue Bendall, Gill Boehringer, John Buchanan, Shelby Fitzpatrick, Brian Simpson and David Sugarman.
2. One way in which the relation between particular social fields or particular legal orders and state law is dealt with is by denying significance to state law. For Galanter, state law is a symbol or deception, a mystifying professional ideology (Galanter 1981a, 198b). Ehrlich asserts that "...one might reasonably maintain that society would not go to pieces even if the state should exercise no coercion whatsoever" (Ehrlich 1936:71). The opposite tack is to accord state law some ultimate supremacy (Hooker 1975:4).
3. There are difficulties with the term "family" which are not considered here (*cf* Barrett 1980:199).
4. The point about disappearance is not pursued in the text. The 'early' Marx saw the family as passing with the abolition of private property (Marx 1971:149). Marx, with Engels agreeing, in the Communist Manifesto saw that with the development of capitalism "differences of age and sex have no longer any distinctive social validity for the working class" and both the bourgeois and the proletarian family "will vanish with the vanishing of capital" (Marx and Engels 1970:42,50). But if, as the text argues, the family cannot be reduced to the capitalist mode of production, then a dynamic related solely to the capitalist mode of production cannot necessarily eliminate the family. We would have to study the family and the capitalist mode and study them interacting before beginning to ascribe such a solvent effect to capitalism. One would need at least a much clearer and a much more comprehensive idea of the society we are moving towards than Marx and Engels provide before it can be said so assuredly that such a tenacious social field as the family would have no part in it.
5. "Suggested" only, because it could be retorted, in the tradition of Hume, that parts explain parts.
6. Explorations in these areas may reveal much about resistance to the imposition of ordering categories that have since become more unthinkingly acceptable:
   > It does in fact seem that at the end of the eighteenth century and at the beginning of the nineteenth century criminality was perceived, by the proletarians themselves, to be a form of social struggle. By the time that struggles take the form of combinations criminality no longer has quite this role; or, rather, breaking the law, the transitory and individual overturning of power and order which criminality represents can no longer have the same meaning, nor the same function in struggles (Foucault 1980:20).
7. Poggi notes:
   > ...it seems to me that within Western culture, at any rate, the principle of the depersonalisation of power — which I have suggested is entailed in the Weberian notion of legal-rational legitimacy — does possess a distinctive moral significance, and thus a true, if perhaps weak, legitimising force (Poggi 1978:107).

   This may not qualify what I say in the text for, as far as law is concerned, its significance may be confined to form (and *cf* Thompson 1977:265-266).
8. I am not saying that modern law is located entirely on this side of the divide; much of it is a product of the medieval period, as Gierke's dazzling analysis should perhaps more often remind us (Gierke 1900:73-100), although these elements of continuity will be given a heightened salience with modernity and the flowering of capitalism (Habermas 1979:133-144).
9. For example, there was the birth of scientific racism in the squaring of liberalism with colonialism and the later invention of prejudice as a scientific notion to account for persistent subordination on racial lines.
10. This vision of law is bolstered also in its immediately facilitative aspects, as in contract law for example.
11. The point can be supported suggestively by considering the fate of universalistic rule in direct or unmediated relation to inequality and coercive authority. The history of imported 'western' law in the third world could provide a massive example. For a dramatically focused instance take *R v The Earl of Crewe ex parte Sekgome* [1910] 2 KB 576. Here a law of a British protectorate in Southern Africa provided specifically for the detention of a potentially restless native. An extremely enterprising counsel argued that since this measure lacked universal application, it could not be valid law and habeas corpus would apply. The argument was rejected and the rejection bolstered in such

sentiments as those best expressed by Farwell L.J.:

> The truth is that in countries inhabited by native tribes who largely outnumber the white population such acts [as the Habeas Corpus Act], although bulwarks of liberty in the United Kingdom, might, if applied there, well prove the death warrant of the whites (615).

In such places the state's "first duty is to secure the safety of the white population by whom it occupies the land" (615-616).

12. Witness the triumph of the mechanistic view in the invention of and claims for the orrery (Cronin 1981:153-155); and "in the eighteenth century an Englishman had only to see machinery to think of God" (*ibid* 155).
13. See also Lord Denning on documents revealing the secret setting up in prisons of draconic "control units" in *Home Office v. Harman* [1981] 2 All ER 349 at 364: "It was in the public interest that these documents should be kept confidential. They should not be exposed to the ravages of outsiders".
14. Both these attitudes are often held together — dirges on the death of law usually being preludes to the advocacy of law's resuscitation, so that it can slay what has just slain it.

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PRIVATE LAW AND PRIVATE LAW THEORY IN THE GLOBAL ECONOMY (PART II)

ON LAW AND SUGAR: HOW PRIVATE LAW FACILITATES THE GLOBAL LAND GRAB (AND MUCH MORE BESIDES…)

Song-Mao (Villagers of the Chikhor, Chhouk and Trapaing villages in the Cambodian province of Koh Kong) v. Tate & Lyle

The GUARDIAN: 10 December 2014 « **European Union agrees to investigate Cambodian sugar industry : Booming industry faces allegations of human rights abuses such as land grabs, forced displacement and child labour »**

The European Union has agreed to investigate forced displacement claims in relation to Cambodia's troubled sugar industry. The move could see thousands of villagers compensated for illegally confiscated land and loss of earnings.

The Clean Sugar Campaign – which has been calling on the EU to investigate its trade ties with Cambodia's sugar industry since 2011 – called the development "a pivotal step towards justice for thousands of Cambodian people who have suffered enormously at the hands of the sugar industry".

The joint EU-Cambodia scheme has already been approved by the Cambodian government and is intended to "ensure redress" and restore "pre-project living standards and income levels" for those affected, campaigners said.

The EU confirmed the scheme in a statement seen by the Phnom Penh Post, in which it said the aim was to "fund technical expertise to develop a mechanism to audit claims in relation to sugarcane plantations in Cambodia, and ensure the implementation of any remedial measures that are found necessary".

Cambodia's booming sugarcane industry – which benefits from a preferential EU trade scheme called the Everything But Arms treaty – is rife with allegations of human rights abuses, among them illegal land grabs, forced displacement and child labour. Human rights groups claim that at least two villages in three provinces were entirely destroyed and thousands of hectares of rice plantations and orchards confiscated to make way for sugar plantations, leaving up to 2,500 families without homes, land or food.

A Guardian report last year into the Thai-owned KSL plantation – which exported sugar to the EU for the sugar multinational Tate & Lyle – investigated allegations of child labour and other abuses. Villagers also described being subjected to physical violence, having their homes and property destroyed, their land confiscated without their consent; they also claimed one person had been killed while land was being forcibly cleared.

Some 200 Cambodian families are currently involved in a lawsuit against Tate & Lyle, claiming the company knew, or should have known, of the allegations against KSL, and allege the sugar company should compensate them for the value of the sugar grown on the land they say still belongs to them.

Following the Guardian investigation into alleged abuses, the drinks corporations Coca-Cola and Pepsico agreed to a "zero-tolerance policy" regarding land grabbing in their supply chain, while the ethical sugar coalition Bonsucrosuspended Tate & Lyle for failing to respond to allegations of abuse related to KSL dealings. The sugar company later resigned from Bonsucro in June this year.

EXCERPTS FROM TOMASO FERRANDO's DISSERTATION ***Land and Territory in Global Production: A Critical Legal Chain Analysis*** *(2015)*

On March 28, 2013, two hundred villagers and former residents of the Chikhor, Chhouk and Trapaing villages in the Cambodian province of Koh Kong filed a tort case against Tate & Lyle plc and Tate & Lyle Sugars before the UK High Court. The central claim is the commission of the tort of conversion by the two UK-based defendants:[1] the plaintiffs claim that the defendants acted inconsistently with their rights over the sugar cane produced on the 1,364 ha of land that was an object of enclosure and eviction. In particular, the claimants are affirming that in the moment where T&L and TLS acquired and took possession of raw sugar originating from land legally belonging or in possession of the three villages they "wrongfully deprived the Villagers of the ownership, use and possession of the Sugar Cane processed into the Raw Sugar and converted the same to its own use."[2]

The claim, which is still pending before the Court, is thus structured around the tort of conversion, which is generally defined as the commission of an act of 'wrongful interference' or 'wrongful interference with goods'[3] whereby a person without authority does any act which interferes with the title of the owner. The basic elements of conversion, a tort which is not as common as negligence and has mainly been used in cases concerning the transnational theft of antiquities,[4] are: (1) the defendant's conduct was inconsistent with the rights of the owner or other person entitled to possession of the goods; (2) the conduct was deliberate rather than accidental; and (3) the conduct produced damages.[5] According to the Torts (Interference with Goods) Act 1977, delivery and damages are the two mechanisms to obtain relief.[6] Whenever a defendant manifests "an assertion of rights or dominion over the goods which is inconsistent with the rights of the plaintiff," she converts the goods to his own use.[7]

Therefore, the three elements that have to be identified in order to prove the tort of conversion are a) the existence of a title (property of possession) over a good that can be the object of conversion,[8] b) the commission of an intentional act that denies another person's right over a chattel or is inconsistent with it, and c) the sufferance of damages. In *Song Mao*, the parties present and discuss all these elements and provide different reconstructions of the facts and conflicting interpretations of Cambodian law. In the next paragraphs I analyze each of these three elements and offer a brief analysis of the arguments advanced by the parties.

VII.iii. Conversion as illegal deprivation of ownership or possession

In the particulars of the claim, the villagers affirm that they have been "the owners and/or legally entitled to possession of 1,364 hectares of land"[9] located within the villages of Chikhor, Chhouk and Trapaing. To support their statement, they produce maps that identify the areas over which they have such titles. Being the owners of the land, they claim, the 2001 Land Law of Cambodia recognizes that they are "entitled to receive all types of fruits from such property, including natural fruits and civil fruits by way of accession."[10] Therefore, as owners of the land they have always been entitled to the possession of the sugar cane produced on the land that they own. The fact that they were illegally evicted from their land and that Koh Kong Companies "held and dealt with both the Land and the Sugar Cane"[11] did not break the link between the title to the land and the title to the sugar. Therefore, the sugar that Koh Kong Companies sold without the authority or the consent of the villagers and that Tate & Lyle and TLS subsequently took possession of, was the villagers' sugar.

