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The Environmental Accountability of Transnational Companies in the Global South

The case of Aguinda v. Chevron

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Riassunto

La presente tesi si propone di indagare il problema dell'irresponsabilità ambientale delle società transnazionali (TNC), in particolare rispetto ai danni causati nei paesi del sud del mondo. La domanda di ricerca è duplice: da un lato, il lavoro vuole stimare in che misura e maniera queste società eludano l'imputabilità, dall'altro, si cerca di identificare il metodo migliore per limitare tale *unaccountability*, attraverso l'analisi di diverse possibili soluzioni. L'approccio della ricerca è interdisciplinare: la questione è esaminata da diverse prospettive, tra cui quella politica, economica, manageriale e legislativa.

Il lavoro è articolato in quattro macro-sezioni. Nel primo capitolo si introduce la figura delle società multinazionali, presentandone struttura, storia e caratteristiche fondamentali. Il loro potere economico e politico, in continua crescita e rafforzato da una struttura oligopolistica e interconnessa, viene comparato con quello degli Stati più ricchi, dimostrando l'equivalenza della loro forza. La complessa relazione tra TNC e Stato è quindi esaminata, mettendo in luce un rapporto competitivo ma allo stesso tempo collaborativo e simbiotico. Successivamente vengono brevemente menzionati gli effetti positivi e negativi che scaturiscono dalle attività di una multinazionale delocalizzata in un paese in via di sviluppo. A causa soprattutto della debolezza istituzionale ed economica di questi paesi e delle condizioni create dalla globalizzazione, le relazioni di potere tra le grandi TNC e i paesi ospitanti non sono affatto bilanciate: questo provoca un consistente abuso di potere da parte delle prime, che sono consapevoli di non rischiare alcuna sanzione significativa nel caso di violazioni o comportamenti scorretti. Le conseguenze di questo abuso si osservano soprattutto in materia sociale ed ambientale; la parte finale del capitolo si dedica quindi alla rassegna dei principali danni ecologici creati dalle multinazionali nel mondo. In particolare, viene studiata la vastità del degrado ambientale causato dalle attività delle TNC, tra cui l'emissione di immense quantità di CO_2 nell'atmosfera, gli incidenti di sversamento di petrolio, le pratiche di combustione di gas e lo sfruttamento minerario su larga scala. Ciò che emerge chiaramente dall'analisi è che il maggiore impatto ambientale viene sopportato dal sud del mondo, in particolare dai paesi dell'Africa, Sud America e Australia, e che tra le vittime più penalizzate si trovano sempre le comunità indigene.

Nel secondo capitolo viene introdotto il caso studio di Chevron, il gigante energetico statunitense, che viene analizzato in questa fase da una prospettiva giuridica. La prima parte del capitolo segue infatti il lungo e complicato processo che ha coinvolto la multinazionale americana per quasi trent'anni, accusata dalle comunità ecuadoriane e peruviane di ingenti danni ambientali nella regione di Oriente. Dopo una rapida presentazione del contesto storico, dei principali attori e dei danni lamentati, il capitolo propone una sintesi delle varie fasi della controversia.

Il processo inizia nel 1993, quando 30.000 cittadini ecuadoriani avviano un'azione legale collettiva nei confronti di Texaco (una multinazionale petrolifera che verrà successivamente acquisita da Chevron). L'azione è presentata davanti ad una corte statunitense, che dopo diversi rinvii ed appelli respinge il caso applicando la dottrina di *forum non-conveniens*. Nel 2003, i querelanti si spostano in Ecuador, ripresentando l'azione legale davanti alla corte di Lago Agrio. Chevron presenta numerose confutazioni all'accusa, contestando l'autorità e la giurisdizione del forum ecuadoriano, sostenendo di non essere il successore legale di Texaco e rifiutandosi di pagare il risarcimento. Il 14 febbraio 2011, il giudice sentenzia a favore dei querelanti, ordinando a Chevron di pagare 19 miliardi di dollari di danni, dei quali la metà rappresentano una sanzione punitiva. La sentenza è particolarmente significativa perché da un lato rompe il *corporate veil* esistente tra Texaco e la sua filiale ecuadoriana, dall'altra ribadisce la responsabilità di Chevron, in quanto acquirente di Texaco. Dopo una petizione di ricorso da parte della multinazionale, la Corte Suprema Ecuadoriana annulla l'imposizione della quota punitiva, ma conferma la colpevolezza di Chevron e impone il pagamento dei 9 miliardi originari. Nella sua decisione, il giudice espone anche i comportamenti contraddittori di Chevron e accusa la società di malafede. A seguito della condanna, la multinazionale ritira gli *asset* dal paese, impedendo ai querelanti di ricevere il risarcimento; questi ultimi proveranno a far rispettare la sentenza nei tribunali di Stati terzi, ma senza successo. Nel frattempo, Chevron sposta il procedimento su vie legali parallele: prima accusa il governo ecuadoriano di aver violato un trattato di investimento bilaterale con gli Stati Uniti davanti alla Corte Permanente di Arbitrato, accusando lo Stato di aver interferito con l'indipendenza del proprio sistema giudiziario, poi presenta una denuncia civile presso il tribunale distrettuale statunitense, nella quale accusa i legali dei querelanti

ecuadoriani di corruzione. Entrambe le corti sentenziano a favore di Chevron, confermando così la sua impunità.

Questo lungo e frammentato processo è particolarmente utile per comprendere come le multinazionali reagiscano ad accuse di danni ambientali, e dimostra anche quanto sia difficile provare la loro colpevolezza in tribunale ed ottenere risarcimenti, specialmente quando le vittime appartengono a paesi in via di sviluppo. La seconda parte del capitolo espone la disparità dei mezzi a disposizione tra Chevron e i querelanti ecuadoriani, per lo più indigeni e contadini, e analizza le strategie legali utilizzate dalla multinazionale. Innanzitutto, appare evidente il tentativo di spostare il processo da un tribunale all'altro, contestando la giurisdizione di ognuno e spostando l'attenzione su altre questioni (come nel caso dell'accusa contro il governo ecuadoriano). Questo genere di contenzioso viene chiamato "processo boomerang", ed è sempre più comune come tattica difensiva delle società transnazionali. In questi processi, le TNC utilizzano escamotage e cavilli legali, non rispettano le scadenze, rallentano deliberatamente gli atti, non presentano i documenti richiesti ed invocano sistematicamente il *forum non-conveniens*: tutti comportamenti rilevati anche nel caso studio sopracitato. Inoltre, l'impiego di mezzi che hanno lo scopo di intimidire e sopprimere i propri avversari è largamente diffuso e Chevron, in particolare, eccelle in questo tipo di tecnica. Nel corso della battaglia legale, la multinazionale ha impiegato anche mezzi diplomatici: da una parte ha fatto pressioni al governo statunitense per cancellare le preferenze commerciali con lo Stato di Ecuador, dall'altro ha cercato di fare lobbying anche sul governo ecuadoriano, offrendo il finanziamento di alcuni progetti in cambio della chiusura del caso. Infine, Chevron ha sfruttato ampiamente strumenti mediatici ed investigativi, diffondendo informazioni false online e vessando i legali dei querelanti, in una strategia chiamata dalla società stessa "demonizzazione mediatica". Nel complesso, la strategia utilizzata dalla TNC nel caso studiato si dimostra decisamente aggressiva, nonché efficace, dato che nessun danno è mai stato pagato. La famosa minaccia del portavoce di Chevron ("We're going to fight this until hell freezes over. And then we'll fight it out on the ice") si è rilevata quantomeno profetica.

Il capitolo si conclude con un'analisi relativa al ruolo degli stati coinvolti nella vicenda. Gli Stati Uniti hanno agito prevalentemente proteggendo i propri interessi economici: nella sua sentenza, il giudice statunitense chiamato a decidere sulle regolarità del processo di Lago Agrio considera esplicitamente l'importanza economica di Chevron per il paese. Lo Stato ecuadoriano, invece, è ancora una democrazia molto giovane, nonché fortemente dipendente dalle sue riserve di petrolio. Quando Texaco si è insediato nella regione, ha potuto muoversi con estrema libertà, impostando in maniera autonoma gli standard ambientali e, in generale, auto-regolandosi: il governo ecuadoriano, infatti, non aveva alcuna conoscenza tecnica sulla questione, e si è fidato della multinazionale statunitense affinché implementasse le tecnologie adeguate. Infine, come gli USA, anche gli Stati terzi in cui le comunità ecuadoriane hanno fatto ricorso hanno protetto i propri interessi economici, rinunciando alla possibilità di alzare il *corporate veil*, presumibilmente anche per paura di ritorsioni da parte di Chevron.

Il terzo capitolo affronta invece la questione dal punto di vista economico-manageriale. Inizialmente viene delineato il contesto regolativo internazionale nel quale si muovono le TNC, per le quali non esiste alcun obbligo vero e proprio (principalmente a causa della mancanza di personalità giuridica). Negli anni sono stati però sviluppati alcuni codici di condotta, a cui le multinazionali possono decidere di conformarsi. La questione si complica ulteriormente in merito alla responsabilità ambientale, in quanto la regolamentazione rivolta specificamente alle società transnazionali è ancora più scarsa. Al giorno d'oggi, si possono elencare tre misure principali orientate in questo senso: i meccanismi di *reporting*, che solitamente richiedono alle aziende la (sola) rendicontazione dei livelli di emissioni di CO_2, i sistemi di scambio delle quote di emissione e, infine, gli strumenti di *soft law*. Tra questi ultimi, i più importanti da segnalare sono le linee guida OCSE e il Global Compact delle Nazioni Unite. Tutti questi regolamenti sono comunque su base volontaria e non vincolanti, di conseguenza non prevedono sanzioni e non possono essere citati in tribunale.

Il capitolo analizza poi il fondamentale ruolo degli azionisti, che negli ultimi anni hanno prestato sempre più attenzione alla questione ambientale e che hanno una notevole influenza sulle scelte manageriali e imprenditive di un'azienda. Anche gli investitori

possono avere una funzione significativa, scegliendo di investire in attività e progetti sostenibili a livello ecologico. Il capitolo prende quindi in esame alcune teorie capaci di spiegare i processi decisionali di una TNC, in particolare la norma *shareholder wealth maximization*, che spiega come ogni decisione dirigenziale venga presa considerando esclusivamente gli interessi economici degli azionisti. Un'altra teoria molto valida presa in analisi è quella della legittimità, secondo la quale un'azienda deve sempre dimostrare alla società di cui fa parte che i suoi valori corrispondono a quelli dominanti. Anche in questo caso, l'esempio di Chevron si rivela utile per un'applicazione concreta dei concetti. Le scelte di divulgazione del procedimento legale da parte della TNC vengono infatti analizzate sulla base delle teorie sopracitate, ed illustrano un'iniziale propensione alla protezione degli interessi degli *shareholder*. Con il tempo, però, la maggiore visibilità mediatica del caso, la cattiva pubblicità per l'azienda, il coinvolgimento di alcuni politici e la richiesta di una parte di azionisti a divulgare i dettagli del processo ecuadoriano hanno convinto la direzione di Chevron a condividere le informazioni.

Il capitolo esplora infine il meccanismo ESG, un sistema di valutazione volontaria per aziende ed altri enti relativamente alla loro sostenibilità ambientale, sociale e di governance. Nonostante le enormi potenzialità di questo strumento, ed i notevoli progressi che ha determinato negli ultimi anni, il meccanismo ESG presenta ancora numerosi limiti. In primo luogo, le informazioni comunicate dalle aziende sono spesso non certificate né sottoposte a revisione esterna; secondo, c'è una mancanza di standardizzazione e di specifiche linee guide regolative; terzo, lo strumento è stato ideato principalmente per le economie sviluppate, mentre la sua applicazione nei paesi in cui le TNC delocalizzano risulta ancora molto complicata; quarto, essendo uno strumento di *soft law*, non sono previste sanzioni. In generale, il meccanismo risulta particolarmente vulnerabile alle pratiche di greenwashing, incentivate soprattutto dalle asimmetrie informative (nella forma di informazioni e azioni nascoste) esistenti tra TNC ed investitori/consumatori. Dopo aver esposto le tecniche di greenwashing più diffuse, il terzo capitolo si conclude con un'ulteriore analisi del caso Chevron, per verificare se la multinazionale utilizza tecniche di greenwashing. La ricerca documenta i numerosi sforzi comunicativi della TNC per presentarsi il più sostenibile e *green* possibile, ma evidenzia anche un divario significativo tra la retorica e le azioni concrete: i piani di investimento,

in particolare, non rispecchiano minimamente le promesse, ed espongono un modello di business ancora fortemente dipendente dal combustibile fossile, all'interno del quale i finanziamenti nel rinnovabile sono pressoché insignificanti.

Infine, il quarto capitolo è dedicato alla presentazione di altre possibili soluzioni alla *unaccountability* delle multinazionali, e propone un approccio interdisciplinare alla questione. Dopo aver reiterato il ruolo centrale delle TNC nella lotta al cambio climatico, vengono fatte alcune considerazioni di merito sugli strumenti di *soft law* analizzati nel capitolo precedente. Si tratta sicuramente di meccanismi importanti, apprezzabili soprattutto per aver riempito il vuoto legislativo internazionale e per aver delineato nuove direzioni nell'ambito della regolamentazione corporativa; tuttavia, non sono ancora sufficienti. Da una parte, è necessario rafforzarne l'implementazione andando ad intervenire su quei difetti menzionati in precedenza; dall'altra, sarebbe opportuna un'integrazione con degli strumenti di *hard law*. Una maggiore attenzione andrebbe data inoltre allo scambio di quote di emissione, un sistema di mercato basato sugli incentivi economici che presenta enorme potenziale per il futuro. Anche l'utilizzo di imposte pigouviane, nella forma di una *carbon tax*, per esempio, produrrebbe risultati significativi, per quanto la sua implementazione non sia sempre semplice. Il capitolo tratta inoltre il ruolo della società civile, troppo spesso ignorato nella letteratura sebbene svolga una funzione cruciale nella battaglia all'irresponsabilità delle TNC.