1 Conversion has been the primary vehicle for tortious protection against interferences with goods. See Richard. H. Helmholz, *Property and the Law of Finders*, 31 *Legal Studies* (2011) 511–515 . The fact that the two defendants are UK-based should reduce the opportunity to effectively rises the objection of *forum non conveniens.* As discussed above, Brussels II Article 4 states that: "Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State. Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State." See also Ch. I.I of this dissertation.

2 *Song Mao PoC.*

3 Torts (Interference with Goods) Act 1977.

4 See generally Patty Gerstenblith, Schultz and Barakat, 'Universal Recognition of National Ownership of Antiquities', 14 *Art Antiquity & L.* 21 (2009) (making reference to the recent case that Iran brought in "the United Kingdom against the London-based Barakat Gallery regarding the its alleged conversion of carved jars, bowls, and cups which were made from chlorite and date back to the period from 3,000 BC to 2,000 BC. Iran asserted its ownership of these antiquities held by the Barakat Galleries, and contended that its immediate right to their possession properly founded a claim for conversion or wrongful interference with goods. The court held that under Iran's Legal Bill of 1979, Iran enjoyed both title and an immediate right to possession of the antiquities. Thus, Iran's interest in the antiquities could found a cause of action in conversion under English law. The court also held that the issue of Iran's title to the antiquities was justiciable in an English court because the relevant provisions of the 1979 Legal Bill were neither penal nor public" (internal references omitted); see *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd*, [2009] QB 22, para. 4. See also *Attorney-General of New Zealand v. Ortiz* [1984] AC 1.)

5 See Drukker Solicitors, Defined Legal Terms & Phrases / Torts / Interference with Goods, available from http://www.drukker.co.uk/publications/reference/tort-of-conversion/#.VRK_XtJwtcQ [last accessed March 25, 2015].

6 More specifically, the Torts (Interference with Goods) Act 1977 provides that in proceedings for wrongful interference against a person who is in possession or in control of the goods relief may be given in accordance with section 3: a) an order for delivery of the goods, and for payment of any consequential damages, or b) an order for delivery of the goods, but giving the defendant the alternative of paying damages by reference to the value of the goods, together in either alternative with payment of any consequential damages, or c) damages.

7 Kuwait Airways Corporation v Iraqi Airways Co (Nos 5 and 5) [2002] 2 AC 883, 1104.

8 The 1977 Act provides that unless the context otherwise requires, 'goods' includes all goods personal other than things in action and money (s14(1)).

9 *Song Mao*, PoC, para 1.

10 Article 95, Land Law 2001, Phnom Penh, available from http://www.cambodiainvestment.gov.kh/land-law_010430.html [last accessed March 25, 2015].

11 *Song Mao*, *PoC*, para 21.

Opposing the claimants' assertion of right over the land and the sugar acquired by the defendants, T&L and TLS advance several arguments which trigger important questions about the interaction between global value chains, domestic legal structures, and courts' interpretation of legal institutions; furthermore, it triggers the way in which their multiple combinations can lead to very different allocations of value. In particular, the defendants advance five arguments that use the geographical distance of the value chain and the multiple moments of value addition to interpose a legal distance between the Cambodian villagers and the sugar delivered to the London refinery. These arguments are: i.a.a) the lack of clear titles over the land; i.a.b) the non-adjudicability of the claim because of the 'Act of State' doctrine'; i.a.c) the loss of a title over the fruits of the land; i.a.d) the fact that the transformation of sugar cane into processed sugar is an irreversible act of specification that transferred ownership to the owner of the mill (KSI); i.a.e) the impossibility to determine whether sugar originating from the KSI plantation was effectively delivered to the Thames refinery.

VII.iv. Conversion as lack of unequivocal ownership or possession over the land

First of all, T&L and TLS challenge the claimants' titles over the 1,364 hectares of land, which are at the center of the controversy. They do so by making reference to the Cambodian land law and, more interestingly, underlining the 2012 decision of the First Instance Court of the Koh Kong Provincial Court that decided to transfer the complaint to the Cadastral Commission because many of the letters and documents which had been submitted by the villagers and not been properly revised by that body.[12] If the UK Court decided to give relevance to this element, the civil action started in 2007 to obtain the cancellation of the Concession could thus become a 'legal boomerang' and generate totally unexpected consequences outside of its original jurisdictional frame.

VII.v. A chain of defenses: concessions as an Act of State

Secondly, the defendants claim that the two Economic Land Concessions (ELCs) issued in 2006 by the Ministry of Agriculture, Forestry and Fisheries and the subsequent agreements to make business production are not illegal. More precisely, the "Defendants assert that, at the time the Land Concessions were granted to KPT and KSI, the areas [...] were the private property of the Government"[13] and therefore it could legally dispose of them in favor of private investors. In any case, the defendants conclude, "the grant of the Land Concessions was a governmental act by the Government of a recognized foreign state within the limits of its own territory [and therefore] the English Court cannot adjudicate upon, or call into question, the grant of the Land Concessions."[14]

The latter point seems particularly interesting in light of what has been said in Chapter II about extraterritoriality and the tactical use of sovereignty. Trying to decipher the position of the defendants and foresee possible development of their argument, it may be affirmed that they are appealing to the 'Act of State' doctrine and to the fact that UK domestic courts cannot adjudicate whether the concession was contrary to principles of 'justice and morality.[15] Without entering into the historic origin of a doctrine,[16] which has been almost universally regarded as one of uncertain content and application,[17] I would like to focus the reader's attention to a case adjudicated by the UK Court of Appeal in 1921. The case, which is considered to be one of the milestones in the definition of the 'Act of State' doctrine has several points in common with the ongoing case of 'blood sugar' and could provide some important clues to anticipate the High Court's position on the specific point raised by T&L and TLS.

In the case, *Luther v Sagor*, the Court investigated a case of a sale realized in the UK of goods that had been previously expropriated by a foreign country through a decree.[18] The Court concluded that "[t]he Courts of this country will not

12 *Song Mao*, Defence, para 10.3.

13 Ibid, para 8.2.

14 Ibid., parta. 8.51, 8.5.2.

15 See *Luther v Sagor* ('Luther') where the UK Court considered, and upheld as valid, a Soviet expropriatory decree. Here, Scrutton J held that it would have been "a serious breach of international comity' if the Court was to adjudicate upon whether the decree was contrary to principles of 'justice and morality." *Luther v Sagor*, [1921] 3 KB 558-9. As pointed out by Lipstein: "The question before the Courts in *Luther v. Sagor* was a question of private international law, or it was a question whether executive acts of foreign Governments in their own country and abroad are entitled to the respect of English Courts." Kurt Lipstein , 'Recognition of Governments and the Application of Foreign Laws', *Transactions of the Grotius Society 35 (*1949), 157-188.

16 According to the general historical reconstructions, the UK 'Act of State' doctrine originated in the 1848 case of *Duke of Brunswick v. King of Hanover* (2 H.L. Cas. 1), was constructed throughout the colonial times and systematized in Lord Esher's dissenting opinion in the 1892 *Moçambique* case, one of the milestones of UK private international law. See *Companhia de Moçambique v British South Africa Co*, [1892] 2 QB 358 ('Moçambique') In that specific circumstance, Lord Esher affirmed that a UK court could not exercise jurisdiction "with regard to acts done outside its territory […] to determine the resulting rights growing out of those acts, unless such jurisdiction has been allowed to it by the comity of nations." Lord Esher's opinion was subsequently upheld by the House of Lords in 1983. In its judgment, the Court confirmed that borders mattered and that domestic courts had no jurisdiction on extraterritorial events concerning titles over foreign land, possession and damages of trespass, even when one of the parties was a UK citizen. See *British South Africa Co v Companhia de Mocambique* [1893] AC 602. One year later, Lord Esher issued his opinion in *Mighell v. The Sultan of Johore* ([1894] 1 Q. B. 149) were he concluded that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country because "Every sovereign state is bound to respect the independence of every other sovereign state, and the Courts of one country will not sit in judgment on the acts of the Government of another done within its own territory." (*Ibid*, 158). In the US, the judicial term of reference is represented by the case *Underhill v. Hernande* of 1887 (168 US 250, 252 (1887)). See also *In re the Claim of Helbert Wagg & Co Ltd* [1956] 1 Ch 323.

17 See Matthew Alderton, 'The Act of State Doctrine: From Underhill to Habib', 12 *Melbourne Journal of International Law* (2011), making reference to Michael Bazyler, 'Abolishing the Act of State Doctrine', 134 *University of Pennsylvania Law Review* (1986) 325; Fritz A Mann, *Foreign Affairs in English Courts* (Clarendon Press, 1986); Richard Garnett, 'Foreign States in Australian Courts' (2005) 29 *Melbourne University Law Review* 704. Contra Andrew D Patterson, 'The Act of State Doctrine Is Alive and Well: Why Critics of the Doctrine Are Wrong',15 *UC Davis Journal of International Law & Policy* (2008) 111.

18 The Soviet Republic issued a government decree of June 20, 1918, nationalizing all wood factories and their property, followed by a taking possession of the goods by the Government under that decree in January, 1919. Ibid.

inquire into the validity of the acts of a foreign government which has been recognized by the Government of this country."[19] In particular, the Court concluded that the decision to adjudicate whether an expropriatory decree issued by the Soviet Republic was contrary to principles of 'justice and morality' would have been 'a serious breach of international comity'.[20] As a consequence, the Court refused the plaintiff's request to declare the invalidity of the sale and purchase contract through which the representative of the Russian Commercial Delegation in London (who was the beneficiary of the expropriation) sold to a London based company (the defendant) part of the goods that had been expropriated from the plaintiff (a US-based company).[21]

As in the case of the *Song Mao* case, the plaintiff in *Luther* was the victim of the governmental act and it was demanding the court to recognize that the seller had obtained the possession of the goods by means of an illegal act and therefore was responsible of the tort of conversion.[22] However, the same case that seems to confirm Tate & Lyle's claim that a British domestic Court cannot adjudicate upon or call into question the grant of the Land Concession in Cambodia, provides one crucial element that points in the opposite direction; it raises interesting questions that are addressed when discussing the case of the 2008 EU timber regulation. Although the Court recognized that jurisdiction is excluded in those cases where the good has been obtained in a lawful manner according to the laws of that country, it also affirmed that UK judges could call into question those acts that are inconsistent with the foreign country's domestic law.[23] The fact that a UK Court cannot apply its own law to define the illegality of the act of a foreign State does not imply that it cannot utilize the *lex rei sitae* to scrutinize it and eventually recognize its contrariety to the legal order where it has been adopted.

In the aftermath of *Luther*, the rigid interpretation of the Act of State doctrine has been progressively reduced, maybe because of the several large expropriations cases that were brought to court by plaintiffs looking for a judicial remedy against events involving foreign governments.[24] For example, UK courts have increasingly refused to consider an act of state merely because that government says it is: "the terminology, and consequently the ensuing deference, are reserved for governmental acts of a particular character, undertaken for particular kinds of reasons."[25] Today it is generally accepted that courts in the UK would refuse to enforce a legislative or executive act of a foreign government that is contrary to the *lex rei sitae*. In *Oppenheimer v. Cattermole*, a 1976 case, the House of Lords declared in *obiter dicta* that Courts should not recognize legislation that constitutes a grave infringement of human rights.[26] At the same time, Courts would not enforce an act that is contrary to the public policy of the UK, including legislative and executive acts of foreign governments executed within their territory that are clearly in breach of public international law.[27]

The decision of the Court in *Song Mao v T&L*, which will certainly represent a crucial moment for the future of transnational human rights litigation and the possibility to structure a multiterritorial strategy against the collusive behaviors of states and capital, could thus be less favorable to the buyers than the defendants expect. In particular, the Court could recognize the fact that the two concessions are in violation of the Cambodian law (without the need to review it judicially) and/or to the framework of international law applicable to Cambodia. Then it could determine whether or not the appropriation of the land and its products deprived the villagers of their rights. If the concession is not declared illegal, there will be no unlawful act of conversion because there will be no inconsistency between the conduct of the refining companies and the (no more existing) right of the villagers.

19 [1921] 3 KB.

20 *Ibid*, 558-9.

21 *Ibid*, 533-534 ("On August 14, 1920, a contract was made in London between L. B. Krassin, the representative of the Russian Commercial Delegation in London, and the defendants whereby Krassin on behalf of the Russian Commercial Delegation sold to the defendants, a firm carrying on business in London, a quantity of birch, alder, and aspen plywood including the 1500 cubic metres of plywood seized by the Commissaries as above stated. The contract was signed on behalf of the Russian Commercial Delegation by "Commissary to Foreign Trade, Krassin; Secretary, Klishko." It was under the seal of the Agents of the Soviets of the People's Commissaries. The plaintiffs claimed a declaration that these goods were their property; an injunction restraining the defendants their servants and agents from selling, pledging, or in any way dealing with them; and damages for conversion and detention of them.").

22 See *Luther v Sagor*, at 534 ("The plaintiffs claimed a declaration that these goods were their property; an injunction restraining the defendants their servants and agents from selling, pledging, or in any way dealing with them; and damages for conversion and detention of them.").

23 *Ibid*, 545.

24 See Michael Singer, 'The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice', 75 *The American Journal of International Law* 2 (1981), 283-323.

25 Ibid,291.

26 *Oppenheimer v. Cattermole* [1976] AC 249 per Lord Salmon at 282

27 See Alderton, supra n 752, 11-12. On this last point, the decision in Kuwait Airways is regarded as being of particular importance. *Kuwait Airways* [2002] 2 AC 883. The international law exception to the Act of State doctrine is one of the few exceptions to the Act of State doctrine in the US context. Although not clearly defined, the exception would derive from Justice Harlan's decision in the *Sabbatino* case, where he stated that the doctrine does not apply if there is a "treaty or other unambiguous agreement regarding controlling legal principles." He also added that "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or international justice." See *Banco Nacional De Cuba v. Sabbatino*, 376 US 398 (US 1964). Interestingly, Sabbatino concerned the expropriation of a sugar plantation in Cuba and the claim raised by the original owner of the plantation, Mr Sabbatino, who argued that the Cuban expropriation was contrary to international law and that he had the right to the price paid by an American commodity broker. Interestingly, the fact that the Court did not recognize its full authority over the content of a foreign act of expropriation led Congress to enact legislation 22 USC. § 2370 – the Second Hickenlooper Amendment. This Amendment requires US courts not to apply the Act of State doctrine when the circumstances of the case require "to make a determination on the merits giving effect to the principles of international law" in cases involving claims to property expropriated by foreign States after 1958. See Frances X. Hogan, 'The Hickenlooper Amendments: Peru's Seizure of International Petroleum Company As a Test Case', *11 B.C.L. Rev.* 77 (1969).

VII.vi. A chain of defenses (ii): dispossession by adding value through (someone else's) labor

The third argument advanced by the defense of T&L and TLS offers a specific reconstruction of the way in which the fruits (or value) produced by the land are allocated. According to article 94 of the 2001 Cambodian Land Law, cited by the plaintiffs but whose application is denied by the defendants, "the owner of immovable property is entitled to receive all types of fruits from such property."[28] According to this disposition, the right over the land is automatically extended to its use value, i.e. to the fruits and products that can be extracted from it without any specific labor.

Article 95 of the same Law, which is cited both by the plaintiffs and the defendants, specifically addresses the issue of the allocation of the value produced by cultivating the land. It states that "the fruits resulting from cultivation of land belongs to the owner of such land provided he pays third parties for the cost of plowing and harrowing works, labor done by them and seeds."[29] Differently from the value that can be extracted without labor, the value that results from the intervention of labor does not automatically belong to the owner of the capital. Rather, it will be his[30] only after labor and seeds are repaid. Such provision, which could be interpreted as a pro-labor measure (although it does not say anything about the amount of the retribution for the value added by working the land) is twisted by the defendants in a way that may determine the complete deprivation of the villagers' rights to the fruits of their land.

According to the defense of T&L and TLS, the fact that the villagers "at any time made any payment to KPT and/or KSI: for the cost of ploughing and harrowing, works carried out by them in cultivating sugar cane on the Land; for the cost of labour undertaken by them (including the work undertaking in processing the sugar cane into raw sugar at the Sre Ambel Mill); and/or for the cost of the seeds utilized in cultivating sugar cane on the Land"[31] determine that even if the villagers were recognized owners of the land, they would have no right to any of the sugar cane cultivated upon the Land. If the Court confirmed this claim, the sugar that the defendants purchased and refined would have never belonged to the villagers but to the land workers, i.e. to companies that cultivated the land and processed the sugar cane.

Several considerations could be advanced to challenge this defense, starting from the defendant's attempt to present their operations as ones that were "adding value labor." Such position appears weak in light of the fact that these operations were conducted in the interest and for the benefit of companies that were aware of the uncertainty surrounding the property rights and of the evictions and violence that had occurred, and that the villagers never gave them mandate or indication to work the 1364 hectares of land.

However, the two most interesting aspects of this claim are represented by the use of labor to separate the land ownership from the right to its fruits and by the fact that the defendants have decided to challenge the villagers' rights at any step of the value chain. These two elements can only be briefly sketched.

Starting with the former, the only thing that should be noticed here is that the reading of the capital-labor relationship adopted by the two multinational companies appears to propose the idea of workers' full ownership of the products of their labor, whenever they are not paid or properly compensated. If this position were accepted, we would assist the introduction of an interesting sanction for labor exploitation consisting of the elimination of capital's right over the product of labor. It would be certainly interesting to see whether T&L and TLS would be ready to defend the same position in claims for the ownership of the products advanced by workers who are not sufficiently paid or not paid at all.

Closely looking at the latter point, the defensive structure appears to be organized as a multi-level legal counter-strategy: it criticizes the allocation of value to the villagers at any step of the chain, from its inception (the right to the land) to the moment where sugar arrives in London. In case the Court did not accept the objections advanced against the land ownership or possession, the defendants would move to the following moments of value generation, i.e. to the production of value by means of cultivation, industrial transformation, and shipping. All these defenses, and specifically the use of industrial specification and subsequent global indeterminacy as a consequence of global transportation, are perfect examples of an anti-liability use of the global value chain.

VII.vii. A chain of defenses (iii): industrialization and loss of rights

One of the most interesting objections raised by the defendants is their attempt to use the process of industrial transformation to deny the villagers' right to the raw sugar. According to their memo:

> "if [...] any of the Villagers were the owners of (or entitled to possession of) any of the sugar cane which was processed by KSI: 1) the Defendants will contend that those Villagers ceased to be the owners of that sugar cane (and/or ceased to be entitled to possession of that sugar cane) when the same was processed into raw sugar [...]; 2) it is denied that those Villagers were (or become) the owners of (or were entitled to possession of) the raw sugar which resulted from that processing; in particular [...] the Defendants will contend: that the process referred above was not reversible; that once that process had taken place: 1) the sugar cane was changed into a different species; the sugar cane no longer existed (and the title to the same had been extinguished); 3) through specification KPT/KSI became the owner of the raw sugar."[32]

The argument advanced by T&L appears particularly relevant from a critical analysis point of view toward the relationship between legal structures, global value chains and the distribution of value. Defendants try to use the ancient institution of specification to affirm that industrial processes, and in particular the transformation of sugar cane into raw sugar in sugar mills, created a legal distance between the land owners where the sugar cane was cultivated and the product that was eventually delivered in London. The legal institution of specification, a form of property acquisition *ab origine* that dates back to Roman

28 Article 94, Land Law 2001.
29 Article 96, Land Law 2001.
30 The English translation of the Cambodian Land Law does not leave space for imagination about the patriarchal nature of the Cambodian society.
31 *Song Mao*, Defence, para 15.1.
32 *Song Mao*, Defence, para 17.2 ss (internal references omitted).

law and is regulated in several civil law countries,[33] is combined with the systems of ownership and production in order to define a particular allocation of value that is its concentration in the hands of capital (the owner of the mill where value is added by mechanic intervention).

According to a general reconstruction of the institution of specification, it "comprehends the case of one who by his labor and skill has created a new product out of another's article, as where marble is carved into a statue or cloth made into a dress."[34] Differently from accession, adjunction or *confusio*, in the case of *specificatio* none of the original article is found, and *nova* species are created that are irreducible to the original good.[35] Interestingly, specification is frequently referred to as "*accession by skill or labor*"[36] and produces different legal consequences depending on the *mens* of the appropriator/worker.

In general terms, common law guarantees the creation of a new property title over the nova species in favor of the specificator. However, that does not determine the absence of an obligation for the new owner to compensate/pay damages. More specifically, the owner of the original material (the sugar cane) "may always recover damages against one taking his property" including "against an innocent purchaser from a willful trespasser, or from a purchaser with knowledge of the defective title. However, the owner can recover only the value at the time of trespass from an innocent purchaser of an innocent trespasser."[37] The attempt of the defendants to utilize the labor and the value addition in order to separate the sugar cane from its owner and deny the existence of a right to compensation and damages should thus be dismissed by the Court.