Infine, la tesi si conclude con l'illustrazione di alcuni strumenti vincolanti innovativi, esaminandone sinteticamente potenzialità e limiti. Uno strumento di legislazione domestica degno di nota è la *due diligence*, analizzata in questa sede attraverso la legge francese pionieristica *Duty of Vigilance* e che incrementa la responsabilità delle TNC all'estero. Sul piano internazionale, si dibatte sulla possibilità di concedere alle multinazionali personalità giuridica, che permetterebbe un'applicazione diretta di tutte le convenzioni climatiche ed ambientali già esistenti. Viene infine presentata una bozza di trattato elaborata in sede ONU, che ha carattere vincolante e mira a regolamentare le società transnazionali in materia di diritti umani.

Introduction

It is almost indisputable, today, that one of the biggest challenges that our generation has to face is climate change and all its environmental implications. Temperatures keep rising globally, glaciers are melting, contributing to the sea level rise and putting in danger ecosystems, people, and animals alike. Extreme weather events such as flooding, hurricanes, droughts, and heat waves are increasingly frequent and disruptive, causing incalculable damage and emphasizing the inequality that exists between wealthy and poor countries.

The awareness of this issue, coupled with the desire to understand *how to solve it*, is what motivated my choice of topic for my master's thesis. I wanted to dedicate myself to the exploration of all the possible solutions to this global challenge, closely examining every instrument and approach to find the most effective one. What has clearly emerged from my studies, especially attending International Law and Global Change and Sustainability courses, is that today, the weakest link in the international system is represented by transnational companies. In the last few decades, the global community has tried to react to the climate change challenge (doing too little, too late), but all the major instruments address states, excluding TNCs from the regulation effort.

This is why the present work focuses on this global actor, disclosing its polluting contribution all around the world and seeking the mechanisms that can be implemented to effectively regulate its activities. My analysis is also centered on exposing the lack of accountability experienced by TNCs, for all the reasons that will be discussed at a later stage. The research question of this dissertation is thus twofold: finding out how transnational companies escape environmental liability on the one hand, and how to reduce their unaccountability, on the other. The hypothesized assumption is that at present, no existing instrument is sufficient on its own to significantly disincentivize TNCs' environmental misconduct in the Global South.

The methodology used in this thesis is mixed but mostly qualitative: we are going to thoroughly analyze the case study of Chevron Corp., the US energy giant, that will follow us through all the stages of this work and give us precious insight into the world

of transnational companies. In particular, the lawsuit *Aguinda v. Chevron* will be reviewed, with a discussion on corporate legal strategies in the event of environmental damage allegations. The US oil company will also be very useful to examine the various regulating mechanisms and their effect on TNCs, as well as the practices of greenwashing employed by oil corporations.

The approach of this thesis is interdisciplinary, drawing from different subject areas and investigating the issue from a legal, political, managerial, and economic point of view. This is, in the intentions, the strength of the present work. Although the literature on this topic is abundant, in fact, it is mainly mono-disciplinary, studying the matter from a single perspective. Given the complexity and the breadth of the problem, however, what is needed is a comprehensive schema capable of incorporating and accounting for all the disciplinary intersections and the multi-level implications arising from the question, particularly in a solution-seeking effort. While this thesis does not claim to fully accomplish the purpose, it is still a starting point for an all-embracing exploration of TNCs' environmental accountability.

The dissertation is structured as follows. In the first chapter, we will briefly introduce the TNC player, outlining its main features and providing a general overview of its environmental impact in the Global South. In the second chapter, the case study will be introduced, and we will follow the litigation between Chevron and Ecuador moving from the US courts to the Ecuadorian ones, then back to the United States, and finally to the international fora. The legal strategies utilized by the company will be discussed, as well as the role played by States in the lawsuit. Chapter three will begin by outlining the environmental regulatory framework in which TNCs nowadays exist, pointing out the limits of the most important mechanisms. We will then investigate the role of investors in promoting TNCs' green practices, evaluating the impact of shareholders and society as a whole on the disclosure choices of Chevron. The last section of the chapter will focus on the ESG assessment: we will identify the potentialities as well as the limits of this instrument, we will explore the practice of greenwashing and the market failures that can emerge in this context, and again, Chevron will be a useful example to expose our findings. Finally, chapter four will make some considerations on the mechanisms

analyzed and will subsequently suggest some additional solutions that should be embraced when seeking to enhance TNCs' environmental liability.

The concluding part will present the thesis' results, confirming the hypothesis of limited TNC accountability in the Global South and proposing a hybrid, comprehensive approach that deals with the issue from multiple angles. Solutions to such complex problems are never simple: many different viewpoints need to be taken into account to determine the multi-level entanglements that can emerge and consequently formulate successful answers.

CHAPTER I

1. Transnational companies: an introduction

According to the International Encyclopedia of Human Geography, a transnational corporation (TNC) can be defined as "A firm or company that has the power and ability to coordinate and control operations in more than one country, even where actual ownership does not reside in that firm or company".[1] Another scholar, R. Alan Hedley, defines a TNC as "Any enterprise that undertakes foreign direct investment, owns or controls income-gathering assets in more than one country, produces goods or services outside its country of origin, or engages in international production"[2]. A slightly more detailed definition, although quite dated, can be found in the Draft of the United Nations Code of Conduct on Transnational Corporations:

> *The term […] means an enterprise, whether of public, private or mixed ownership, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centers, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others*[3].

Other denominations used to refer to the same agency are Multinational Corporation (MNC), Transnational Enterprise (TNE), or Multinational Enterprise (MNE). Whichever definition or label one wishes to adopt, the core characteristic of transnational companies appears to be the expansion and fragmentation of an enterprise in at least two different countries. Given the context of the global world economic system, nowadays no one can

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[1] P. Dicken, "Globalization and Transnational Corporations", in *International Encyclopedia of Human Geography*, 2009, 563-569.

[2] R. A. Hedley, "Transnational Corporations and Their Regulation: Issues and Strategies", *International Journal of Comparative Sociology* 40 (1999), pp. 215-216.

[3] United Nations, "Draft United Nations Code of Conduct on Transnational Corporations", 1983, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2891/download. Last accessed April 14, 2023.

dispute the influence that TNCs have in shaping the global economy. Thus, simply put, transnational corporations can be said to be the most striking winners of the globalization[4] process of our era. The United Nations Conference on Trade and Development (UNCTAD) has been examining the TNCs' role in leading global economic growth since the 1960s, and in the 1995 World Investment Report it recognized their activities as "the productive core of the globalizing world economy"[5].

Despite having existed in some measure before the twentieth century, with colonial trading enterprises like the East India Company as a sort of forerunner, it is not until the mid-nineteenth century that transnational companies took the current form and started to be rightfully identified as such[6]. And it was only during the 1960s that TNCs truly became key actors in the world scene[7]. The year 1960, in fact, marks the beginning of a new era in the transnationalization of the world economy. Every decade, from 1960 until the end of the millennium, has seen at least a triplication of the world's foreign direct investment stock (FDI), which is a good indicator for the analysis of companies' internationalization. From the 2000s onwards the growth has been slower-paced, and the FDI global inflow has stabilized at around 1,500 billion dollars per year. In 2021, it reached 1.58 trillion US$, up 64 percent from the exceptionally low level in 2020 —

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[4] The International Monetary Fund defined globalization as "The rapid integration of economies worldwide through trade, financial flows, technology spillovers, information networks, and cross-cultural currents."
International Monetary Fund, "World Economic Outlook", May 1997, http://www.imf.org/external/pubs/weomay/weocon.htm. Last accessed March 27, 2023.

[5] UNCTAD, "1995 World Investment Report - Transnational Corporations and Competition", https://unctad.org/system/files/official-document/wir1995_en.pdf. Last accessed January 30, 2023.

[6] Ljiljana Milos Maksimović, Milan Kostić and Gordana Marjanović, "Relationship between modern transnational corporations and states: a view of developing countries", *Research Gate,* 2019. Last accessed January 25, 2023.

[7] World Bank, *World Development Report 1987*, (New York: Oxford University Press, 1987), p. 45. https://openknowledge.worldbank.org/bitstream/handle/10986/5970/9780195205633_ch03.pdf?sequence=5&isAllowed=y. Last accessed January 21, 2023.

although UNCTAD 2022 Investment Report warns that the prospects for the future are bleak[8].

Despite the FDI flows stabilization, in recent years transnational corporations have become even more powerful by taking advantage of the favorable conditions of the changing economic and financial system brought by globalization. National economies, in fact — and developing countries' governments in particular — have been reducing the financial and political barriers in order to attract foreign investment, and multinational companies have been "aggressive in exploiting these new opportunities"[9]. By re-writing the rules of economic engagement, TNCs have challenged the traditional principles of state sovereignty and juridical boundaries, and as a consequence are now able to have an impact not only on markets and economic matters, but also on foreign affairs and international relations policies[10].

Besides the indicator of FDI flows, we can infer the incredible power and influence of transnational companies by analyzing their annual revenues. As a report of Global Justice Now points out, the biggest TNCs have today a GDP size comparable to, and sometimes bigger, than many wealthy national economies[11]. The figures show that 69 of the richest 100 organisms of the world are not country governments, but corporations. Moreover, the revenues of the top ten TNCs, a list including Walmart, Toyota, Shell, and several Chinese companies, exceeded $3 trillion in 2017[12].

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[8] UNCTAD, "World Investment Report 2022", https://worldinvestmentreport.unctad.org/world-investment-report-2022/chapter-1---global-investment-trends-and-prospects/#fdi-flows. Last accessed 21 January 2023.

[9] Jennifer A. Westaway, "Globalisation, Transnational Corporations and Human Rights. A New Paradigm", 2011, p. 2.

[10] Ibidem.

[11] Global Justice Now, "69 of the richest 100 entities on the planet are corporations, not governments", 17 October 2018, https://www.globaljustice.org.uk/news/69-richest-100-entities-planet-are-corporations-not-governments-figures-show/. Last accessed January 21, 2021.

[12] Table available for consultation in appendix A. Sources: CIA World Factbook 2017. https://www.cia.gov/the-world-factbook/about/archives/. Last accessed January 20, 2023; Fortune Global 500. https://fortune.com/ranking/global500/. Last accessed February 2, 2023.

This size equivalence between states and corporations is an extremely crucial aspect, with consequences both for the evolution of their power relations and for the global panorama. As Maksimović states, in fact, "Relations between these two actors are at the heart of global changes and global economic transformation"[13]. There is, indeed, an ongoing debate in academic circles about the role of TNCs in international law and the global economic system.

Generally speaking, we can consider the relationship between TNCs and states as both cooperative and competitive. The starting point to take into consideration is that they are two very distinct kinds of institutions, with different functionings, assets, histories, interests, and, above all, different goals. The key distinction between these two entities is that a state's final objective is the general well-being of its citizens, while a transnational company's only concern will always be to increase profits and shareholder value[14].

Nevertheless, their interests — although not identical — are typically intertwined. While states depend on companies because they provide employment, taxes, and generate wealth, corporations need the institutional framework created by governments in order to safely engage in business transactions[15]. Among its many different roles, the state should be able to determine and impose the rules for transnational companies to follow, should they choose to operate in a given territory. In addition to indicating the conditions to access the market and enforcing general norms and restrictions, states should also impose their authority by directing TNCs toward the achievement of the national goals set by governments — such as solving unemployment, inequality, or environmental pollution[16].

However, this is unlikely to happen, especially in developing countries. As mentioned before, in fact, national economies of the Global South have been reducing the barriers limiting access to their markets, and by doing so transnational companies acquired more discretional power and can move more freely among norms and regulations. Moreover,

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[13] Maksimović et al., "Relationship between modern transnational corporations and states: a view of developing countries", 2019, p. 1.

[14] Ibidem.

[15] Milan Babic, Jan Fichtner, and Eelke M. Heemskerk, "States versus Corporations: Rethinking the Power of Business in International Politics", *The International Spectator*, 52:4 (2017), 20-43.

[16] Maksimović et al., "Relationship between modern transnational corporations and states", 2019.

the bigger the TNC, the stronger its leverage on the state, especially when the latter needs foreign investments to support its economy.

The exceptional power of TNCs compared to developing states is even more striking when we consider that the largest corporations in the world belong to an essentially oligopolistic system. Not only, as seen before, the wealthiest TNCs can compete with whole national economies, but they are also incredibly interconnected with each other. The top 200 biggest corporations, in fact, share a complex web of relations and affiliates all over the world and operate in sectors that are oligopolistic at a global level. As a consequence, "Five companies manage more than 50% of the global market in the following industries: durable goods, automotive, aviation, aero cosmic, electronic components, and electricity and steel industries, while five companies control over 40% of global oil, personal computers, and media markets"[17].

"The network of global corporate control" by Stefania Vitali, James B. Glattfelder, and Stefano Battiston was the first investigation into the structure of this international ownership web. Through a series of algorithms and mathematical functions, the research shows that transnational companies form a "giant bow-tie structure" and that a large section of control is concentrated in a very tightly-knit group of financial institutions. They proceeded to estimate the control held by each actor in the global scene, and the shocking conclusion is that nearly 40 percent of the economic worth of all TNCs in the world is controlled by a cluster of only 147 firms[18].

This dissertation has no intention of demonizing globalization and transnational companies. As with any other player in the complex global system, TNCs are not inherently good or evil; in fact, they can have both positive and negative impacts on the Global South. On one hand, the advantages of TNCs locating in a country can include the creation of jobs, investment in health and infrastructure, improved education and skills in

[17] Ibidem, p. 3.

[18] Stefania Vitali, James B. Glattfelder, and Stefano Battiston, "The network of global corporate control", *Plos One*, 2011.

the country, and a more developed economic base for the region[19]. It could also be argued that transnational companies relocating to developing countries could result in positive multiplier effects on the local economies[20]. Of course, all these possible advantages strongly depend on many factors and circumstances, including the social and economic structure of the state, the corporation's behavior and goals, and the role of the local government.

On the other hand, a transnational company can also be disruptive to a developing country's society and territory. Among the many disadvantages, we can list labor exploitation, poor working conditions, and uncontrolled urbanization. From a more strictly economic point of view, as well, transnational companies may be not so beneficial to the host country, given that the majority of the profits go overseas to the Western headquarters[21]. Some may argue that TNCs ensure a more stable and reliable income to workers than farming does, but this is only partly true, considering that as soon as labor costs increase, corporations tend to relocate again to other countries.

Furthermore, transnational companies necessarily compete with local businesses, which are usually less efficient and eventually go bankrupt. An alternative possibility is TNCs blocking competition in the first place, by purchasing local companies. Additionally, the UN Committee for Development Policy has noticed the suppression of local productive capabilities as one of the risks of transnational corporations' presence in the Global South[22]. Finally, TNCs have a habit of over-exploiting natural resources, especially in developing countries, where environmental regulations are looser and can be more easily disregarded. This thesis work will deal precisely with the latter issue, focusing and investigating on the environmental effects produced by TNCs in the Global South.

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[19] BBC, Bitesize. "Trade and globalization. Impact of world trade pattern" https://www.bbc.co.uk/bitesize/guides/zdctyrd/revision/2. Last accessed: February 2, 2023.

[20] Development and globalization. "Positive and Negative". http://developmentandglobalisation.weebly.com/positives--negatives.html. Last accessed January 27, 2023.

[21] BBC, "Trade and globalization".

[22] Hiroshi Kawamura, "On the challenges posed by large corporations", *CDP Secretariat*, 2013.

Because of the favorable conditions allowed by globalization, because of the weakness of developing countries in imposing rules and conditions, and because of the tendency of TNCs to operate in oligopolies, the equilibrium between big transnational companies and states is not balanced at all, heavily favoring the side of the former. Given that transnational corporations' goal is maximizing profits while minimizing costs, it is not surprising that this imbalance results in powerful companies not complying with national legislations.

By institutionalizing their power, TNCs often can afford to openly violate the law, because they are aware that states are very unlikely to sanction their misconduct. The legal processes against transnational companies, in fact, are not only very rare but also quite useless, especially when said companies are big and powerful. Some national legal frameworks may envisage fines for TNCs' violations; however, the penalties are always extremely low compared to the revenue generated by the illegal activities that are supposed to be sanctioned. In addition, numerous transnational companies even have the legal ability to mediate with the authorities fining them. As Maksimovic et al. effectively summarize in their work, "The existing legal regulations in developed countries allow companies to be fined for violating the law, but there are no methods that will lead to a change in corporate behavior"[23]. As might be expected, the possibilities for poor developing countries to fine a TNC and hold it accountable for its violations are even narrower.

The major consequences of this abuse of power by transnational companies can be seen in the social and environmental spheres. The most frequent TNCs' infractions in host countries include but are not limited to, making cartel agreements, bribing politicians to obtain exclusive contracts, violating civil and labor rights, and polluting the environment[24]. As individual states evidently do not possess the appropriate means to deal with the violations of transnational corporations, it is only natural to wonder about the role that can be played by the international community. Currently, corporate

[23] Maksimović et al., "Relationship between modern transnational corporations and states", 2019, p. 7.

[24] Ibidem.

environmental responsibility is largely left to the single company's voluntary action, as no international standard for reporting TNCs' sustainability performances has been endorsed yet[25]. Nevertheless, international organizations and the global community at large could potentially play a decisive role in facing the issue of environmental violations.

For this reason, after an overview of the ecological damages created by transnational companies in the global south, this dissertation will analyze the matter from a legal point of view, by examining the strengths as well as the limits of the international system in this respect. The following chapter will examine the case study of *Aguinda v. Chevron* (as well as the following lawsuit *Chevron v. Ecuador*) in order to investigate more concretely which are the problem faced by Global South countries trying to hold big TNCs accountable. The third chapter will then deal with more business-perspective solutions: we will inquire if the answer to TNC violations can be found in the voluntary practices to be implemented by corporations themselves, such as the recent ESG assessment. Chevron Corporation will be useful, once again, as a practical example for our evaluation. Finally, in the last part, this dissertation will explore other possible solutions aiming to reduce TNCs' violations and to hold them more accountable.

[25] Kawamura, "On the challenges posed by large corporations", 2013.

2. A general overview of TNCs' environmental impact in the Global South

Transnational companies, in particular oil and gas producers, are responsible for countless environmental damages around the world. Some of the worst ecological impacts caused by TNCs include, but are not limited to, greenhouse gas emissions, oil spillage, air, water, and soil pollution, mineral extraction waste, agro-toxins in the food chain, soil erosion, deforestation, desertification, and loss of biodiversity[26].

Starting from greenhouse gas emissions, TNCs can be identified as the major polluters globally, rivaling the emissions levels of the largest states. In total, in the last century and a half, investor-owned companies have been responsible for 315 gigatonnes of equivalent CO_2 ($GtCO_2e$) of emissions, compared to 312 $GtCO_2e$ emitted by states. It is important to note that approximately 50% of these quantities have been emitted in the last 37 years, which implies that corporate carbon emissions, despite the many pledges, are not actually declining[27].

According to Richard Heede's quantitative research, over 30% of global industrial greenhouse gas emissions can be attributed to transnational carbon major companies (which include producers of oil, coal, natural gas, and cement). A cluster of just twenty fossil fuel corporations accounts for 35% of the total energy-related carbon dioxide and methane emissions since 1965. Specifically, the leading emitter company is Chevron, followed closely by BP, Exxon, and Shell: the four energy TNCs alone are responsible for more than 10% of carbon emissions from 1965 to 2010[28]. As Mei Li, Gregory Trencher, and Jusen Asuka rightfully point out, "Decarbonizing the global economy by

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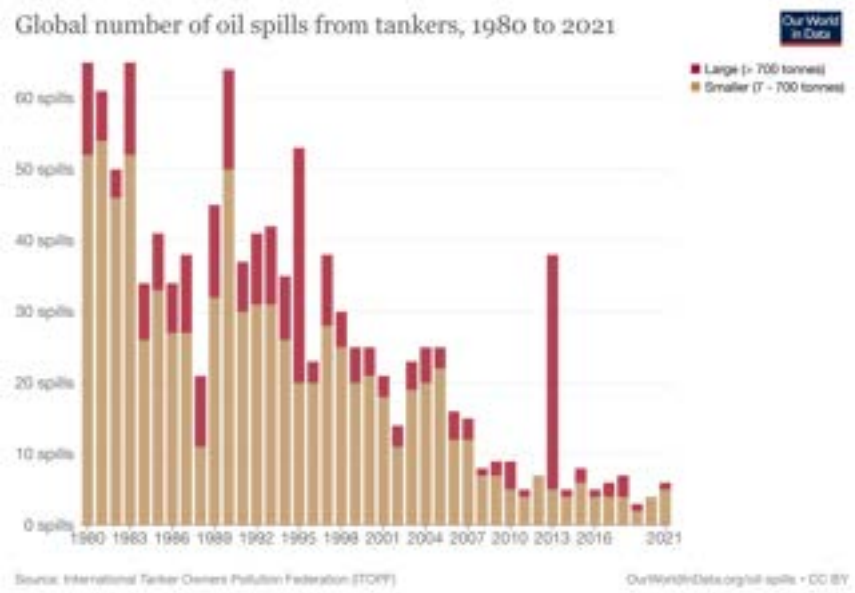
[26] Paul Cooney and William Sacher Freslon, ed., *Environmental Impacts of Transnational Corporations in the Global South,* Research in political economy, volume 33 (Bingley: Emerald Publishing Limited, 2019).

[27] Lisa Benjamin, "The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?", *Transnational Environmental* Law (Cambridge University Press, 5:2, 2016): 353–378.

[28] Richard Heede, "Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010", *Climatic Change,* 122 (2014): 229-241.

mid-century to avoid dangerous climate change […] cannot occur without a profound transformation of their fossil fuel-based business models"[29].

Another environmental damage caused by oil corporations is the infamous petroleum leakage. Since 1980, there have been more than 1.100 oil spilling accidents globally. The following chart shows a clear decline in leakage cases during the last two decades, but the number is still too high, considering the harmful consequences on both the environment and people's health. Loss of biodiversity, loss of plant and fish life, whale deaths, and loss of livelihoods are just some of the negative repercussions of oil spillage[30]. In the last 10 years, we have still witnessed 63 spills of 7 tonnes or more, resulting in 164,000 tonnes of oil lost; 91% of this amount was spilled in just 10 incidents[31]. In particular, the year 2013 displayed a very poor performance, with 33 large spills, most of which concerned more than 700 tonnes of petroleum.



[29] Mei Li, Gregory Trencher, and Jusen Asuka, "The clean energy claims of BP, Chevron, ExxonMobil and Shell: A mismatch between discourse, actions and investments", *Plos One*, 17:2 (2022), p. 1.

[30] Franklin Obeng-Odoom, "Petroleum accidents in the global south", in *Environmental Impacts of Transnational Corporations in the Global South,* ed. Paul Cooney and William Sacher Freslon (Bingley: Emerald Publishing Limited, 2019), Research in political economy, volume 33: 111-142.

[31] ITOPF, "Oil Tanker Spill Statistics 2022", https://www.itopf.org/knowledge-resources/data-statistics/statistics/. Last accessed February 7, 2023.

In his research, Franklin Obeng-Odoom goes beyond the mere figures and argues that petroleum spilling "accidents", as they are usually referred to, are not actually isolated incidents, but are instead structural, a part of the routine in the value chain of the oil system ruled by TNCs[32].

> *It is an aberration to study accidents apart from the economic system in which they occur. Whether arising from drilling (upstream), refining (midstream), or driving (downstream), under fossil-based capitalism, accidents neither exist nor persist simply because of incessant accumulation. Adapting the methodology first developed by Harvey Molotch (1970) to a value chain analysis of the oil industry, […] petroleum accidents recur because of imperialistic, oligopolistic, and monopolistic processes of accumulation driven by transnational corporations that work in cahoots with, but also manipulates, states, the army, local, and national oil companies for its own gain[33].*

Obeng-Odoom continues his accusation by stating that the main result of this system is environmental pollution and degradation, which appears to be an unavoidable condition for transnational companies to operate and make profits.

Some oil-related accidents are quite famous around the world. The most known example is the 2010 oil spill by BP in the Gulf of Mexico, USA, which has received extensive media coverage because of its geographical location and because it resulted in the death of eleven people[34]. Other accidents are much less familiar to the international public but are nonetheless very serious in terms of negative environmental impact. The multiple incidents that happened in the Niger Delta, which have recently been dealt with by extensive literature, are among the most severe as regards the effects on the ecosystems and the local communities[35]. Studies have assessed that approximately 13 million tonnes

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[32] Obeng-Odoom, "Petroleum accidents in the global south", 2019.

[33] Ibidem, p. 136.

[34] Oluwasoye P. Mafimisebi and Odinaka C. Ogbonna, "Environmental Risk of Gas Flaring In Nigeria: Lessons from Chevron Nigeria and Ilaje Crisis", *Journal of Environment and Earth Science*. Vol. 6, No. 3, 2016.

[35] Ibidem.

of hydrocarbons have been spilled in the region, which resulted in the contamination of 2,000 sites in Nigeria[36].

Oluwasoye P. Mafimisebi and Odinaka C. Ogbonna have carried out a broad analysis regarding the environmental and health impacts of gas flaring in the region, following the case study of Chevron and Ilaje. Gas flaring is the combustion of natural gas generated during the oil extraction process. According to the World Bank, flaring is "A monumental waste of a valuable natural resource that should either be used for productive purposes, such as generating power, or conserved. […] Flaring persists to this day because it is a relatively safe, though wasteful and polluting, method of disposing of the associated gas that comes from oil production"[37].

Nigeria is the second country, after Russia, as regards the volume of gas flared annually, and the data shows that carbon dioxide emissions in the region are among the highest in the world. Mafimisebi's research exposes the grave health implications of gas flaring registered in the Niger Delta, including respiratory symptoms such as aggravated asthma, pneumonia, chronic bronchitis, but also leukemia and premature death. Furthermore, gas flaring has a direct correlation with acid rain, which on its part damages crops and vegetation, acidifies the water, and causes loss of biodiversity[38].

Obeng-Odoom also contributes to the discussion and adds that, aside from the destruction of biodiversity and the health impacts, one of the worst consequences has been the massive displacement of communities from their homeland as a result of the accidents[39].

The scholars Hakeem O. Yusuf & Kamil Omoteso, too, have conducted noteworthy research on the impact of oil TNCs in Africa, focusing especially on the case study of

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[36] Kabari Sam, Frédéric Coulon, and George Prpich, "Management of petroleum hydrocarbon contaminated sites in Nigeria: Current challenges and future direction", *Land Use Policy*, Vol. 64 (2017): 133-144.

[37] World Bank, "Global Gas Flaring Reduction Partnership", https://www.worldbank.org/en/programs/gasflaringreduction/gas-flaring-explained. Last accessed February 7, 2023.

[38] Mafimisebi and Ogbonna, "Environmental Risk of Gas Flaring In Nigeria: Lessons from Chevron Nigeria and Ilaje Crisis", 2016.

[39] Obeng-Odoom, "Petroleum accidents in the global south", 2019.

Shell in the kingdom of Ogoniland, Nigeria. Their analysis presents the region as an egregious example of environmental degradation, having suffered multiple incidents of oil spills, oil well fires, and hydrocarbon contamination[40]. The environmental and human rights violations have been attested also by a government-commissioned assessment, carried out by the United Nations Environment Program (UNEP). The UNEP report key findings show that the pollution generated in 50 years of oil operations penetrated further and deeper than expected, and that "The environmental restoration of Ogoniland could prove to be the world's most wide-ranging and long-term oil clean-up exercise ever undertaken if contaminated drinking water, land, creeks and important ecosystems such as mangroves are to be brought back to full, productive health"[41].