However, the position advanced by the defendants rises leads to two interesting considerations: a) if the Court accepted the thesis that the extraction of raw sugar from the cane automatically determines the transfer of property from the farmers to the specificator, i.e. KSI, that would imply the recognition that adding labor to the raw material produces an acquisition of property by the labor provider. The labor theory of value would thus be implicitly recognized by a Court of law and it could open unexpected scenarios in terms of legal and political recriminations of value throughout the chain (as in the case of the point concerning the loss of rights over the fruits of the land because of the intervention of unpaid labor); b) Secondly, the attempt of the plaintiffs to utilize a legal structure that is rooted in the Gaius tradition of Roman law reveals the legal complexity of contemporary global value chains but also the fact that they are deeply rooted in law and traditional legal institution.[38] If that is the case, lawyers and courts can certainly have a strong role in defining their patterns and dynamics.

VII.viii. A chain of defenses (iv): find your sugar... if you can

The last argument proposed by the defendants to deny the existence of the plaintiffs' right over the sugar refined in London (and therefore deny one of the legal basis of the tort of conversion) tries to use the complex structure of the global supply chain to create 'legal uncertainty' and obtain a favorable judgment. On the one hand, the defendants recognize that T&L signed a contract in 2007 whereby "KSI agreed to nominate between 51% and 100% of its production of sugar (from sugar cane grown in Cambodia) to T&L from 2008 to 2014,"[39] and that TLS on 3 August 2011 entered into a contract with KSI "whereby KSI agreed to supply to TLS with 100% of its raw sugar production for the crop years 2011-2012 and 2012-2013."[40] On the other hand, they do not admit that any of the raw sugar that was delivered to the Thames Refinery Factory in London had been processed from sugar cane grown on the 1,364 hectares of land referred to in paragraph 1 of the Particulars of Claim.[41]

Independently from the effectiveness of the defense and from the position that the Court will adopt, it is interesting to notice the defendants' attempt to attribute significant legal consequences to the circumstance that their supply chain is structured on multiple sources of raw material and, in particular, on sugar cane that is produced on thousands of hectares of land. Similarly to the case of Nestlè discussed in Chapter II (where the defendant claimed that it was not aware of the working conditions in the cocoa plantations) or the case of conflict minerals' that is discussed below (where the majority of the companies filing the §1502 SEC report have stated that they claim that they could not link specific minerals to their goods),[42] leading firms like T&L try to reduce their responsibilities by entrenching behind obscurity and complexity. But, above all, they downplay the amount of control that they have on each step of production and, more generally, on the supply chain.

Despite the general concerns for food safety, T&L's claims that the company has the responsibility to ensure it is buying the right goods and services for its business and "[t]he Procurement team at Tate & Lyle is evolving into a strategic sourcing organization,"[43] in the judicial confrontation against the Cambodian villagers the defendants adopt the attitude of disempowered buyers who cannot assess the exact origin of the sugar processed in its refinery. In all these cases, the confidence and authority revealed by claims like "[o]ur reputation is built on delivering consistently high quality ingredients to our customers" or "[a]ll of us, whatever our roles, have a responsibility to do what we can to ensure that everything we produce is of the highest quality, and meets our customers' expectations"[44] are transformed into uncertainty, insecurity and lack of information when it comes to

33 For example, article 940 of the Italian civil code.

34 Earl C. Arnold, 'The Law of Accession of Personal Property', 22 *Columbia Law Review* 103–120 (1922),103 citing *Lamlptot's Executors v. Preston's Executors* (Ky. 1829) 1 J. J. Marsh. 455, 463, where it is said: "Right by 'specification,' can only be acquired when, without the accession of any other material, that of another person, which has been used by the operator *innocently*, has been converted by him into something specifically different in the inherent and characteristic qualities which identify it."(italics added).

35 See Justinian, Institutes, 2.1.25; Stair, Institutions, 2.1.41; Erskine, Institute, 2.1.16. See D L Carey Miller, Corporeal Moveables in Scots Law (1991), 67.

36 Justinian, id.

37 Ibid,120.

38 See, e.g., Ernest Metzger, 'Acquisition of Living Things by Specification', *Edinburgh Law Review 8* (2004), 112- 115 (discussing a Scottish case where the plaintiff tried to utilize *specificatio* to claim ownership on full grown salmons that were once smolts and that had multiplied their size while in possession of the defendant).

39 *Song Mao*, Defence, para 17.3.1.

40 Ibid, para 19.3.

41 *Song Mao*, PoC, para 1; *Song Mao*, Defence, para 18.2, 20.2.

42 Jeff Schwartz, 'The Conflict Minerals Experiment', supra n 4.

43 Tate&Lyle, Global Procurement, available from http://www.tateandlyle.com/responsibility/oursuppliers/globalprocurement/pages/procurement.aspx [last accessed March 27, 2015].

44 Tate&Lyle, Code of Ethics: Essential Ingredients, Point 7: Food Safety and Quality, available from

allocating responsibilities and defining the effective economic and legal control that a leading company can exercise throughout the supply chain.

Regarding a law and global value chains analysis, this point is crucial. When it comes to marketing their products and obtaining consumers' trust, companies claim to have enough information and power to guarantee the quality of the food that they sell. On the contrary, when it comes to being held accountable for violations committed throughout the chain, they hide behind distance, complexity, and the multiplication of tiers. The reason for this is not only economic. Illuminating an entire supply chain is a process that would certainly have to continue all the way to the source and necessarily adds expense.[45] However, it is also a process that can expose legal chokeholds, make legal fragilities visible, and expose capital to a higher level of scrutiny and resistance. Similar to the case of Kiobel analyzed in Chapter II, companies try to use the multiterritorial structure of production, which is essential to the minimization of costs and the maximization of profits, to maintain a sufficient level of obscurity and legal impunity.

Given the importance that the information pertaining to the origin of processed sugar has for the whole community of consumers (imagine if the 1,364 hectares of land were contaminated by nuclear scores) and the lower cost the company should face in order to obtain it,[46] Courts should require the lead firm to provide the proof of origin of the contested good. An opposite allocation of the burden of proof would, on the contrary, lead to an easy manipulation of the global value chain and a reduced level of accountability. To conclude on this point, the final distribution of power, value and responsibility in the Song Mao case may not only depend on the interpretation of Cambodian law or of Roman legal structure, but also on the definition of apparently technical mechanisms of civil procedure.

VII.ix. Conversion: intentional act that is inconsistent or contrary to the person's right

The second element of the tort of conversion is represented by the intentional commission of an unequivocal act of ownership that is contrary to the property right or the possession that someone else has on a specific chattel. More specifically, conversion is the exercise of a right that is not substantiated and can be integrated by the unauthorized taking, detaining, misuse or disposal of movable goods, and also by receiving chattels that have been previously converted. In all these cases, the plaintiff's right over the good is denied or interfered by an action or by an assertion of dominion or control. In *Song Mao,* the tort case was filed against T&L as the legal person that received and disposed of sugar that was allegedly stolen from the villagers in a way that is inconsistent with the villagers' own right. The material conduct of the defendants is therefore identified as accepting delivery and taken possession from an illegal possessor of almost forty thousand tons of sugar that were produced on the 1,364 hectares of land violently enclosed and subtracted from the villagers.[47] According to the villagers, the defendant committed conversion because they knowingly, or negligently, received chattels that had been unlawfully obtained and converted (i.e. stolen sugar cane then transformed into raw sugar).

As in all torts, the second element to be taken into consideration is represented by the psychological element of the conduct. Differently from the United States, in the United Kingdom the tort of conversion is considered a tort of strict liability, i.e. the psychological element of the converter is irrelevant. According to the most recent precedents in the British Courts, the only element required is the intention to commit an act independently from the "specific intention to oust the true owner if the defendant intends to do an act which does in fact oust the true owner."[48] However, the fact that the rights over the sugar cane were taken away by KSI and then transferred to the defendants by contract and physical delivery introduces an element of complexity. In some legal orders, like the Italian one, the property title of the bona fide purchaser would be protected by the legal order (despite the seller having no title to transfer) and the real owner would only have an action against the seller.[49] Contrary to most continental legal systems, the English system has maintained a strong adhesion to Roman principle of *nemo dat quod non habet*. Therefore, as a general rule, the owner who loses his property as a result of a wrongful act of an intermediary can demand the restitution of his property from any third party regardless of the latter's good faith.[50] Cases on theft of cultural property show this – how you can use the choice of law rule to launder stolen property

However, even the British system contains some exceptions in the case of purchase in *bona fide*, i.e. when the purchaser receives the chattel in good faith, honestly and does neither have knowledge of his seller's lack of power nor of facts liable to create serious doubts as to the seller's authority either as a *non-dominus* or as a *falsus procurator*.[51] For this reason, the Particulars of Claim make specific reference to public actions, media campaigns and the production of dossiers as elements from which the Court should infer that Tate & Lyle was aware of the abuses committed in Cambodia when it concluded the contract with KSI in 2009 and received the tons of sugar in 2010.[52] Without trying to determine whether or not the purchasers were in bona fide or not, there are three main elements that emerge from the comparison of the two parties' arguments: a) the direct role that civil society organizations can play in the construction and enforcement of transnational torts; b) the attempt of the plaintiffs to utilize the economic relevance of the defendants in the sugar market and its implications in terms of *bona fide* ignorance of the land and villagers' conditions in Cambodia; c) the implications in terms of information and knowledge that the Court will attribute to the existence of a consultant operating in Cambodia but communicating with the leading company in the

http://www.tateandlyle.com/Responsibility/Documents/Code_of_Ethics_English.pdf [last accessed March 27, 2015].

45 See Schwartz, 'The Conflict Minerals Experiment', supra n 4.

46 A traditional law and economics analysis of the burden of proof determines that it should be assigned on the basis of cost minimization. There is no doubt that the defendant is in a better position than the villagers to prove the origin of the sugar. See e.g. Bruce L. Hay & Kathryn E. Spier, 'Burdens of Proof in Civil Litigation: An Economic Perspective', *26 J. Legal Stud.* (1997), 413; Eric L. Talley, 'Law, Economics, and the Burden(s) of Proof', *Research Handbook on the Economic Analysis of Tort Law* (2013);

47 *Song Mao*, PoC.

48 Christian von Bar, *Non-contractual Liability Arising Out of Damage Caused to Another* (PEL Liab Dam., Chapter I, Introduction, A, I: 2009).