Mining is another activity carried out by transnational companies that is incredibly impactful for the environment. Mining can be defined as the activity of extracting minerals from the subsoil through different chemical and physical processes. These operations result in increasingly gigantic industrial installations, to the point that today we use the term "mega-mining" when referring to it.

Large-scale mining exploration and exploitation soared in the 1990s and the 2000s, with the main actors for these investment waves being transnational corporations, especially from the United States and the United Kingdom but also, more recently, from China. Between 1991 and 1999, for example, Latin America became the most common destination for mineral exploration, showing a 500% increase in investment[42].

William Sacher Freslon and Paul Cooney conducted an extensive analysis to inquire about all the negative aspects associated with the spread of mega-mining in South

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[40] Hakeem O. Yusuf and Kamil Omoteso, "Combating environmental irresponsibility of transnational corporations in Africa: an empirical analysis", *Local Environment*, 21:11 (2016): 1372-1386.

[41] United National Environment Programme, "Environmental Assessment of Ogoniland", 2011, https://www.unep.org/resources/report/environmental-assessment-ogoniland. Last accessed February 8, 2023.

[42] William Sacher Freslon and Paul Cooney, "Transnational Mining Capital And Accumulation By Dispossession", in *Environmental Impacts of Transnational Corporations in the Global South,* (Bingley: Emerald Publishing Limited, 2019), Research in political economy, volume 33: 11-34.

America, particularly the environmental destruction and the forced expropriation of territories. They state, in fact, that since the modern large-scale mining model requires larger and larger production, TNCs need always new territories available to implement their projects. The result is the widespread practice of concession and appropriation of lands, which in Latin America translates into the violent expropriation of indigenous people, forced evictions, genocides, as well as immense losses of common and collective lands. In Peru, for instance, over 26 million hectares are today under mining concession, an area that constitutes about 20% of the national territory[43].

In addition to the terrible psycho-social, cultural, medical, and economic consequences, mega-mining is considered to be one of the most intensive human activities in terms of environmental impact. First of all, it is estimated that large-scale mining produces every year approximately 1.520 billion tons of waste — more than any other industrial sector[44]. Moreover, the massive extraction of minerals and rocks, together with the use of toxic reagents, discharges big quantities of pollutants into the environment and provokes the acidification of air, water, and soil. This contamination has detrimental effects also for the ecosystems and contributes to the deforestation process and to biodiversity loss[45]. Overall, the impacts of large-scale mining in Latin America have been highly negative both for community destruction and environmental devastation.

Australian territories, too, have suffered from mining and resource-extraction projects, with severe and long-lasting consequences for Indigenous people. One of the most impactful extraction sites is Glencore's McArthur River Mine (MRM), an open-cut mine near the Gulf of Carpentaria, Northern Territory. MRM is the second largest source of zinc in the world, as well as producing lead and silver[46]. The Gulf region is of significant

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[43] Ibidem.

[44] Bernd Lottermoser, *Mine wastes. Characterization, Treatment and Environmental Impacts,* (Heidelberg: Springer Berlin, 2010).

[45] Sacher Freslon and Cooney, "Transnational Mining Capital And Accumulation By Dispossession", 2019.

[46] Seán Kerins and Kirrily Jordan, "Mining Giants, Indigenous Peoples and Art", in *Environmental Impacts of Transnational Corporations in the Global South*, ed. Paul Cooney and William Sacher Freslon (Bingley: Emerald Publishing Limited, 2019), Research in political economy, volume 33: 35-72.

ecological value and hosts many vulnerable and endangered native species of flora and fauna — such as the orange horseshoe bat, the Gouldian finch, and the little tern[47]. Despite its outstanding natural worth, the territory has not been protected by the Northern Territory and Australian governments, which have instead facilitated the MRM project and in 2013 approved a further expansion, doubling the mining rate to 5.5 million tonnes of ore per year and prolonging the life of the mine up until 2036[48].

The mining site has been denounced for environmental problems by several different voices and reports over the years. Kerins and Jordan report that the aboriginal peoples of Garawa, Gudanji, Marra, and Yanyuwa cannot rely on their traditional livelihood systems anymore, because the species they used to hunt, fish, and gather are rapidly disappearing. In addition, they cannot access many of their significant territories due to ecological contaminations and access restrictions.

One of the most authoritative monitoring reports, prepared by ERIAS Group, found that 90% of fish swimming in the area contained dangerous quantities of lead, exceeding the levels permitted by Food Standards Australia and New Zealand[49]. It was also signaled that the pyrite contained in the waste rock pile of the mine was "spontaneously combusting", creating a haze of sulfur dioxide that caused health issues for local Aboriginal communities[50]. Finally, the ERIAS report estimated that the risk of waste rock dumping was extreme, with "likely catastrophic" effects, among which the destruction of local species.

All in all, the McArthur River Mine exemplifies the propensity of governments to privilege the large-scale mining industry and the TNCs' profits over environmental issues and over the rights of Aboriginal people. The historian Patrick Wolfe rightfully reminds us that "The settler colonial logic of eliminating native societies to gain unrestricted

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[47] Ibidem.

[48] Anthony Young, *McArthur River Mine: Monumental Regulatory Mess* (Land Rights News, Northern Edition, 2015).

[49] ERIAS Group, "McArthur River Mine. Independent Monitor Environmental Performance Annual Report 2014". *Report to the Minister for Mines and Energy Department of Mines and Energy.* (Melbourne: ERIAS Group, 2015).

[50] Young, *McArthur River Mine: Monumental Regulatory Mess*, 2015.

access to their territory is not a phenomenon confined to the distant past"[51]: Western corporations, in fact, are still guilty of dispossessing Indigenous communities and contaminating their lands.

This chapter has briefly shown the variety and amplitude of the environmental damage brought by transnational companies all over the world. Even though it goes beyond the scope of this dissertation, it is noteworthy to remark that the ecological impact is often associated with health issues, psycho-social implications, and human rights violations. It is almost impossible to separate one effect from the other: they are all intrinsically interconnected. From economic implications to social conflicts and violent repression, passing through the lack of access to clean water and uncontaminated soil, environmental devastation generates a detrimental domino effect on all other aspects of human life. Local communities and indigenous populations are usually the most affected victims, with their social, cultural, and economic livelihoods seriously jeopardized. As the scholars Seán Kerins and Kirrily Jordan comment, "Propelled by expanded reproduction, transnational corporations and the state have continued to systematically privilege the interests of private capital accumulation over those of Indigenous landowners"[52].

Another self-evident observation emerging from this general overview is how most of TNCs' wrongdoings and damages are concentrated in countries of the Global South — in particular Latin America and Africa. As mentioned before, this happens mainly because TNCs relocate to labor-cheap countries with permissive environmental laws, where they can operate more freely and where governments are unlikely to sanction their violations. Considering that developing countries seek to attract foreign investment, the governance and regulation of transnational companies will be very weak in "resource-rich, but economically poor" countries[53]. Of course, the less restricted a corporation is, the higher its profits. In addition to these economic and institutional reasons, we can also mention the historical side of the issue. The TNCs' dominance of the Global South, especially Africa, dates back to the colonial period, with the monopoly of companies such as the

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[51] Kerins and Jordan, "Mining Giants, Indigenous Peoples and Art", 2019, p. 36.

[52] Ibidem, p. 65.

[53] Pádraig Carmody, *The New Scramble for Africa* (Polity: Cambridge, 2011).

British East India Trading Company and Lever Brothers. The "scramble for Africa", as Pádraig Carmody calls it, is both old and new and keeps being fueled by the demand for natural resources[54]. Thus, because of weak institutional structures, high poverty, and frequent political corruption, TNCs' impactful activities proceed virtually unopposed in many former colonies of the Global South[55].

[54] Ibidem.

[55] Yusuf and Omoteso, "Combating environmental irresponsibility of transnational corporations in Africa", 2016.

CHAPTER II

1. Case study: the lawsuit between Chevron and Ecuador

1.1. Historical and environmental background

This chapter introduces a specific case study in order to have a better understanding of the environmental impact of TNCs in developing countries, as well as the mechanisms that rule corporate liability disclosures. The case in question, regarding the oil spillages in Ecuador by Texaco (later absorbed by Chevron), is particularly relevant and insightful for its legal proceedings, because it shows how TNCs react when they get sued. Using this example as a guideline, in fact, this chapter will analyze the legal instruments and strategies usually deployed by transnational corporations. Chapter three will then present the legal framework in which TNCs operate, explain the main theories behind corporate decision-making, and expand its examination onto the ESG assessment, investigating its efficacy in contrasting the environmental impact of TNCs.

The main actors of this case study are the U.S. oil corporation Texaco, acquired in 2001 by Chevron through a merger, the national oil company PetroEcuador, the Republic of Ecuador, the Ecuadorian and Peruvian plaintiffs, and the parties' respective attorneys. I will attempt here to provide a clear and objective description of the factual background of the litigation from the beginning, although that is not exactly an easy task, considering that the parties maintain completely opposed narratives and even disagree over the actual facts.

Texaco Petroleum Company ("Tex Pet") was a fourth-level wholly owned subsidiary of the U.S. corporation Texaco, which arrived in the Ecuadorian territory of Oriente in 1964. It operated in the region for roughly thirty years, until 1992[56]. The original concession of land by the Ecuadorian state stipulated 1,500,000 hectares for oil

[56] *Aguinda v. Texaco, Inc.*, 303 F.3d 470, United States Court of Appeals, Second Circuit. (Southern District of New York). Decided August 16, 2002.

exploration and exploitation. However, another contract was signed between the parties nine years later, and the concession was reduced to 491,355 hectares[57].

Upon its arrival in the region, Texaco assigned 50% of its holding in the concession to Oil Gulf Company, another U.S. corporation (which will be acquired by Chevron too, in 1984), thus forming a consortium in which Texaco was, notably, the only provider of services. In 1973, Gulf Oil and Texaco signed a new concessionary contract, incorporating the newly-created CEPE (*Corporación Estatal Petrolera Ecuatoriana*[58]) into the consortium, which acquired 25% of holdings. According to the new contract, Texaco had to provide a share of the crude oil production to the government of Ecuador, for the satisfaction of the state's domestic consumption needs. The rest of the produced petroleum could be exported and sold for a higher market price.

In December 1976, CEPE purchased the remaining shares held by Oil Gulf Company, reaching 62.5% of the consortium's shareholdings. It is significant to note that, although owning just 37.5% of the shares, Texaco continued to be the only operator of the consortium: Gulf Oil and CEPE never operated in the region. In 1989, CEPE was replaced by PetroEcuador, the new oil company owned by the Ecuadorian state[59]. PetroEcuador started to assume some of the drilling activities in July 1990 and then bought all of Texaco's interests in the consortium on June 6, 1992 — the expiration date of the original contract.

During the twenty-eight years of operations (1964-1992), Texaco drilled 339 wells in fifteen different oil fields and abandoned over 620 toxic wastewater open pits[60]. As regards the environmental impact, it was estimated that the consortium TexPet-Gulf Oil dumped 19 billion gallons of toxic waste in the rainforest, without any kind of treatment,

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[57] Concessionary contract published in the Official Registry 186, 21 February 1964.

[58] "Ecuadorian State Petroleum Corporation".

[59] Antoni Pigrau, "The Texaco-Chevron case in Ecuador: Law and Justice in the Age of Globalization", *Revista Catalana De Dret Ambiental.* Vol. V Núm. 1 (2014): 1-43.

[60] A.K. Hurtig, M. San Sebastián, "Epidemiology vs. epidemiology: the case of oil exploitation in the Amazon basin of Ecuador", *International Journal of Epidemiology*, Vol. 34 (2005): Issue 5, p. 1171.

and discharged over 16.8 million gallons of crude oil[61] — an amount 85 times greater than the infamous Gulf of Mexico spill by BP in 2010[62]. In addition to these deliberate discharges, accidental spills of oil were allegedly very common[63].

Professor Antoni Pigrau, in his research, reports that the oil operations by the consortium led to the deforestation of 2,000,000 hectares of the Amazon rainforest, with a serious impact on soil, rivers, and estuaries[64]. Gulf Oil and Texaco were also accused of aggravated damages caused by the implementation of "obsolete and highly polluting technologies"[65] in the region — while using considerably more modern and less impacting practices in the United States during the same period[66].

Several studies, among which the work of Beristain et al. is particularly insightful, have provided us with specific data about the environmental impact of petroleum activities in the region — although Chevron denies all the accusations on its official website[67]. Among the alleged consequences, scholars include widespread deaths of animals (caused by falls in the open pits, drinking contaminated water, or gas asphyxiation), human rights implications such as forced displacement, and severe impacts on locals' health[68]. In particular, it is significant to mention that 43% of children appeared to be malnourished — compared to 21.5% of children living in zones removed from oil operations — and that the infant mortality rate reached 143 deaths out of 1,000 births. In addition to that, the area displayed the highest percentage of cancer as a cause of death (32%), a figure

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61 Sarah Joseph, "Protracted lawfare: the tale of Chevron Texaco in the Amazon", *Journal of Human Rights and the Environment*, volume 3, issue 1 (2012): 70-91.

62 Coral Wynter, "Chevron-Texaco profits from ecocide", *Greenleft,* 4 March 2015.

63 Hurtig, "Epidemiology vs. epidemiology", 2005.

64 Pigrau, "The Texaco-Chevron case in Ecuador", 2014, p. 4.

65 Ibidem.

66 Stacie Buccina, Douglas Chene, and Jeffrey Gramlich, "Accounting for the environmental impacts of Texaco's operations in Ecuador: Chevron's contingent environmental liability disclosures", *Accounting Forum 37* (2013): 110–123.

67 Chevron, "Ecuador lawsuit", https://www.chevron.com/ecuador. Last accessed March 26, 2023.

68 Carlos Martín Beristain, Darío Páez Rovira, and Itziar Fernández, *Las palabras de la Selva. Estudio psicosocial del impacto de las explotaciones petroleras de Texaco en las comunidades amazónicas de* Ecuador (Bilbao: Instituto Hegoa, 2009).

three to four times higher than in the rest of Ecuador. In general, three-quarters of the population living in the affected area were found to drink and use contaminated water, which triggered several types of illnesses[69]. Miscarriages, birth defects, and skin conditions were among the most widespread health consequences, affecting in particular poor farmers and Indigenous people[70]. Finally, according to Coral Wynter, two Amazon peoples (the Cofarestiona and the Siekope) had to migrate from the rainforest in order to survive the environmental devastation, and two other tribes, the Tetetes and the Sansahuari, have completely disappeared[71].

As mentioned before, Chevron strenuously rejects these accusations. The corporation claims that Texaco's activities were "completely in line with the standards of the day" and argues that no "corroborating evidence" relative to the health allegations can be found, accusing trial lawyers to spread false information.[72] Nevertheless, Texaco's awareness about the degradation created in the region seems to be confirmed and proved by the behaviors of the oil company itself. For instance, on 17 July 1972, Texaco's top management explicitly instructed its fourth-level subsidiary TexPet to hide the evidence of the pollution: the memorandum commands that "No reports are to be kept on a routine basis and all previous reports are to be removed […] and destroyed"[73].

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[69] Pigrau, 2014, p. 5.

[70] Erin Brockovich, "This lawyer should be world-famous for his battle with Chevron – but he's in jail", *The Guardian*, 9 February 2022. https://www.theguardian.com/commentisfree/2022/feb/08/chevron-amazon-ecuador-steven-donziger-erin-brockovich. Last accessed April 10, 2023.

[71] Wynter, "Chevron-Texaco profits from ecocide", 2015.

[72] Patrick Radden Keefe, "Reversal of fortune", *New Yorker,* 1 January 2012. https://www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe. Last accessed February 18, 2023.

[73] Texaco Memorandum CGE-398/72, "Reporting of environmental incidents. New instructions", 17 July 1972. (Available for consultation in appendix B).

1.2. Litigation in U.S. courts

The litigation between Texaco-Chevron and the people of Oriente, the most affected region, is long and quite complex. It started in 1993 when a class action lawsuit supported by 30,000 Ecuadorian citizens was filed against Texaco ("Aguinda v. Texaco Inc"). This action was followed by an almost identical one the following year, this time on behalf of 25,000 Peruvian plaintiffs living downstream from the Oriente region ("Jota v. Texaco Inc."). Both lawsuits were filed in the United States, in the Southern New York District Court, and were initially assigned to Judge Vincent Broderick[74].

These complaints argued that Texaco had polluted the rivers and the forests of Ecuador and Peru during the twenty-eight years of its drilling activities, and sought damages for cleanup. In particular, the lawsuits presented four allegations. First of all, the plaintiffs alleged that Texaco "improperly dumped large quantities of toxic by-products of the drilling process into the local rivers"[75], while the prevailing (and safer) practice in that period was to pump the toxic substances into the emptied wells. Secondly, they alleged that the oil company used many other inadequate means for the disposal of toxic waste, such as burning it, spreading it on local dirt roads, and dumping it into landfills. Thirdly, the Trans-Ecuadorian pipeline, constructed and operated by Texaco, had allegedly leaked large amounts of petroleum in the region. Finally, and as a result of the first three misconducts, the plaintiffs alleged that the local residents had experienced an increased occurrence of injuries and diseases, such as poisoning and cancerous growths.

The two complaints, thus, sought monetary damage on grounds of "negligence, public nuisance, private nuisance, strict liability, medical monitoring trespass, civil conspiracy, and violations actionable under the Alien Tort Act"[76]. An extensive equitable relief was also sought by the plaintiffs, to redress the pollution and contamination suffered by the territory. The lawsuits included, among other demands, an environmental cleanup, the

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[74] Buccina et al., "Accounting for the environmental impacts of Texaco's operations in Ecuador: Chevron's contingent environmental liability disclosures", 2013.

[75] *Jota v. Texaco, Inc*., 157 F.3d 153, United States Court of Appeals, Second Circuit. Decided October 5, 1998, p. 2.

[76] Ibidem, p. 2.

closure or the renovation of the Trans-Ecuadorian Pipeline, access to clean potable water and to hunting and fishing areas, the creation of a medical monitoring fund, and an injunction preventing Texaco from performing activities with a high risk of human or environmental injuries.

In December 1993, Texaco moved to dismiss the *Aguinda* case (and later the *Jota* one, as well) on three grounds: (1) the Court was considered to be an inappropriate forum for the lawsuit (*forum non-conveniens*); (2) the Court should have respected the laws of the State where the infraction allegedly had occurred ("international comity"), and (3), under Foreign Sovereign Immunities Act, PetroEcuador and the Republic of Ecuador were not subjected to U.S. jurisdiction, despite being essential parties of the case[77].

The court chose to reserve decision, but stated that dismissal might have been appropriate — since "effective adjudication in New York" for that dispute would have been "problematic at best"[78]. Nevertheless, Judge Broderick stated that dismissal on *forum non-conveniens* grounds was premature and would have had to be conditioned upon Texaco's consent to accept jurisdiction in Ecuador. The court, therefore, ordered discovery as to "Whether Texaco in fact directed activities in Ecuador from the United States and whether extensive evidence from Ecuador would be necessary to prove plaintiffs' claims"[79].

Judge Broderick died in March 1995, and the cases were reassigned to Judge Rakoff. After discovery was completed, the court granted Texaco's motion to dismiss the case on grounds of international comity and *forum non-conveniens*. Judge Rakoff also justified the dismissal on the basis of the impossibility to assert jurisdiction over PetroEcuador and the Republic of Ecuador, both indispensable parties for the resolution of the case. Consequently, the Republic of Ecuador filed a motion asking to intervene on behalf of the plaintiffs, and stated that its objective was to protect its citizens, "who were seriously

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[77] Buccina et al., "Accounting for the environmental impacts of Texaco's operations in Ecuador", 2013.

[78] *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527, United States Court of Appeals, Second Circuit. Decided April 11, 1994.

[79] *Aguinda v. Texaco, Inc*., 303 F.3d 470, United States Court of Appeals, Second Circuit. Decided August 16, 2002, pp. 2-3.

affected by the environmental contamination attributed to the defendant company"[80]. Even though the Republic of Ecuador was ratifying its participation in the case, it was not expressing willingness to waive its sovereign immunity; its motion was therefore denied by the court — together with the plaintiffs' request to reconsider the dismissal.

In 1998, the *Aguinda* and *Jota* plaintiffs, together, appealed the cases to the U.S. Court of Appeals in the Second District[81]. On this first appeal, the court vacated the dismissal and remanded for consideration, stating that a *forum non-conveniens* dismissal was inadequate, at least without Texaco's commitment to accept the jurisdiction of Ecuadorian courts[82]. Following remand, the company consented to submit to jurisdiction in Ecuador and Peru, and then renewed its motion to dismiss the case on *forum non-conveniens* grounds. The second district court deferred the ruling on Texaco's motion, giving the chance to inquire whether Ecuadorian and Peruvian courts were impartial and independent enough to provide due process.

On May 2001, the court granted Texaco's motion to dismiss the complaints, ruling that the oil company had "demonstrated the availability of an adequate alternative forum" and had "consented to jurisdiction in Ecuadorian and Peruvian courts"[83]. The court rejected all three of the plaintiffs' objections to the adequacy of the Ecuadorian forum, finding it to be appropriate, and stated that the cases had "everything to do with Ecuador and nothing to do with the United States"[84].

A second appeal followed, in 2002, in which the plaintiffs contended that the district court had "abused its discretion in determining that Ecuador was an adequate alternative forum". They also claimed that the balance of public and private interest factors ruled in favor of dismissal[85]. The court found no abuse of discretion and confirmed the dismissing

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[80] *Jota,* 157 F.3d at 158.

[81] Buccina et al., "Accounting for the environmental impacts of Texaco's operations in Ecuador", 2013.

[82] *Jota,* 157 F.3d at 158.

[83] *Aguinda v. Texaco, Inc.*, 303 F.3d 470, p. 4.

[84] *Aguinda and Jota v. Texaco Inc*., 241 F.3d 194, United States Court of Appeals, Second Circuit. Decided in 2001.

[85] *Aguinda v. Texaco, Inc*., 303 F.3d 470, 2002, p. 5.

judgment on grounds of *forum non-conveniens*, thus apparently ending the process in the U.S. Federal Court system[86] — but not for long.

1.3. Litigation in Ecuadorian courts

The litigation moved therefore to Ecuador, in Lago Agrio. Here, in 2003, a new class action lawsuit was filed against Texaco, which had recently been acquired by Chevron. The complaint was filed under the framework of the civil code (for civil actions) and under the Environmental Management Law, article 43, which rules the possibility of presenting action and obtaining compensation "for damages caused to health or the environment, including to biodiversity and its constitutive elements"[87]. The claim alleged severe environmental contamination on more than 500,000 hectares of territory. The plaintiffs' demands included "The elimination or removal of the contaminating elements that still threaten the environment and the health of the residents" (in particular asking for the disposal of the waste, the removal of the remaining machinery, and the clean up of rivers and lands) and "the repair of the environmental damage caused"[88].

Chevron presented multiple rebuttals. Firstly, the corporation rejected the authority and jurisdiction of the Ecuadorian forum. Then, it alleged that Chevron was not the successor to Texaco, and therefore had no obligation to pay reparations since it was not required to answer for third parties. It also claimed that the Environmental Management Law could not be applied retroactively (the law had passed in 1999). Additionally, the company alleged that the plaintiffs' claims were not supported by credible evidence, and casted doubts on their legitimacy also for their "lack of connection" with the Chevron-Texaco corporation.

Later, in 2010, when the documentary *Crude, The Real Price of Oil* was released, Chevron presented a petition before the court requesting dismissal of the lawsuit on

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[86] Buccina et al., 2013.

[87] Environmental Management Law, Art. 43. Law No. 37, published in Official Registry No. 245 of 30 July 1999. Unofficial translation (Antoni Pigrau).

[88] Ibidem.

grounds of alleged fraud committed by the plaintiffs. In general, the case has been characterized by procedural incidents and mutual accusations of corruption and illegal actions. For instance, Dr. Juan Nuñez, the first appointed Judge, was accused of corruption by Chevron and in 2009 had to recuse himself from the case — although he denied any impropriety[89].

In 2007, before the recusal, Judge Nuñez had appointed Richard Cabrera Vega as the court's independent expert to carry out the case investigations. With his team, Cabrera found excessive petroleum hydrocarbons in 44% of the water samples analyzed in the area, as well as cadmium, barium, lead, and other heavy metals in the sludge of wastewater pits. The report stated that Texaco had caused serious health and social problems for the local population, including forced dislocation. Moreover, Cabrera's team provided scientific evidence that showed cancer rates in the region being almost double compared to Ecuador's average, especially with regard to leukemia and cancer of the uterus. The report estimated that the oil company was responsible for 1401 documented excess cancer deaths in Lago Agrio[90].

Finally, the report determined 16.3 billion dollars as the recommended reparation amount, of which 8.3 billion were to be paid as "an unjust enrichment penalty to offset Texaco savings by operating at the expense of Ecuadorian residents"[91]. Seven months later, Cabrera increased the damage estimate to $27.3 billion, encompassing the contamination caused in the area, the cancer deaths, and the clean-up costs[92]. Chevron, however, disputed Cabrera's nomination as the court's expert and accused him to collude with the plaintiffs; the judge, therefore, decided not to take into consideration the report in his own judgment of the case[93]. Meanwhile, in September 2010, the plaintiffs presented an updated evaluation of the damages, ranging from 90 to 113 billion dollars.

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[89] Buccina et al., 2013.

[90] Pigrau, 2014.

[91] Buccina et al., 2013, p. 114.

[92] Richard Cabrera Vega, *Technical summary report: Expert opinion,* 24 March 2008, http://chevrontoxico.com/assets/docs/cabrera-english-2008.pdf.

[93] Pigrau, 2014, p. 13.

On 14 February 2011, the new judge (Nicolas Zambrano) announced his judgment in favor of the plaintiffs, ordering Chevron to pay environmental reparations as well as compensation. The judge considered the issue regarding the merger of Texaco with Chevron, and ruled that Chevron had inherited both Texaco's rights and its obligations. As concerns the alleged separation between Texaco and its Ecuadorian affiliate, the ruling stated that it was necessary to "Entirely lift the corporate veil that separates Texaco Inc. and its fourth-level subsidiary […] since it has been proven that it was a company with capital much lower than the volume of its operations, which required constant authorizations and investments from the parent company to carry out its normal flow of commercial activity" and that "Failing to lift the corporate veil would imply a manifest injustice"[94].

In the judge's view, the absence of regulations establishing precise environmental standards did not mean that no law was applicable to the case, and proceeded to cite four different codes supporting his ruling. First of all, he mentioned the validity of the Regulations for Hydrocarbons Exploration and Exploitation[95], which determines the obligation to perform all activities in a way that prevents damage to people and natural resources. Secondly, the judge cited the 1971 Health Code[96], which establishes the prohibition of discharging dangerous substances into the environment, especially industrial waste. Thirdly, the Law of Hydrocarbons was equally applicable to the case, with its obligation to "avoid contamination of waters, the atmosphere, and the soils"[97]. Finally, the Water Law was cited, which prohibits "all contamination of waters that affects human health or the development of flora or fauna"[98].

Judge Zambrano admitted that it was not possible to rule on activities carried out in the past with environmental standards of the present; nevertheless, he provided proof of

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[94] *Aguinda v. Texaco, Inc.*, Ruling, Trial No. 2003-0002, Single Chamber of the Provincial Court of Justice of Sucumbios. Decided February 14, 2011, p. 26. (Non-official translations by Antoni Pigrau).

[95] (Supreme Decree 1185, Official Registry No. 530 of 9 April 1974).

[96] (Official Registry No. 158, 8 February 1971).

[97] (Official Registry No. 322 of 1 October 1971).

[98] (Official Registry of 30 May 1972).

specific sanctions that had been imposed on Texpet as a result of its violations of legal mandates in the period of its operations in the region.