49 See art. 1153 and 1479 of the Italian civil code.

50 Johan G. Sauveplanne, 'The Protection of the Bona Fide Purchaser of Corporeal Movables in Comparative Law', 29 *Rabels Z. Für Ausländisches Int. Priv. Rabel J. Comp. Int. Priv. Law* (1965) 651–693.

51 *Lord Sheffield v. London Joint Stock Bank* (1888), 13 App. Cas. 333 (H.L.).

52 *Song Mao*, PoC.

UK.

VII.x. The claim: the role of civil society in constructing transnational tort

Three of the elements that the plaintiffs offer to the court to assess that T&L and TLS knew or ought to know of the underlying land condition in Cambodia are precedent legal steps made by the Community Legal Education Centre, a Cambodian non-governmental organization that is concerned with achieving 'legal empowerment' in Cambodia. In particular, the plaintiffs make reference to the two complaints that CLEC submitted to the Koh Kong Companies in 2008 and 2009 about the "illegality of its operations, providing evidence of the Villagers' ownership of the land,"[53] the production of a file in 2010 containing a summary of all the abuses allegedly committed against the villagers, and the fact that this dossier was "sent to Tate & Lyle by CLEC on or around 12 July 2010."[54]

Responding to the allegations, the defendants deny having any knowledge of the dialogue between CLEC and the Koh Kong Companies and challenge the content of the report. Furthermore, they also admit that from about July 2010 T&L was "aware that CLEC was making the allegations which were set out in CLEC's report." Although the defendants deny that T&L knew or ought to have known that the villagers were the owners of (or entitled to the possession of) the raw sugar, they recognize that the leading firm had been directly informed about the existence of controversies, struggles and tensions around the ownership of the land. It will be interesting to read the decision of the Court on this point and understand what importance it will attribute to information that is made publicly available, like the report and the global anti-blood sugar campaign, to the NGOs' communications that directly address T&L. The high threshold of bona fide that characterizes the UK system of tort law and the requirement of honesty and due diligence of the purchaser seem to suggest that the Court could conclude that these excuses should not apply to T&L. If this were the case, the judges would contribute to the recognition of civil society as a crucial actor in the current system of global supply chains and corporate accountability.

VII.xi. Know your chain: defendants ought to know

The second point raised by the plaintiffs is that the position of T&L as a leading player in the sugar market was such that it ought to have known that the villagers were the owners of and legally entitled to possession of the raw sugar that they purchased from KSI. If accepted, the argument of the villagers may have significant implications in terms of distribution of rights and responsibilities throughout global value chains. What the plaintiffs are suggesting is, in fact, that economic relevance and the fact of being one of the leading firms in the entire productive sector (and not only in the specific value chain that is under analysis) impose a higher standard of diligence on the defendants and, in particular, reduce their possibility to use ignorance as an excuse for their conducts. In particular, economic relevance and the global nature of a corporation would cease to be instruments to evade responsibilities (like in the case of Daimler AG discusses in Chapter II) but rather sources of extra legal requirements and control of the production system. On the contrary, a rejection of the argument advanced by the plaintiffs would require civil society organizations to intensify the communications and information that are directly sent to leading firms and possibly to all the other companies that are part of the global supply chain.[55]

VII.xii. The buyer-consultant relationship and the transfer of liability

A third element that requires some attention is represented by the relevance that the Court will give to the existence of a consultant firm, PALP Consultant ("PALP"), that according to the plaintiffs worked with the Koh Kong Companies and was chosen together by Koh Kong Companies and Tate&Lyle "to develop the sugar cane estates"[56] on the contested land. Although the defendants do not recognize a direct contractual relationship with PALP, it will be interesting to see whether the judges will decide to scrutinize the role played by private actors that operate throughout the chain, linking core hubs (like T&L) and its peripheral branches.

More precisely, the argument could be read in at least three different ways: a) the fact that the leading company has contracted a consultant to supervise the agricultural operations in Cambodia determines a direct responsibility of the company for the operations (or omissions) of its agent, b) the consultant is not an agent, but its presence on the ground implies that T&L was certainly informed of the ongoing struggles for the land, of the possible illegality of the concessions, and of the abuses that lied behind the production of the raw sugar that it was purchasing and c) consultants are independent parties that have no impact on the legal requirements to assess direct or indirect tort responsibility of the party that co-hires (or sometime hires) a consultant. Needless to say, the choice of the High Court to pursue one direction rather than another would produce significant modifications on the legal options available to the villagers and on the balance of power between leading firms, suppliers and the people affected throughout the chain. the last element is represented by the existence of a damage produced by the defendant's intentional conduct.

VII.xiii Recovering the full value: asking for land and sugar

As anticipated, the English common law system does not require the intention of producing harm by means of conversion nor the knowledge of the fact that harm is going to be generated. It considers the tort existing when there is the intention of adopting the conduct that has been discussed above. Such structure has direct implications in terms of damages recovery. Generally speaking, in case of unlawful but not willful conversion, the system of common law allows plaintiffs to recover "the value of [the chattel] at the time and place of conversion, with interest, with no deductions for labor performed upon the timber anterior to the consummation of the conversion by actual removal."[57] "Where the taker acted in good faith, it

53 *Song Mao*, PoC, para 14.5.

54 Ibid., para 17.

55 Targeting multiple tiers could increase the number of positive actions for negligence, conversion, or other torts that depend on the knowledge of an underlying violation.

56 *Song Mao*, PoC, para. 22.

57 'Trover and Conversion: Measure of Damages for Conversion of Timber', *19 Michigan Law Review* (1920) 228–229. See also *West Yellow Pine Co. v. Stephens* (Fla., I920), 86 So. 241.

was held more reasonable that the "estimate should' be the fair value of the property in situ, before severance."[58] Different mental attitudes of the defendants would thus produce different redistributive obligations: in all cases, the court should guarantee damages for a converted good (especially in the case of specification).

In *Song Mao*, the villagers claim that the deprivation of sugar and its subsequent conversion by the defendants have produced loss and damages. From their perspective these damages account to the value of the sugar cane that has been produced on the 1,364 hectares of land over which they claim to own a property title or possession. More precisely, the plaintiffs affirm that each hectare of "Land would produce around 40 metric tonnes of Sugar Cane per annum. At US$41.88 per metric tonne the value of the Sugar Cane which is capable of being produced on the Land each year is approximately US$2,285,397."[59]

In the framework of conversion, the way in which the villagers identify and calculate the damages does not represent a novelty. However, from the point of view of law and global value chains that is adopted here, their action may open significant opportunities for redefining the allocation of value throughout the chain. Moreover, it deeply differs from the traditional human rights' approach to ex post compensation for land grabbing and to the recent position adopted by the European Commission in its attempt to mitigate the negative implications of the Everything But Arms initiative. The reason why the damages request deriving from the spoliation of the land is, in my opinion, particularly interesting is because it does not crystallize the violation at the moment of the eviction. Instead it looks at accumulation as a dynamic process that starts with the primitive enclosure of the land and continues throughout all the years in which the exploitation of the land is illegally conducted.

With the action against T&L, which is just one of the actions that the same villages have filed in order to defend their property rights and their future, the plaintiffs do not ask to be reintegrated in the possession of the land but to be attributed all the value generated by their land. In this way, the farmers are going to the core of land grabbing and global capitalism, which is not represented by one moment of exploitation but rather by the consolidation of a continuous system of capital extraction of value to the detriment of labor, environment, nature, villages, etc. On the contrary, the compensation for the loss of land and the reduction of income, which is the solution pursued by the European Commission after the December 2014 decision, take the reproduction of capital over dispossessed goods as a given and only try to offer a remedy for the static fraction of the value that has been extracted by KSI, KPT and (indirectly) T&L.

In my opinion, the legal twist that allows the European Commission to detach the primate moment of accumulation with its subsequent phases is the adoption of a human rights' perspective that describes the abuses as multiple episodes of violence in the history of the villages without making the link between their commission and the subsequent production and accumulation of value by cultivating the land that has been allegedly appropriated in an illegal way. When a human rights' approach is integrated with the tort architecture, enclosure can be translated into a continuous loss; so, the compensation for the loss of the land (*damnum emergens*) has to be extended to the loss of the value generated by the land (*lucrum cessans*). If the immediate and future losses are taken into consideration when investment arbitrators compensate investors whose land is expropriated in the interest of the public good, why should people evicted in the interest of the private good receive the same treatment?

To conclude, in case the Court recognized the commission of conversion by the defendants it should also condemn it to the payment of damages for the losses that the villagers suffered after being evicted from their land. If that was the case, the Court should also recognize that the defendants have committed multiple acts of conversion throughout the years and therefore condemn to the payment of damages for each ton of 'blood' raw sugar appropriated and refined in London. The theoretical and redistributive implications of the recognition of the villagers' right to all the value illegally extracted throughout the years would be extremely significant. The remedy to the spoliation of land finalized to the extraction of natural resources (oil, gas, timber, water or sugar) would cease to be a *una tantum* payment of the value illegally appropriated; it would be found in the reallocation of the entire profit of such a violation.

In the long term, a decision of the Court to recognize post-eviction damages for the exclusion from the rights over the raw sugar produced may redefine the bargaining power between capital and communities. In particular, the ex post provision of a full compensation would affect the pre-investment phase. Despite the evident limits and concerns, such attitude of the courts would mean that investors might perceive a stronger threat, deriving from not complying with laws and participatory requirements. In addition, informed and assisted villagers may find themselves in a reinforced position vis-à-vis the other parties involved (public and private) and could obtain better agreements: more specifically, the possibility to recover the full use value generated by the land would represent an incentive for the investors to accept profit-share agreements and leave significant parts of the value with the communities.

Although it is certainly not intended as subversive, the High Court's recognition of the villagers' right and claim to the payment of full damages for conversion may signify a new phase of political, legal and economic struggles regarding land. For all the reasons above, critical lawyers and activists should pay particular care to the unfolding of the *Song Mao* case and to the possibility of replicating its patterns.

VIII. The Criminalization Of Land Enclosure And The Redefinition Of Patterns Of Production

VIII.i. The Communication to the International Criminal Court

October 7, 2014 may be remembered as a turning point in the struggle against forced evictions, enclosure of land, and the use of State authority to operate as a broker between the interest of transnational capital and a country's resources. On that day, Richard Rogers from Global Diligence filed a criminal complaint at the International Criminal Court's Office of the Prosecutor for mass human rights violations perpetrated against the Cambodian civilian population by senior members of the Royal Government of Cambodia ("RGC"), senior members of State security forces, and government-connected business leaders (the "Cambodian Ruling Elite"), from July 2002 to present.[60]

58 *Wood v. Morewood*, 3 Q. B. 44o.

59 Song Mao, *PoC*, para 30.

60 Communication Under Article 15 of the Rome Statute of the International Criminal Court: The Commission of Crimes Against Humanity in Cambodia July 2002 to Present, Executive Summary, para 3, available from

The objective of the communication, which has not received an official response, yet, was to ask the Office of the Office of the Prosecutor to consider the Communication according to its obligations under Article 15 of the ICC Statute, with the aim to initiate an investigation pursuant to Article 53 of the ICC Statute.[61] However, its scope of the Communication is not limited to one event and one precise actor. On the contrary, it uses several examples (including these of the KPT and KSI concessions in the Koh Kong province) to denounce the existence of a systemic structure of violence linked to enclosures of common land and their transformation into industrially viable plantations. Reproduced from 2002 until present, this scheme would reveal the crucial role of the state in the generation of non-internalized externalities and 'dark value' that are at the basis of several value chains that originate in Cambodia (mainly sugar and rubber).

https://www.fidh.org/IMG/pdf/executive_summary.pdf [last accessed March 18, 2015] (herein "Communication').

61 Ibid, para 1.

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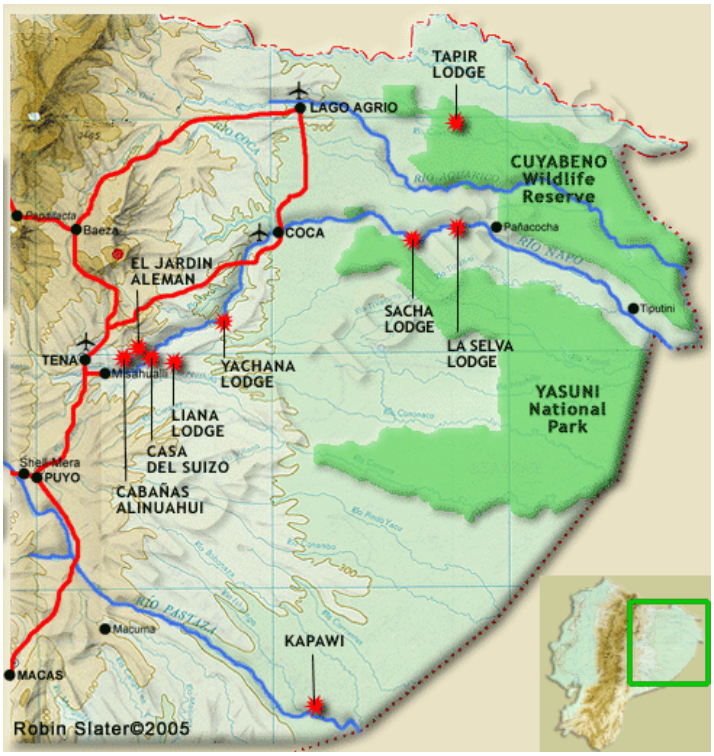
For discussion purposes among workshop participants only

THE LAGO AGRIO LITIGATION: *ECUADOR V CHEVRON*

Introduction

The Lago Agrio oil field is an oil-rich area in the Ecuadorian province of Sucumbíos near the city of Nueva Loja, discovered in the 1960s. The Lago Agrio field is known internationally for the serious ecological problems that oil development has created there, including water pollution, soil contamination, deforestation and community upheaval. Since 1993, lawyers representing local residents have sought to force former well operator Texaco and its now parent company Chevron Corporation to clean up the area and to provide for the care of those allegedly affected. Over a period of 20 years, the Lago Agrio field produced 1.7 billion barrels (270×106 m3) of oil with a profit of $25 billion.



Chevron and Ecuador have different opinions regarding the outcome and consequences of the Lago Agrio Project:

According to Chevron, 95 percent of the profit from the consortium went to the government.

According to Ecuador and Amazon Watch, at the height of Texaco's operations, the company was dumping an estimated 4 million gallons of oil per day, a practice outlawed in major US oil producing states like Louisiana, Texas, and California decades before the company began operations in Ecuador in 1967. By handling its toxic waste in Ecuador in ways that were illegal in its home country, Texaco saved an estimated $3 per barrel of oil produced.

The agreement to remediate the environmental damage

In 1995, the government of Ecuador and Texaco/Chevron reached an agreement to implement a plan of action to remediate the environmental damage. Today, however, the two parties hold different views regarding this agreement.

For Chevron, as part of a 1995 Remediation Action Plan, Texaco Petroleum Company (Texpet, a subsidiary of Texaco) remediated 161 of 430 identified oilfield pits (and 7 spill areas), a proportion that was equal to their share in the consortium. Texpet was a minority partner in a government-owned oil consortium in Ecuador from 1964 - 1992. Petroecuador, the state oil company of Ecuador, was the majority partner and has exclusively operated the oil fields since 1992. Texaco Petroleum's involvement in the project was governed by a concession agreement, where all activities were conducted with the oversight and approval of the government of Ecuador.

At the end of the concession agreement, two audits were conducted to address the impact of the consortium operations on the soil, water and air, and assess compliance with environmental laws, regulations and generally accepted operating practices. Each independently concluded that Texaco Petroleum acted responsibly and that there is no lasting or significant environmental impact from the former consortium operations. Additionally, Texaco Petroleum conducted a remediation program reflective of its 1/3 share of the oil-producing consortium with Petroecuador in which producing wells and pits formerly utilized by Texaco Petroleum were closed, produced water systems were modified, cleared lands were replanted, and contaminated soil remediated. All remediation activities were inspected and certified by the Ecuadorian government.

The $40 million remediation program began in 1995 and was completed in late summer 1998. During the process, all remediation activities were inspected and certified by the Ecuadorian government on a site by site basis. On September 1998, Ecuador's Minister of Energy and Mines, The President of Petroecuador and the General Manager of Petroproducción signed the "Final Release of Claims and Delivery of Equipment." This 1998 agreement finalized the Government of Ecuador's approval and certification of Texaco Petroleum's environmental remediation work and stated that Texaco Petroleum fully complied with all obligations established in the remediation agreement signed in 1995. In addition, the Municipalities in the area of the drilling operations signed a negotiated settlement with Texaco Petroleum that released the Company from any future claims and obligations.

For the local population, Texaco quit the oil production consortium in Ecuador in 1990, and negotiated an agreement with the Ecuadorian government in which it would pay for and conduct a cleanup of the environmental damage it had produced. Unfortunately, from the start, the terms of this agreement limited the scope of the remediation. Texaco only agreed to take responsibility for 37.5% of contaminated sites, in accordance with its share in the oil production consortium, despite that Texaco had been the sole operator for 26 years and had designed the system responsible for 100% of the contamination in the region. Texaco also negotiated a grossly inflated standard for acceptable levels of contamination. Ecuador law currently prohibits total petroleum hydrocarbons (TPHs) in the soil at amounts greater than 1,000 ppm (considered a lax standard for polluters as the median U.S. standard is 100 ppm). Texaco, however, agreed to apply a 5,000 ppm standard in its "remediation" contract. Finally, Texaco's remediation addressed only specific well sites, with no consideration of the damage the company had done to the broader ecosystem by polluting surface streams and groundwater.

Even with the deck thus stacked in its favour, Texaco still failed to honestly live up to the standards it had basically set for itself. In some cases Texaco used scientific trickery to obtain soil samples that complied with the agreed-upon contamination standard, as a more recent study of the exact same sites has found contamination far exceeding that standard. Evidence has also shown in ensuing years that many waste pits were simply covered with dirt, rather than truly remediated. The toxic waste is still there, several feet underground. Local people have since built houses on some of these sites, having been assured by Texaco that there was no remaining danger.

In 1998, Texaco certified to the Ecuadorian government that it had completed its remediation, at a cost of a meagre $40 million (compared to the billions of dollars that the judge, based on expert testimony, has now estimated an actual comprehensive cleanup will cost). The government thus signed off on a release waiving its right to seek any further compensation from Texaco for environmental damage.

The litigation: the Lago Agrio Case

Because of the vast environmental and health damage produced by the Lago Agrio Project, the inhabitants of the area initiated a legal complaint to seek damages from Texaco/Chevron. This dispute has reached a high level of complexity, involving several legal questions and various domestic and international jurisdictions. In essence, Chevron, which purchased Texaco in 2001, has relied on the settlement agreement to argue that the lawsuit is invalid, although the release may only apply to claims originating from the Ecuadorian government.

- The case was first filed in 1993 under the Alien Tort Claims Act on behalf of the Ecuadorian victims or "Afectados" in the federal court for the Southern District of New York, for damages done from 1964 through 1992, ongoing to this day, during drilling for oil in the region where the plaintiffs live and work. This was a class-action lawsuit accusing Texaco of discharging produced water into open pits, contaminating the water that was used by the locals for fishing, bathing, and drinking. This case is known as *Aguinda v Texaco*.

- For nine years Chevron contested being tried in the United States on the grounds that Ecuador was a more convenient forum and that its courts were fair. In 2002, Chevron succeeded in dismissing the original suit. Among other reasons, Judge Rakoff (142 F.Supp.2d 534, S.D.N.Y. 2001) considered that:

  "The failure of the military coup of January 21, 2000 reaffirmed Ecuador's insistence on democratic, civilian control of its institutions. While no one claims the Ecuadorian judiciary is wholly immune to corruption, inefficiency, or outside pressure, the present Government of Ecuador, headed by a former law school dean, has taken vigorous steps to further the independence and impartiality of the judiciary" (Page 544).

  "The Ecuadorian local interest in the controversy is, on plaintiffs' own showing, very substantial, whereas the public interest of the United States is much more modest. According to plaintiffs, the acts complained of resulted in environmental pollution of Ecuador's rainforest regions and other property, and thereby injured tens of thousands of Ecuadorian and Peruvian citizens in their property and/or persons" (Page 551).

  "On any fair view of the evidence so far adduced in this case, the alleged preference given by the Consortium to oil exploitation over environmental protection was a conscious choice made by the Government of Ecuador in order to stimulate its economy. The public interest of the United States in second-guessing those decisions is modest indeed. While plaintiffs allege that the piping and waste disposal practices used to implement this choice were 'negligent' (in the sense of causing more environmental harm than other, more expensive alternatives available to the Consortium would have caused), they have not adduced anything but conclusory statements to suggest that the Government of Ecuador was unaware of the trade-off; and, in any case, whether or not the Government of Ecuador was or was not aware of these alleged consequences can only be determined, in any meaningful way, if the litigation is brought in Ecuador, where (as noted) the Government of Ecuador can be joined as a party" (Page 551).