In his judgment, Zambrano took into consideration more than a hundred reports brought to the process, which estimated the contaminated area to reach 7,392,000 cubic meters[99]. The judgment also presented specific remarks regarding the health of local people, jeopardized by the activities of the oil company, and emphasized the severe impacts suffered by indigenous people — including the forced displacement, the cultural damage, and the annihilation of their social system[100].

Finally, the judgment closed with three strong statements, exposing Texaco's wrongdoings and holding Chevron accountable:

> *(It) appears clear to this court that,*
>
> 1. *Contamination attributable to the scheme of petroleum operations in the concession exists, since it was designed to take advantage of the dumping of effluents into the environment, in spite of the existence of other available alternative technologies;*
>
> 2. *The contamination reported can be considered as hazardous, because of the admitted possibility that the dumping of fluids such as those that Texaco has admitted to have dumped, under the name of Texpet, causes damage to agriculture and to the health of persons […];*
>
> 3. *The dumping of contaminants as described could have been avoided by the defendant with the use of other technology that was available at that time, but which was omitted from the operational scheme for the concession, which was under the full responsibility of the company Texpet, which operated as a fourth-level subsidiary of Texaco Inc., which in turn publically merged with Chevron, thereby creating Chevron Texaco, the defendant company in this trial, which would later change its name to Chevron Corp*[101].

As regards the amount of reparations imposed on Chevron, Judge Zambrano indicated three different types of reparation criteria: primary measures, aimed at the restoration of

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[99] *Aguinda v. Texaco, Inc*, 2011, p. 125.

[100] Ibidem, pp. 165-172.

[101] *Aguinda v. Texaco, Inc*, 2011, p. 174.

the environment to its original state; compensatory measures, conceived for when primary measures are delayed or insufficient; and mitigation measures, with the objective of reducing the effects of damages that could not be repaired. Based upon these criteria, the judge established 8.646 billion dollars as the amount of reparation to be paid, with an additional 10% for the Amazon Defense Coalition, the organization assigned to the administration and implementation of the reparations. Furthermore, the judge imposed a punitive sanction on Chevron, in the form of a public apology for the damages caused by Texaco. However, this punitive sanction would have been transformed into an additional financial penalty if Chevron refused to apologize within 15 days, increasing the damage award to 19 billion dollars[102].

Indeed, Chevron refused to apologize, and on 9 March 2011 presented a petition of appeal to the court, requesting the annulment of all proceedings "for lack of the court's jurisdiction, for lack of authority, for violations of the standards of due process, and for fraud in the proceedings"[103]. The oil company reiterated that Chevron was not the legal successor of Texaco, that Texaco did not control Texpet's operations, and that it did not accept the jurisdiction of the Ecuadorian forum. Meanwhile, the plaintiffs had appealed the decision as well, considering the reparation amount to be insufficient to compensate for the economic impact suffered by local people. The Provincial Court of Sucumbíos resolved both petitions of appeal and confirmed the decision of Lago Agrio Court entirely, thus condemning Chevron to pay 19 billion dollars to the plaintiffs[104].

Chevon, therefore, filed another petition of appeal, this time to the Supreme Court of Ecuador. The high court's judgment, released in November 2013, partially annulled the previous sentence. The supreme court, in fact, ruled that the imposition of punitive damages (both in the form of a public apology and of a financial penalty) had no basis in Ecuadorian legislation. Chevron was thus ordered to pay the original 8.646 billion dollars — plus 10% to the Amazon Defense Coalition. Moreover, the high court basically accused Chevron of bad faith, exposing its self-contradictory attitude.

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[102] Ibidem, pp. 185-186.

[103] Pigrau, 2014, p.19.

[104] Ibid.

> *(A)fter litigating in the United States of America for ten years, where it could be judged according to its jurisdiction then, waiving its authority and admitting to have confidence in the Ecuadorian justice as honest and independent, competence fell on the administration of justice in Ecuador. However, in contradiction, it disowns Ecuadorian jurisdiction and competence […] with abuses and offenses towards the nature of this state power. It accused Ecuadorian justice at a domestic and international level, not only of lack of jurisdiction and competence but also, with absolute lack of evidence, of having a "dishonest and corrupt administration of justice", which threatens the prestige of the judicial system […]. There is no legal cause nor foundation for declaring the process null […]. It is sufficient to note that fraud was never proved and that the company has continuously been alleging it without legal basis. It is reiterated that neither default nor procedural violation has been established for the alleged disqualification to operate. The repeated insistence of the appellant deviates from procedural good faith*[105].

This judgment marked the end of the lawsuit in the Ecuadorian forum, but not the litigation itself, which moved again and continued in third countries as well as in an international forum.

1.4. Litigation in third states and international courts

After the judgment, Chevron moved its assets outside Ecuador, preventing the plaintiffs from recollecting the damage award within the country[106]. Therefore, the Ecuadorian victims sought to enforce the judgment in third states, namely Canada, Argentina, and Brazil — all countries where Chevron had operated for years[107].

In second instance, the Canadian court accepted to hear the case and claimed to have jurisdiction to adjudicate an enforcement action against Chevron, defined as the "indirect corporate parent" of Chevron Canada[108]. It was especially interesting the comment made

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[105] *Aguinda v. Texaco, Inc*, 2011, p. 220-221.

[106] Sharon Lerner, "How the environmental lawyer who won a massive judgment against Chevron lost everything", *The Intercept,* 29 January 2020, https://theintercept.com/2020/01/29/chevron-ecuador-lawsuit-steven-donziger/. Last accessed April 13, 2023.

[107] Pigrau, "The Texaco-Chevron case", 2014.

[108] *Yaiguaje v. Chevron Corporation*, 2013 ONCA 758. Court of Appeal for Ontario. Decided December 17, 2013, p. 38.

by the Canadian judges, recalling the 20 years (hitherto) of the litigation and Chevron's unfair behaviors, and stating that "In these circumstances, the Ecuadorian plaintiffs should have an opportunity to attempt to enforce the Ecuadorian judgment in a court where Chevron will have to respond on the merits"[109]. Chevron's spokesman stated that the company was never going to accept the Ecuadorian judgment, and pronounced the famous words: "We're going to fight this until hell freezes over. And then we'll fight it out on the ice". The Court explicitly answered the challenge, declaring that "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"[110].

After this promising start, however, on 23 May 2018, the court ruled that Chevron Canada was an autonomous entity from the parent company, therefore it had no obligation to the Ecuadorian Justice system[111]; some months later, the Ecuadorian appeal was rejected. The same verdict was reached by Argentina and Brazil's courts, which cited a lack of jurisdiction and held that Chevron's subsidiaries were not responsible for the parent company's wrongs. It was also stated that the Ecuadorian judgment was a product of fraud and corruption, therefore it could not be enforceable[112].

In the meantime, before and after the Ecuadorian ruling, Chevron started to move to other parallel legal avenues, mainly with the objective of voiding the judgment and stopping its execution. First of all, in its final appeal petition, it asked the Ecuadorian authorities to open criminal proceedings against the judges and against the plaintiffs' lawyers. Secondly, the oil company returned to the previous U.S. forum and filed a complaint before the U.S. District Court (Southern District of New York), in February

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[109] Ibidem, p. 70.

[110] Ibid.

[111] Leticia Fajardo, "The case of Chevron in the Ecuadorian Amazon: the ruling of the Supreme Court of Canada closes the doors to end impunity", *Dismantle Corporate Power,* https://www.stopcorporateimpunity.org/the-case-of-chevron-in-the-ecuadorian-amazon-the-ruling-of-the-supreme-court-of-canada-closes-the-doors-to-end-impunity/. Last accessed April 9, 2023.

[112] Chevron, "Brazil's High Court Rejects Attempt to Enforce Fraudulent Ecuadorian Judgment Against Chevron", 2017, https://www.chevron.com/ecuador/press-releases/archive/brazils-high-court-rejects-attempt-to-enforce-fraudulent-ecuadorian-judgment-against-chevron. Last accessed April 9, 2023.

2010. Thirdly, and most significantly, it moved the lawsuit before an international court[113].

The latter event took place in September 2009, when Chevron presented a demand for international arbitration at the Permanent Court of Arbitration, The Hague. Here, the corporation cited the United Nations Commission on International Trade Law and alleged that the Ecuadorian government had violated the bilateral investment treaty with the United States. Specifically, the allegation was based on the grounds that the agreement between TexPet and the Republic of Ecuador regarding the reparation of the damages was expired, and that Ecuador had interfered with the independence of its judicial system. Chevron was seeking dismissal of the Aguinda case and wanted to be absolved of liability. The lawyers of the Ecuadorian victims remarked that Chevron's strategy was to bypass the domestic proceedings by drawing a new player — the state of Ecuador — into the litigation, in order to take away the focus from the Ecuadorian victims[114].

Both the plaintiffs of the Ecuadorian process and the Republic of Ecuador sought to block the international arbitration, fearing that it would affect the still open proceedings in the Ecuadorian forum, but their demand was dismissed. On 9 February 2011, just a few days before the judgment of Lago Agrio was to be issued, the court adopted an *ad interim* measure in favor of Chevron: it ordered Ecuador to suspend the execution of any judgment against the oil corporation, "within or outside Ecuador", until the Permanent Court itself released a ruling concerning the merits of the claim[115]. On February 7, 2013, the Court reported the violation of its interim measure, because the Ecuadorian plaintiffs had sought execution of the Lago Agrio judgment in third countries, as mentioned above[116].

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[113] Antoni Pigrau, "The Texaco-Chevron Case in Ecuador", *EJOLT (Environmental Justice Organisations, Liabilities and Trade),* Factsheet No. 42, 2012.

[114] Pigrau, "The Texaco-Chevron Case", *Revista Catalana De Dret Ambiental*, 2014.

[115] Pigrau, "The Texaco-Chevron Case in Ecuador", *EJOLT*, 2012.

[116] Pigrau, 2014.

The Court also opined that the right to file actions for collective damage did not exist for individuals up until 1999 (when the Environmental Management Act was issued), four years after the class action lawsuit was opened in the United States. For its part, Ecuador sustained that the arbitration at the International Court was null due to lack of jurisdiction, since the Bilateral Investment Treaty cited by Chevron was signed in 1993 and entered into force in 1997[117], many years after Texaco had left the Ecuadorian territory. Ecuador additionally claimed that international arbitration was sought at a moment when the procedural steps in the Ecuadorian juridical system had not concluded[118].

On September 7, 2018, The Court ruled in favor of Chevron, finding that the Republic of Ecuador had violated the aforementioned treaty by issuing a judgment against the U.S. oil company. The 500-page ruling forbade Ecuador to enforce the Aguinda judgment, commenting that the whole Ecuadorian case was characterized by fraud and corruption[119].

At the same time, as mentioned before, Chevron also filed a civil complaint before the U.S. District Court, in February 2011. It did so under the framework of RICO laws (Racketeer Influenced and Corrupt Organisations), a special federal law originally aimed at combating Mafia. The new legal strategy argued that the Ecuadorian claimants and their lawyers were part of a criminal organization, whose goal was to extort money from the oil company[120]. The litigation, from this point on, became even more complex and shifted the focus to personal attacks. In particular, the RICO allegation targeted Steven Donziger, one of the lawyers for the Ecuadorian communities.

On 8 February 2011, again just a few days before the Lago Agrio's judgment, federal judge Kaplan issued an unusual temporary restraining order in favor of Chevron,

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[117] UNCTAD, "Ecuador - United States of America BIT (1993)", *Investment Policy Hub,* 27 August 1993.

[118] Pigrau, 2014.

[119] Sara Randazzo, "Tribunal Condemns Ecuador's $9.5 Billion Ruling Against Chevron", *Wall Street Journal,* https://www.wsj.com/articles/tribunal-condemns-ecuadors-9-5-billion-ruling-against-chevron-1536337680. Last accessed April 11, 2023.

[120] Pigrau, 2014.

preventing Ecuadorian claimants from executing the judgment for twenty-eight days (then extended to thirty-six). The judge considered that the Ecuadorian juridical system was partial, and also highlighted the importance of Chevron for the U.S. economy, mentioning the "public interest" and the thousands of American people employed by the company[121].

The temporary restraining order, however, was revoked seven months later, when the Second Circuit Court of Appeals remarked on Chevron's inconsistent claims — first moving the litigation from the U.S. court to an Ecuadorian one on *forum non-convenient* grounds, and then back again alleging impartiality in the Ecuador justice system. The court consequently rejected Chevron's request to restore the previous order, stating that Judge Kaplan lacked the authority to interdict the execution of Lago Agrio judgment.

Nevertheless, the proceeding regarding the other issues raised by Chevron continued, and the trial eventually started in October 2013. The debate was focused on determining whether the Ecuadorian judgment had been reached in a fraudulent way. Judge Kaplan's decision once again favored the oil company, maintaining that Ecuador did not provide impartial courts and concluding that "Chevron (had) suffered injury – and (was) threatened with additional and irreparable injury – in consequence of defendants' fraud and their efforts to enforce the Judgment that they fraudulently obtained"[122]. On 19 March 2014, the Ecuadorian communities appealed to the Supreme Court and submitted a suspension request, to no avail.

It is interesting to report Judge Kaplan's words, from the introduction of his opinion:

> *The issue here is not what happened in the Orienté more than twenty years ago and who, if anyone, now is responsible for any wrongs then done. It instead is whether a court decision was procured by corrupt means, regardless of whether the cause was just. An innocent defendant is no more entitled to submit false evidence, to coopt and pay off a court-appointed expert, or to coerce or bribe a judge or jury than a guilty one. So even if*

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[121] *Chevron Corporation v. Steven Donziger, et al.* No. 11 Civ. 0691(LAK), United States District Court, S.D. New York., 768 F. Supp. 2d 581 (S.D.N.Y. 2011). Decided March 7, 2011.

[122] *Chevron Corporation v. Donziger, et al*., No. 11 Civ. 0691, United States District Court, 768 F. Supp. 2d 581 (S.D.N.Y. 2011), p. 469.