  The decision was confirmed by the U.S. Court of Appeals for the Second Circuit. However, this tribunal required Texaco to make a commitment to submit to the jurisdiction of the Ecuadorian courts as a condition to the dismissal of this suit. Texaco made this commitment, reserving its right

to contest the validity of an Ecuadorian judgment in the circumstances permitted by New York's Recognition of Foreign Country Money-Judgments Act.

- The trial of a claim filed in Ecuador began in May 2003 in a provincial court in the province of Sucumbíos, in Northern Ecuador. On February 2011, the court in Ecuador found overwhelming evidence that the company deliberately dumped billions of gallons of toxic waste into the Amazon rainforest, rivers and soil from 1964 to 1992, uprooting indigenous groups and other residents and causing a public health crisis, including a cancer outbreak that has killed or threatens to kill thousands of people. Judge Nicolás Zambrano found Chevron liable and imposed a damages award that was affirmed by a separate Ecuadorian appellate court. The amount of damages that Chevron must pay is $19 billion.

  Following the appellate decision upholding the trial award, Chevron filed an appeal with the highest court in Ecuador. This court reviewed the case and upheld the initial verdict against Chevron for the pollution, but halved the damages to $9.5 billion. It reduced the amount of damages because, under Ecuadorian law, there is no legal basis to award damages for Chevron's failure to offer a public apology − as it was ordered by the judge of the first instance tribunal.

  James Craig, a spokesman for Chevron, stated that "the only decision that the Court of Justice could have taken […] was to declare the trial null and void and leave this illegitimate sentence without effect." In his view, the ruling is "as illegitimate and unenforceable today as it was when it was issued nearly three years ago."

The efforts to enforce the Lago Agrio decision

Since Chevron has no significant assets in Ecuador and refuses to pay the Ecuadorian judgment, the "Afectados" have initiated foreign enforcement actions in Canada (May 2012), Brazil (June 2012) and Argentina (November 2012). They have also tried to obtain a provisional measure from the Inter-American Commission on Human Rights (February 2012), and have recently filed a case before the International Criminal Court (October 2014).

Argentina

In November 2012, the Commercial Court of Justice in Argentina, acting under the Inter-American Convention on the Execution of Preventive Measures and the Ecuadorian Order froze all of Chevron's relevant assets Argentina. On January 2013, a 3-judge appellate court unanimously upheld the embargo. On September 2013, however, Argentina's Supreme Court ruled in favour of Chevron and against the Ecuadorian government. In a five page ruling, the Argentine Supreme Court unanimously agreed to lift the embargo, noting Chevron Argentina and the other involved entities were separate from Chevron Corporation, and therefore not parties to previous litigation.

Brazil

Brazil, unlike many other countries, hears cases to recognize foreign judgments at the highest non-constitutional court level: the Superior Tribunal de Justiça, or STJ, located in Brasilia. This fact will likely reduce the time to reach a recognition decision by eliminating appeals from lower court levels. A judge was named to hear the case and a recognition ruling was estimated sometime in 2014. In May 2015, the Brazilian federal prosecutor recommended to the court that recognition be denied based on a number of concerns including that the judgment was obtained in an irregular manner under a situation of corruption. In September 2017, the plaintiffs announced that they were abandoning efforts to have the judgment enforced in Brazil.

Canada

In May 2013, Judge David Brown of the Ontario Superior Court of Justice issued a stay in the action filed by the Ecuadorians nearly a year before to recognize and enforce their judgment against Chevron and Chevron Canada's assets in Canada. While Judge Brown found that his Canadian court does have jurisdiction against both Chevron defendants, the key issue on the motion in front of him, he stayed the action, without prejudice to future appeals, citing the slim likelihood that the Ecuadorians can legally attach properties owned by Chevron subsidiaries. In his view, "the plaintiffs have no hope of success in their assertion that the corporate veil of Chevron Canada should be pierced and ignored so that its assets become exigible to satisfy the Judgment against its ultimate parent (Paragraphs 109-110)." Judge Brown, however, did not question the legitimacy of the Ecuador decision or its right to enforcement in jurisdictions where Chevron does have assets.
On December 2013, however, the Ontario Court of Appeal overturned this decision, allowing the recognition and enforcement action to proceed (2013 ONCA 758 (CanLII). The tribunal decided that:

> "[74] Even before the Ecuadorian judgment was released, Chevron, speaking through a spokesman, stated that Chevron intended to contest the judgment if Chevron lost. He said: 'We're going to fight this until hell freezes over. And then we'll fight it out on the ice.'
> [75] Chevron's wish is granted. After all these years, the Ecuadorian plaintiffs deserve to have the recognition and enforcement of the Ecuadorian judgment heard on the merits in an appropriate jurisdiction. At this juncture, Ontario is that jurisdiction."

Chevron appealed this decision to the Supreme Court of Canada. In September 2015, the Supreme Court of Canada unanimously denied the appeal concluding that the Ontario courts did have jurisdiction to decide whether to recognize and enforce the Ecuadorean judgment (Chevron Corp v Yaiguaje 2015 SCC 42). The Supreme Court emphasized that in finding that the Ontario court has jurisdiction to consider recognition and enforcement, Chevron and Chevron Canada can use available procedural arguments to try to dispose of the plaintiffs' allegations. Further the Supreme Court noted that its decision should not be understood to prejudice future arguments with respect to the distinct corporate personalities of Chevron and its Canadian subsidiary or whether the subsidiary's assets will be available to satisfy Chevron's debt. The Ecuadorean plaintiffs are now continuing with the recognition and enforcement hearing on the merits in Ontario courts. In January 2017, an Ontario court ruled that the plaintiffs could not proceed against Chevron's Canadian subsidiary but permitted the enforcement to proceed against Chevron itself. The ruling that rejected enforcement against the Canadian subsidiary is currently under appeal at the Ontario Court of Appeal.

Inter-American Commission on Human Rights

On 9 February 2012, the Ecuadorian plaintiffs filed a petition for precautionary measures with the Inter-American Commission on Human Rights explaining the various ways in which relief requested by Chevron and orders of the investor-state tribunal (see below) would violate the human rights of the Ecuadorian plaintiffs. The plaintiffs' legal representatives argued that the investor-state proceedings presented serious threats to the Ecuadorian plaintiffs' "enjoyment of core rights to life, physical integrity, health, as well as their rights to a fair trial, to judicial protection…, and to equal protection under the law." As relief, they requested the Inter-American Commission to order measures to assure that, irrespective of any orders by the investor-state tribunal, Ecuador would not interfere with the Ecuadorian plaintiffs' judgment in violation of their human rights.

The Lago Agrio Plaintiffs withdrew this petition on March 2 2012. Consequently, the prospects for a ruling by the Commission addressing the relationship between human rights and investment treaty arbitration seem to have quietly dissipated.

International Criminal Court

In October 2014, the Lago Agrio Plaintiffs submitted a complaint to the International Criminal Court (ICC) requesting the ICC prosecutor to open an investigation against Chevron Chairman

and CEO John Watson and other high-level company officers for "crimes against humanity" related to the company's "inhumane" actions "to ensure that it will never have to pay a cent to affected peoples." They argue that Chevron engaged in murder, forced deportation and other acts that constitute crimes against humanity. In March 2015, the ICC Office of the Prosecutor wrote to the complainants indicating that based on the available information the ICC did not have the basis to proceed further with the complaint, noting concerns that some of the allegations do not fall within the ICC's temporal jurisdiction and others do not appear to fall within the subject-matter jurisdiction of the complaint.

Chevron strikes back: The U.S. RICO case and the Investor-State litigation

Chevron maintains that the Lago Agrio judgment is illegitimate because of documented evidence of fraud and unethical action by the plaintiffs' lawyers as well as the Ecuadorian government and judiciary. These fraudulent actions include the plaintiffs' lawyers falsifying data in multiple instances and in the name of supposedly independent environmental experts; paying experts to ghost-write exaggerated environmental-impact assessments; and bribing a judge who allegedly allowed the plaintiffs' lawyers to write the actual judgment issued against Chevron.

The Litigation in the United States

1. Resisting enforcement

In the context of RICO case, see below, Chevron requested a "preliminary injunction restraining enforcement of the Ecuadorian judgment (the Lago Agrio decision) outside Ecuador." Judge Kaplan accepted this request and issued an order preventing the plaintiffs from collecting on the Ecuadorean judgement anywhere in the world. Judge Kaplan raised serious concerns about the legitimacy of the judgment against Chevron, and accepted the argument that the decision rendered in Ecuadorian courts appeared to be an act of extortion. He relied on the Alvarez Report, concluding that "the Ecuadorian judicial system no longer acts impartially, with integrity and firmness in applying the law and administering justice. It has been plagued by corruption and political interference for decades, and the situation has worsened since President Correa's election (Pages 77-78)."

This injunction, however, was overturned by the Second Circuit Court of Appeals in September 2011.

2. The illegitimacy of the Ecuadorian decision

Chevron has brought a civil lawsuit under the Racketeer Influenced and Corrupt Organizations Act (RICO) against the trial lawyers and consultants leading a fraudulent litigation and public relations campaign against the company.

The RICO complaint was filed in February 2011 and seeks to hold the plaintiffs' representatives accountable for fraud, extortion and other misconduct associated with the Lago Agrio litigation.

Chevron, among others, claimed that Ecuadorian courts invented a criminal case against two former Texaco lawyers. The allegations were that the defendants falsified documents concerning the 1995 agreement between Texaco and Ecuador, in which the government agreed to release the company from environmental claims in return for the remediation of some sites. In June 2011, however, a court in Ecuador dismissed these criminal proceedings.

On the other hand, a former Ecuadorian judge acknowledged his direct involvement in orchestrating a fraudulent judgment against Chevron. In a sworn declaration filed on January 28, 2013, Alberto Guerra, who presided over the case when it was first filed in 2003, reveals that he was paid thousands of dollars by the plaintiffs' lawyers and a subsequent judge, Nicolás Zambrano, for illegally ghost-writing judicial orders issued by Zambrano and steering the case in the plaintiffs'

favour. Guerra attests that the plaintiffs' lawyers were permitted to draft the $18 billion judgment itself after they promised to pay Zambrano a $500,000 bribe out of the judgment's enforcement proceeds.