Donziger and his clients had a just cause – and the Court expresses no opinion on that – they were not entitled to corrupt the process to achieve their goal[123].

He stressed the fact that the objective of the judgment was not determining whether or not Chevron was to be held responsible for Texaco's pollution, but rather assessing the legality of the Lago Agrio litigation. This specification is very important when considering the interpretation that could be given to a headline reporting Chevron's victory.

Several appeals to this decision followed, but eventually, in 2020, Steven Donziger was disbarred from the legal profession, and later, when he refused to submit his phone and laptop to Chevron lawyers, he was convicted of contempt of the court. In 2021, then, he had his passport confiscated and his bank accounts frozen[124], and after two years of house arrest, he was sentenced to serve six months in jail[125].

As a consequence of the RICO trial, the Ecuadorian community attempted to shift the litigation toward a more personal level, as well. In 2014, the International Criminal Court was requested to investigate Chevron's CEO, John S. Watson. A series of crimes against humanity were alleged, including murder, forcible transfer of population, and "other inhumane acts […] intentionally causing great suffering, or serious injury to body or to mental or physical health"[126]. However, the International Criminal Court rebuffed the request for lack of jurisdiction: it was stated that the Court could only prosecute crimes that occurred in 2002 or later, and that the subject matter jurisdiction of the ICC, as presented in the Rome Statute, did not include environmental damages[127].

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123 Ibidem, pp. 1-5.

124 Erin Brockovich, "This lawyer should be world-famous for his battle with Chevron", 2022.

125 Gideon Long, "US lawyer who battled Chevron in Ecuador sentenced for contempt", *The Financial Times*, 1 October 2021, https://www.ft.com/content/97745c0d-2aa7-4484-99f5-0b0066ea073b. Last accessed April 7, 2023.

126 International Criminal Court, Claim filed by the Ecuadorian community before the ICC to Prosecutor Mrs. Fatou Bensouda, pp. 40-41.

127 Caitlin Lambert, "Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?", *Leiden Journal of International Law*, Vol. 30 (2017): 707–729.

It is worth mentioning that one year later, in September 2016, the same prosecutor, Mrs. Fatou Bensouda, showed a partial change of mind, releasing a statement signaling that her office would actually consider hearing cases of environmental destruction[128].

[128] Ibidem.

2. Analysis of Chevron's environmental lawsuit

This long litigation between Chevron and the Ecuadorian communities is a very useful and illustrative case, as it shows how large transnational companies usually react when they are prosecuted for environmental degradation. In general, it demonstrates how difficult it is to hold TNCs accountable for their violations, especially when the damage is in the Global South. Many observations can be made, and many lessons can be learned from the lawsuit; we are going to focus in particular on the legal tactics deployed by the corporation, the role of the state, the outcomes, and the possible margins for action.

2.1. Chevron's legal strategy

The first obvious remark concerns the imbalance between the parties involved, which have very different types of assets. The inequality of the economic and legal means is, in fact, one of the main problems of these environmental lawsuits, since the victims are usually poor people while the defendants are multi-billion dollar companies.

It is reasonable to suppose that Chevron spent millions of dollars on this case, perhaps more, taking into account the legal proceedings, the advertisement to the public, the economic deals, and the private investigation[129]. The 30,000 plaintiffs of the class action, mostly farmers and Indigenous people, certainly did not have the same financial means.

Notably, the oil company used its assets to move the lawsuit all around the world, from national to international courts, often simultaneously. For instance, it is significant to point out how Chevron turned the tables halfway, alleging that the Ecuadorian victims were actually offenders, and their lawyers were conspiring against the oil company, which was presented as the true victim of the whole case. Moreover, by drawing the Republic of Ecuador into the lawsuit, before the Permanent Court of Arbitration, Chevron shifted the focus again from the real victims (who were not part of the proceedings) to an entire nation. As a consequence, the case became more complex, and

[129] Pigrau, 2014, pp. 38-39.

the attention was moved away from the environmental allegations and the reparations request. As years pass by, the ecological and human damages expand, and it becomes increasingly harder to remediate the devastation and rehabilitate the territory.

Constitutional law scholar Cortelyou Kenney defines this kind of litigation as a "boomerang suit". She explains that, recently, the judicial systems of developing countries have become more willing and more capable to hold transnational companies accountable for their violations; the defendant corporations, however, usually refuse to accept the judgments against them. Therefore, the typical reaction of TNCs is to use procedural loopholes to avoid the judicial process and challenge the legitimacy of the proceedings in various ways. For instance, it is customary that the defendant companies first lobby to move the litigation from the U.S. to the courts of developing countries (where the plaintiffs are from), and then contest the legitimacy of the forum again, requesting to move the trial back to the United States. The consequences of these boomerang suits are massive delays, inconsistent results, and the aggravation of the environmental devastation that the lawsuit sought to correct in the first place[130].

In our specific case study, for instance, Judge Zambrano found Chevron to engage in "procedural misconduct"[131] and to deliberately delay proceedings. In particular, he pointed out that the company had failed to provide documents without justification, had obstructed the process of gathering evidence, and had frequently raised already-resolved issues. Judge Zambrano also mentioned the various attempts to "abuse the merger between Chevron Corp. and Texaco Inc. as a mechanism to evade liability"[132].

Chevron's behavior is not an exception, but rather the rule: the practice of dismissing the cases on grounds of *forum non-conveniens* is widespread, and many other large corporations have been accused of using loopholes to refuse to comply with adverse judgments. Shell, in particular, has a bad reputation for "perfecting the art of denying any

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[130] Cortelyou Kenney, "Disaster in the Amazon: Dodging 'Boomerang Suits' in Transnational Human Rights Litigation", *California Law Review,* Vol. 97:857 (2009).

[131] *Chevron v. Donziger*, p. 300 (footnote n. 1212)

[132] Ibidem.

wrongdoing, delaying and ultimately derailing already fragile judicial processes in developing countries […] to avoid liability"[133].

Moreover, transnational companies use various means to intimidate and suppress their legal opponents in court. In particular, we can mention the SLAPPs — Strategic Lawsuit Against Public Participation, designed precisely to suppress speech and crush any opposition[134]. Large wealthy corporations, in fact, do not even need to win their litigations, because they can resort to solutions such as suing plaintiffs back, bankrupting them with legal fees, or, using Chevron's own words, drowning them in "an avalanche of paper"[135]. A 2021 report by the Business and Human Rights Resource Centre unveiled that over 350 pointless lawsuits were filed in the previous 5 years, all of which could be classified as SLAPPs. It is also interesting to point out that 73% of those lawsuits were filed in countries of the Global South[136]. Chevron excels in this intimidation technique: it was awarded twice with "Corporate Bully of the Year" by Protect The Protest (an anti-SLAPP organization) and won a "lifetime achievement award" for its aggressive tactics[137].

In addition to its legal methods, the oil company also tried to pressure the Republic of Ecuador via diplomatic means. Professor Sarah Joseph reports that during the lawsuit, Chevron lobbied the U.S. government trying to cancel the trade preference with Ecuador. It was estimated that, if successful, that operation would have cost Ecuador 300,000 jobs[138]. Furthermore, some Wikileaks cables revealed that Chevron was also attempting

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[133] Yusuf and Omoteso, "Combating environmental irresponsibility of transnational corporations in Africa", 2016, p. 11.

[134] Public Participation Project, "What is a SLAPP?", https://anti-slapp.org/what-is-a-slapp. Last accessed April 12, 2023.

[135] Radden Keefe, "Reversal of Fortune", 2012.

[136] Business & Human Rights Resource Centre, "SLAPPed but not silenced: Defending human rights in the face of legal risks", 2021, https://media.business-humanrights.org/media/documents/2021_SLAPPs_Briefing_EN_v657.pdf. Last accessed April 10, 2023.

[137] Protect the Protest, "Slappies: Second Annual Slapp Awards", 2020, https://protecttheprotest.org/2020/06/25/slappies/. Last accessed April 13, 2023.

[138] Joseph, "Protracted lawfare", 2012.

to lobby the Ecuadorian government, offering to fund some social projects in the country in exchange for its support in "ending the case"[139].

In general, we can define the behavior of Chevron in this lawsuit as vexatious. The company's objective to punish and intimidate its opponents is particularly evident in the case of Donziger: even before the Lago Agrio judgment, Chevron's internal emails demonstrated that the chosen strategy was that of "demonizing" the lawyer to the public eye[140]. The corporation gathered hundreds of lawyers from 60 different firms for the campaign, with Gibson Dunn as the mastermind behind the legal strategy — a corporate law firm that in a different case had been rebuked for "legal thuggery" and "actual malice"[141].

Additionally, Chevron hired several private investigators to monitor Donziger and created online newspapers that sought to smear him[142]. Coral Wynter reports that over twenty media firms were hired by Chevron, with the exact objective of spreading lies and misinformation about the process[143]. In particular, they used means such as Google ads and The Amazon Post, a website specifically created to influence public opinion about the Ecuadorian lawsuit, with several posts released every week. The typical headlines of The Amazon Post's articles are "Chevron to Ecuador: Keep Your Promise, Clean up the Amazon" and "Confession of a Fraud: Watch the videos that Steven Donziger doesn't want you to see"[144]. All of the articles are written by Chevron's representatives, and the sources quoted are often just the oil company's own statements. In "Lab Tests Confirm

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[139] Quito, Ecuador, "Chevron Disputes Report By Ecuadorian Environmental Expert", *Public Library of US Diplomacy,* Wikileaks cable: 08QUITO323_a. 7 April 2008. https://wikileaks.org/plusd/cables/08QUITO323_a.html. Last accessed April 12, 2023.

[140] Chevron's internal emails. 26 March 2009. Contributed by Sharon Lerner. https://www.documentcloud.org/documents/6661647-Demonize-Donziger.html. Last accessed April 11, 2023.

[141] Paul Beckett, "Gibson Dunn Used "Legal Thuggery," Say Montana Supremes", *Wall Street Journal*, 13 March 2007, https://www.wsj.com/articles/BL-LB-3471. Last accessed April 13, 2023.

[142] Lerner, "How the environmental lawyer who won a massive judgment against Chevron lost everything", 2020.

[143] Wynter, "Chevron-Texaco profits from ecocide", 2015.

[144] Chevron, Homepage, *The Amazon Post,* https://theamazonpost.com/. Last accessed April 11, 2023.

Full Chevron Cleanup in Ecuador", for instance, the lab tests were conducted by the company itself ("Chevron has analyzed 306 soil samples for hexavalent chromium and 96% of them did not contain any chromium VI")[145].

In general, if we consider that the oil company still has not paid a cent to the Ecuadorian victims of environmental pollution, we can maintain that Chevron's aggressive strategy has been very effective. The same can be said for Donziger's destiny: as mentioned before, he was prohibited from leaving his house, working, traveling, and earning money; in addition, after two years of house detention, the lawyer was sentenced by Judge Kaplan to serve six months in jail. It is, collectively, the longest sentence for a misdemeanor ever, in the U.S. judicial system[146]. The federal judge's decision was largely determined by the testimony of Alberto Guerra, an Ecuadorian judge who claimed that Donziger had bribed him. Guerra was deemed to be a controversial witness, since he accepted hundreds of thousands of dollars from Chevron, and was prepared by the oil company itself on over 50 occasions before his testimony. Moreover, Guerra subsequently recanted much of his claim, admitting that he had exaggerated and changed the story multiple times[147].

Another legal peculiarity occurred in July 2019, when the U.S. attorney's office rejected the request to prosecute Donziger for criminal contempt (after he refused to hand over his devices) and Judge Kaplan decided to appoint a private law firm to do so. It was an unprecedented move, that two U.S. Senators defined as "highly unusual" and "concerning"[148]. The Senators also noted that the firm chosen by Judge Kaplan, Seward & Kissel, had previously represented Chevron. Several members of the European

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[145] Chevron, "Lab Tests Confirm Full Chevron Cleanup in Ecuador", *The Amazon* Post, 30 July 2009, https://theamazonpost.com/lab-tests-confirm-full-chevron-cleanup-in-ecuador/. Last accessed April 11, 2023.

[146] Morgan Simon, "Courts Are Not A Weapon: How Corporations Like Chevron Use The Law To Get Their Way", *Forbes*, 26 May 2022, https://www.forbes.com/sites/morgansimon/2022/05/26/courts-are-not-a-weapon-how-corporations-like-chevron-use-the-law-to-get-their-way/?sh=7a4f43f128c2. Last accessed April 13, 2023.

[147] Adam Klasfeld, "Ecuadorean Judge Backflips on Explosive Testimony for Chevron", *Courthouse News*, October 26, 2015. https://www.courthousenews.com/ecuadorean-judge-backflips-onexplosive-testimony-for-chevron/. Last accessed April 9, 2023.

[148] United States Senate, *Letter to Judge Mauskopf*, Senators Edward J. Markey and Sheldon Whitehouse, 29 July 2021.

Parliament, multiple lawyers' associations, and International judicial monitors have also condemned the charges against Donziger, and 29 Nobel laureates signed an open letter claiming that the lawyer is a victim of judicial harassment[149].

A similar aggressive behavior was displayed in 2012, during the lawsuit filed by a Nigerian community against Chevron. After the Nigerian plaintiffs alleged that the transnational company was responsible for the shooting and the deaths of several protesters on its oil platform, not only did Chevron defeat the plaintiffs in court, but it also attempted to oblige the impoverished communities to reimburse the company's legal fees. Bert Voorhees, one of the attorneys in that case, stated that Chevron's goal in this kind of litigation is deterrence: "The point is to scare off the next community that may try to assert its human rights", he explained[150].

2.2. The role of states

The role of national states, in this lawsuit, is also very interesting to analyze. As regards the United States, we have mentioned before that dismissing third countries' cases on grounds of *forum non-conveniens* is a practice that has been steadily increasing in the last decades. Generally speaking, it is a well-known fact that the United States has been progressively eluding the role of international supervisor in the global community. In addition to that, it is safe to say that the reasons behind the *forum non-conveniens* trend also include the protection of national interests: in his judgment, in fact, Judge Kaplan explicitly took into account the importance of Chevron for the U.S. economy.