On March 4, 2014, the U.S. District Court ruled that the $9.5 billion Ecuadorian judgment was the product of fraud and racketeering activity, finding it unenforceable. The nearly 500-page ruling finds that Steven Donziger, the lead American lawyer behind the Ecuadorian lawsuit against the company, violated the federal Racketeer Influenced and Corrupt Organizations Act (RICO), committing extortion, money laundering, wire fraud, Foreign Corrupt Practices Act violations, witness tampering and obstruction of justice in obtaining the Ecuadorian judgment and in trying to cover up his and his associates' crimes. The ruling prohibits Donziger and his associates from seeking to enforce the Ecuadorian judgment in the United States and further prohibits them from profiting from their illegal acts.

Donziger appealed this decision before the Circuit Court. In August 2016, the Second Circuit unanimously affirmed the decision of Judge Kaplan. In June 2017, the Supreme Court of the United States denied a petition for certiorari.

The investment arbitration (U.S. - Ecuador bilateral investment treaty)

1. Chevron's investment claim

III. Respondent's Conduct Breaches Its Investment Agreements With Claimants and Its Treaty Obligations

66. As set forth in more detail above, Ecuador (in its sovereign capacity) agreed to the Scope of Work to be carried out by TexPet, approved all of TexPet's remediation work and consequently granted TexPet a full release from all legal and contractual obligations and from any further liability for environmental impact arising out of the Consortium's operations. Similarly, the relevant municipalities and province in Ecuador fully released TexPet from any liability—including for environmental impact—arising out of any Consortium-related activities conducted in the Concession area.

67. Yet, contrary to the foregoing express contractual promises and public statements and admissions, Ecuador has used all means available to it to evade its obligations under the investment agreements and to undermine and nullify its agreements with Claimants. Ecuador has refused to notify the Lago Agrio court that TexPet and its affiliated companies have been fully released from any liability for environmental impact resulting from the former Consortium's operations (thereby permitting Chevron to be sued for environmental impact that Ecuador assured by binding contract had been discharged), and has refused to indemnify, protect and defend the rights of Claimants in connection with the Lago Agrio Litigation. Ecuador also has supported actively the Lago Agrio plaintiffs in various ways, including openly campaigning for a decision against Chevron and b y initiating baseless criminal proceedings against two Chevron attorneys.

68. Ecuador has engaged in a pattern of improper and fundamentally unfair conduct, whereby Ecuador: (i) breaches and effectively seeks to repudiate the 1995 Settlement Agreement, the 1996 Municipal and Provincial Releases and the 1998 Final Release; (ii) improperly exercises *de facto* jurisdiction over Chevron; (iii) improperly assists and colludes with the Lago Agrio plaintiffs in an effort to impose the State's obligations on Claimants through the Lago Agrio Litigation, and seeks to improperly influence the courts through public

statements; and (iv) abuses the criminal justice system and pursues other inequitable measures to advance Ecuador's improper goals.

69. Ecuador's conduct described above violates its investment agreements and the Ecuador-United States BIT in numerous ways, and thus is actionable under the Treaty. Specifically, Ecuador violated the following Treaty obligations, among others:

- Ecuador's obligation to provide Claimants' investment fair and equitable treatment, full protection and security, and treatment no less than that required by international law (Article II(3)(a) of the BIT);
- Ecuador's obligation to provide effective means of asserting claims and enforcing rights with respect to investment and investment agreements (Article II(7) of the BIT);
- Ecuador's obligation not to impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of Claimants' investment (Article II(3)(b) of the BIT);
- Ecuador's obligation to treat Claimants and their investment on a basis no less favorable than that accorded to investments owned by its own nationals or nationals of third countries (Article II(1) of the BIT); and
- Ecuador's obligation to observe any obligation entered into towards investments (Article II(3)(c) of the BIT).

3. The investment arbitral injunction

As the Lago Agrio trial reached an end and its enforcement loomed, Chevron began to ask the arbitration panel for "interim orders" to the effect that the government of Ecuador should prevent enforcement of the judgment. The arbitral tribunal issued a series of orders and injunctions against the government, the most recent of which ruled that Ecuador had violated the tribunal's previous interim awards and that it should have stopped the "Afectados" from pursuing enforcement actions in other countries pending the outcome of the investment arbitration (February 7, 2013). Ecuador's challenge to the jurisdiction of the tribunal to make such interim awards was rejected by the District Court of The Hague in January 2016.

4. The investment dispute so far

Given the complexity of the dispute, the tribunal decided to adopt a "twin-track" procedure, leading simultaneously to: (i) a first short hearing addressing preliminary legal issues arising from the settlement agreements; and (ii) a second longer hearing addressing all extant issues which may be required finally to decide the dispute. Only certain awards regarding the first track have been rendered. The more important is the First track award, 17 September 2013, available at http://www.italaw.com/cases/257.

According to the investor-state tribunal, "the Parties' disputed interpretation turns upon a few crucial Spanish words in Article 5 of the 1995 Settlement Agreement to be construed under the relevant rules of Ecuadorian law on contractual interpretation. Although the materials submitted by the Parties are voluminous, the essential issues of legal interpretation, whilst perhaps difficult, are relatively short and uncomplicated" (Paragraph 34).

The tribunal considered that under the language of the agreement "the description of 'all' the subsequent categories of unnamed Releasees was generally intended to be as broad as was then conceived to be possible, covering both all existing and future persons associated with TexPet who might conceivably be the subject of any environmental claim by the Respondent and PetroEcuador (Paragraph 82)." In addition, the tribunal noted that "if the issue had arisen at the time the 1995 Settlement Agreement was being signed, both sides would have reacted similarly, to the effect that the wording "principales y subsidiarias" was an obvious shorthand term, requiring no additional

wording, for "las compañías principales y subsidiarias"; and that neither side would have suggested then that their chosen wording referred to a principal-agent relationship (Paragraph 84)."

Thus, the arbitrators decided that "Chevron, as a party to and 'part of' the 1995 Settlement Agreement, can enforce its contractual rights under Article 5 of the 1995 Settlement Agreement as an unnamed Releasee (as also under Article IV of the Final Release), in the same way and to the same extent as TexPet as a signatory party and named Releasee. Moreover, the Tribunal decides that Chevron and TexPet can exercise those rights both defensively and offensively, as claimant or respondent in legal or arbitration proceedings seeking in both any appropriate relief under Ecuadorian law. In the Tribunal's view, nothing in the 1995 Settlement Agreement supports the contention that the manner in which those rights may be exercised is limited, as submitted by the Respondent" (Paragraph 91).

Regarding the legal implications of this decision, the tribunal first observed that "the release granted to Chevron by the Respondent under Article 5 covers claims made by the Respondent (with or without PetroEcuador). As worded, the release does not extend to any claims made by third persons in respect of their own individual rights separate from the Respondent under Ecuadorian or other laws. In the Tribunal's view, this factor is not materially disputed by the Parties. The Claimants recognise that the release does not affect such individual rights, both for personal harm claimed by an individual and also the personal claims made by the identifiable Aguinda Plaintiffs in New York [*Aguinda et al. v Texaco*]" (Paragraph 95).

"Second, the Tribunal decides that the release in Article 5 by the Respondent does not amount, from its own wording and under Ecuadorian law, to a settlement with a general "erga omnes" effect as *res judicata* upon any claims made by third persons in respect of their own individual rights separate from the Respondent under Ecuadorian or other laws. Under Ecuadorian law, in order to settle a claim, a person must have the ability to dispose of that claim; and the Respondent had no right to dispose of such an individual claim by a third person: Articles 2349 and 2354 of the Civil Code. This issue is different from and not to be confused with the next issue regarding the capacity of the Respondent in regard to "diffuse" or "collective" rights at the time of the 1995 Settlement Agreement" (Paragraph 96).

[The reading of paragraphs 97 to 106 is recommended to gain a deeper understanding of the legal issues at stake in the decision].

"In the Tribunal's view, under Ecuadorian law as at the time when the 1995 Settlement Agreement was executed (i.e. before the 1999 Act), only the Respondent could bring a diffuse claim under Article 19-2 to safeguard the right of citizens to live in an environment free from contamination. At that time, no other person could bring such a claim. No instance of the Respondent bringing or settling such a claim (other than this case) and no decisive provision of Ecuadorian law was brought to the attention of the Tribunal. Nonetheless, it must follow from the circumstances prevailing in 1995 that the Respondent, and only the Respondent, had the legal capacity to make and settle a diffuse claim under Article 19-2. If the Respondent could not make and then settle a diffuse claim under Article 19-2, no-one else could. The Tribunal is therefore persuaded by the analysis submitted by the Claimants' expert witnesses on this point, namely that in 1995 the Respondent (acting by its Government) could settle a diffuse claim under Article 19-2 "forever" against the Releasees; and that accordingly no such diffuse claim could be made in the future against any Releasee" (Paragraph 106).

For these reasons, the tribunal decided that "under Ecuadorian law, Article 5 of the 1995 Settlement Agreement and Article IV of the Final Release preclude any claim by the Respondent against any Releasee invoking the diffuse constitutional right under Article 19-2 of the Constitution, but that these releases also preclude any third person making a claim against a Releasee invoking the same diffuse constitutional right under Article 19-2, not being a separate and different claim for personal harm (whether actual or threatened)" (Paragraph 107).

In a further decision, Decision on Track 1B, dated 12 March 2015, available at http://www.italaw.com/cases/257, a majority of the arbitration tribunal decided that (1) The Lago Agrio Complaint of 7 May 2003, as an initial pleading, included individual claims resting upon individual rights under Ecuadorian law, not falling within the scope of the 1995 Settlement Agreement (as invoked by the Claimants); (2) The Lago Agrio Complaint was not wholly barred at its inception by res judicata, under Ecuadorian law, by virtue of the 1995 Settlement Agreement (as invoked by the Claimants); and (3) The Lago Agrio Complaint included individual claims materially similar, in substance, to the individual claims made by the Aguinda Plaintiffs in New York.

The investment arbitration tribunal continues to hear the arguments and evidence concerning the more involved Track 2 of the dispute, including detailed material concerning the allegations of fraud in the Ecuadorean courts.

Sources

This brief of the dispute between Ecuador and Chevron regarding the Lago Agrio oil field was prepared for educational purposes based on several resources available at the internet. The ongoing investment arbitral dispute between Ecuador and Chevron is registered at the Permanent Court of Arbitration in The Hague, Case No. 2009-23.