The Republic of Ecuador, for its part, is a very young democracy, and its role in the affair must be understood against this background. Ecuador is a small and poor country, and it was ruled by military dictatorships from the mid-1960s to 1979, when Jaime Roldós Aguilera introduced a democratic government. More importantly, the national economy was — and actually still is — very dependent on its oil reserves. As Professor Judith

[149] Brockovich, "This lawyer should be world-famous", 2022.

[150] Radden Keefe, "Reversal of Fortune", 2012.

Kimerling points out, since Texaco's arrival in the country Ecuador heavily depended on its technical expertise for the construction of the oil fields. This, in turn, led to a situation in which Texaco had extensive power over the Ecuadorian government, which trusted the oil company for the management of the whole activity[151]. Ecuador, in fact, was allegedly unaware of the environmental hazards of the oil industry and surely had no experience in environmental protection. Kimerling reports that "Texaco set its own environmental standards and policed itself", while the Ecuadorian government simply relied on the U.S. company to use the appropriate technology[152].

As already observed, small countries of the Global South often do not have the means to adequately regulate large transnational companies operating in their territories. Ecuador clearly failed to do so, partly due to its inexperience and naivety, partly due to Texaco's reputation and daily control over the oilfields. It is almost humorous to note that in court, Chevron tried to put the blame on Ecuador for the environmental losses suffered by the Ecuadorian communities. Chevron maintained that while Texaco abused its autonomy by adopting inadequate practices, the Republic had failed to regulate the company and enforce its own environmental laws. According to this reasoning, Texaco should have been exonerated from liability — despite the fact that it had taken advantage of governance failure — because the government had neglected its monitoring duty. This argument, however, was not accepted by the judge[153].

The role of third countries in the lawsuit is also interesting to examine. As we have seen, the Ecuadorian plaintiffs have unsuccessfully tried to implement Lago Agrio's judgment in other countries, after Chevron withdrew its assets from Ecuador. Argentine and Brazil refused to hear the case, while Canada ruled that the national Chevron subsidiary was autonomous and independent from its parent company. The same reasoning is maintained by Chevron regarding the relationship that existed between Texaco and its Ecuadorian branch TexPet. In general, states are not willing to lift the corporate veil that Judge

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[151] Judith Kimerling, "Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v Texaco", *International Law and Politics*, Vol. 38 (2006): 414-664.

[152] Ibidem, pp. 435-442, 654-655.

[153] Joseph, "Protracted lawfare".

Zambrano mentioned in his ruling. The main reason behind this unwillingness is, again, the protection of national economic interests, as well as the fear of retaliation from big corporations like Chevron.

2.3. Final observations

All in all, what this case clearly shows is how difficult it is to hold a powerful transnational company accountable for environmental damage, especially in the Global South. Even when the plaintiffs manage to obtain a favorable judgment, it is incredibly hard to enforce it, if the defendant company withdraws its assets from the host country. Transnational companies, in fact, take advantage of the corporate form: as Sarah Joseph explains, they allocate assets across different jurisdictions in order to minimize the risk of liability. This way, "An undercapitalized subsidiary may be the entity which officially bears responsibility for risky yet lucrative ventures"[154]. While the Ecuadorian forum found TexPet to be the alter ego of Texaco, U.S. courts disagreed. With Judge Kaplan's sentence, the impunity of Chevron in the U.S. was achieved, and with the refusal of third countries to lift the corporate veil, the implementation phase is blocked also everywhere else.

Transnational companies, for their part, have every interest in defending this kind of system, in which the chance of being seriously sanctioned is close to zero. If their structure allows them to evade national regulations and judgments, then what is needed is an international framework capable of holding them accountable. This solution, however, is currently not feasible, due to the lack of legal personality of TNCs at the international level. Unlike states, traditionally recognized as international law subjects, transnational companies operate in fact in a legal vacuum, with no direct obligations — and therefore, no liability in case of misconduct.

Considering all the dynamics analyzed so far, it is evident that moving legal proceedings against transnational companies can be very discouraging for the victims of

[154] Joseph, "Protracted lawfare", p. 25.

environmental devastation. Despite this, and despite all the measures adopted by Chevron to frustrate the reparation lawsuit, it is impressive to notice that the Ecuadorian peasants and the Indigenous communities are still fighting for the cause. Their resistance has not wavered, and their limited resources have not prevented them from doing everything within their power to expose Texaco's abuses and request compensation. This determination and fortitude should not be underestimated: boycotts, class actions, and other forms of civil society resistance, in fact, often prove to be crucial in this kind of battle. If nothing else, they deserve credit for exposing TNCs' violations to the world's public opinion.

Another positive note to mention, as regards this lawsuit, is the role of investors. During the litigation, in fact, Chevron started to face pressure from its own shareholders, who expressed concern about the "lawfare" strategy chosen by the company. In particular, on 25 May 2011 a group of major institutional shareholders — whose assets collectively exceeded 156 billion dollars — wrote a jointly signed letter to Chevron, criticizing the company's approach to the quarrel and asking to end the litigation[155]. They pointed out that the attempts to defend Texaco's poor remediation efforts resulted in "grave reputational damage" for the company, and urged for a more constructive approach, such as "an equitable negotiated settlement"[156]. According to the shareholders' letter, "Chevron has shown poor judgment and has caused investors to wonder whether our company's leaders can adequately manage the variety of environmental challenges and risks that they face"[157].

The shareholder proposal received about 25% of the vote[158], but the episode represented the expression of an increasingly common practice. Shareholders, in fact, especially Western investors, are more and more concerned about environmental issues, and companies need to take into account the reputation damage they could face when

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[155] Pigrau, "The Texaco-Chevron Case in Ecuador", *EJOLT*, 2012.

[156] Joseph, p. 21.

[157] Pigrau, 2012, p. 12.

[158] Trillium Asset Management, "Large Investor Coalition Urges Chevron to Explore Settlement in Rainforest Pollution Lawsuit", 26 May 2011, https://archive.trilliuminvest.com/2011/05/26/large-investor-coalition-urges-chevron-to-explore-settlement-in-rainforest-pollution-lawsuit-related-shareholder-proposal-gets-25-of-vote/. Last accessed April 12, 2023.

controversial stances are supported. The increasingly endorsed belief is that this aggressive, never-ending type of litigation damaged not only Ecuador and its people but also Chevron itself. We are going to further explore this subject in the following chapter, which will be focused on the corporate management analysis of TNCs' environmental issues. In particular, our investigation is going to address the shareholders' role, the employment of voluntary environmental assessments such as the ESG, and the practice of greenwashing.

CHAPTER III

1. Outline of TNCs' environmental regulatory framework: mechanisms and limits

As shown in the previous chapters, transnational companies are not very likely to be held accountable for the environmental damage they create, especially if we consider the international legal framework, which is favorable to their fragmented and flexible structure. This chapter will further explore the context in which TNCs navigate, with a special focus on the managerial aspect and the role of shareholders in addressing the environmental issue. Again, the Chevron case study will help us understand the functioning of large corporations, as well as their practices and performances. In particular, the mechanism of ESG will be examined, with a comparison between TNCs' claims and the policies that get actually implemented.

Contrarily to states, transnational companies are not subject to international obligations: no treaties about the regulation of TNCs exist at the international level. Over the years, corporations have accepted some standards and "codes of conduct" to comply with, especially as concerns human rights, even though no compliance is assured. In the framework of international environmental law, it is even more complicated to regulate large companies' practices. For instance, with regard to carbon emissions, there are no domestic or transnational emission limits imposed on TNCs[159]. We can mention the Global Compact and the OECD guidelines as the only international attempts to encourage corporate environmental responsibility, as they are specifically aimed at multinational companies. However, none of the two documents is legally binding, as they only contain recommendations and guidelines, and therefore cannot be challenged and brought to court in case of violations — unless the rules of these codes of conduct correspond to national law[160].

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[159] Lisa Benjamin, "The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?", *Transnational Environmental Law* (Cambridge University Press, Vol. 5, Issue 2, 2016): 353–378.

[160] Sara De Vido, "Climate Change Law", Lecture, *International Law*, Venice, 2021.

States, on the other hand, do have internationally binding treaties on climate change: the most important and recent one is the Paris Agreement, adopted in 2015 at the COP21 — the XXI Conference of the Parties to the United Nations Framework Convention on Climate Change. This legally binding treaty aims at limiting global warming and was ratified by 195 countries worldwide[161]. The behavior of transnational corporations, on the contrary, is mainly regulated through instruments of soft law[162]. Even at the domestic level, the environmental obligations imposed on these companies usually concern only the disclosure of emissions.

In general, transnational companies are subject only to voluntary, self-regulatory mechanisms or, sometimes, to market-based regulations[163]. Before diving into the analysis of these specific mechanisms, it is useful to delineate the meaning of "regulation". It can be considered, in fact, as a dynamic concept, for which no universal definition exists. In this context, regulation can be seen as an instrument to correct market failures, in particular the negative environmental externalities of businesses[164]. Several scholars believe that state intervention through regulation mechanisms is beneficial not only for equality and environmental reasons but also for corporate efficiency[165]. Extensive literature exists on this subject, examining the role of regulation and its cost-benefit effects, usually grounded in neoclassical efficiency[166].

An externality can be defined as a "Positive or negative effect of a production, consumption, or other economic decision on another person or people that is not specified as a benefit or liability in a contract"[167]. When we talk about externalities, we

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161 United Nations Climate Change, UNFCCC, https://unfccc.int/, last accessed May 2, 2023.

162 Giovanna Adinolfi, "Cambiamenti climatici e responsabilità degli investitori stranieri in materia ambientale", in *Doveri intergenerazionali e tutela dell'ambiente. Sviluppi, sfide e prospettive per Stati, imprese e individui*, ed. by Pasquale Pantalone (Modena: STEM Mucchi Editore, 2021).

163 Benjamin, "The Responsibilities of Carbon Major Companies", 2016.

164 Ibidem.

165 Brian R. Cheffins, *Company Law: Theory Structure and Operation,* New York: Oxford University Press, 1997.

166 Benjamin, "The Responsibilities of Carbon Major Companies", 2016.

167 Margaret Stevens, Rajiv Sethi, et al., "Markets, Efficiency, and Public Policy", Unit 12 in The CORE team, *The Economy*, ed. by Samuel Bowles, Wendy Carlin, and Margaret Stevens, 2017.

usually refer to the negative effects, therefore to the costs not envisaged in a given contract. In this case, we are interested in the environmental externalities: if a company decides to use a polluting pesticide, for instance, its profits will be maximized (through an increased yield), but it will also create detrimental effects ("spillovers") for the environment and perhaps other parties. In the face of a private benefit, thus, there will be external costs to bear. For society as a whole, this qualifies as a market failure, as it can be seen as a Pareto-inefficient market outcome[168]. Environmental externalities can be corrected through two main lines of approaches: quantity-based policies, which try to minimize the external costs by limiting the production of polluting products (or emissions), and price-based policies, which encourage green decisions via incentives and make it expensive to harm the environment (through fines and taxes)[169].

Concretely, we can mention three major mechanisms that nowadays seek to regulate TNCs' environmental impact and compensate for the externalities of its activities: the reporting of emissions, market mechanisms such as carbon permits, and voluntary systems — which broadly include the Global Compact, OECD guidelines, and ESG assessment. The main objective of these latter instruments is to encourage multinational enterprises to engage in responsible business conduct, setting standards across a broad range of issues, including the environmental sphere. In addition to these mechanisms, special attention must be paid to the role of shareholders, but we are going to address this subject in the following section. This is by no means a comprehensive list of answers to the problem of TNCs' environmental unaccountability, especially because it does not include solutions that are feasible but not usually implemented. In chapter four we will list and investigate other mechanisms, such as the Pigouvian tax and hard law instruments, underlying their potential as well as their limits.

The reporting mechanism is a simple system: transnational companies can be asked — usually by domestic organisms — to monitor and report the carbon emission levels that get released into the atmosphere. Some examples of agencies and programs involved in

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[168] Ibidem.

[169] Juan Camilo Cárdenas, Marion Dumas, et al., "Economics of the environment", Unit 20 in The CORE team, *The Economy*, ed. by Samuel Bowles, Wendy Carlin, and Margaret Stevens, 2017.

this type of monitoring are the U.S. EPA Greenhouse Gas Reporting Program, the EU Climate Monitoring Mechanism, and the Strategic Report under the UK Companies Act 2006. The main limit of this instrument is that these regulations do not require companies to reduce the emissions levels, only to report them. Moreover, scholar Lisa Benjamin notices that these regulations often do not ask for any specific or coherent pattern of reporting, therefore making it difficult to compare GHG emission levels over time and between different companies. Some corporations may have internal commitments to reduce GHG emissions, and may therefore use the regulations to set their own goals; however, they tend to set intensity targets rather than absolute reduction targets[170]. While absolute targets strive to reduce emissions by a set amount (e.g. 20 percent reduction in five years), intensity targets set emission goals by also accounting for the economic growth of the company. As a result, intensity-based targets do not automatically guarantee that actual reductions occur: even when they are reached, it means that the emissions were reduced in proportion to the associated economic output metric[171].

The reporting mechanism is closely related to the second instrument, which is the participation of businesses in market-based mechanisms. The carbon tax is one of the most famous instruments among the market mechanisms, mainly used to fiscally internalize the environmental externalities produced by businesses. Despite being a valid solution, it is not easily implemented; we will try to analyze its potentialities and obstacles to its enforcement in chapter four. Another very important tool belonging to the realm of these trading mechanisms is the carbon market, a system in which a central authority provides a set number of permits that companies need to buy in order to produce greenhouse gas emissions. The largest and most significant regional carbon trading mechanism is the European Union Emission Trading Scheme (EU ETS), which was propelled by the emission trading mechanism in the Kyoto Protocol, ratified in 2005. The EU ETS covers approximately half of EU emissions[172], and its aim is to both internalize the social cost of GHG emissions and incentivize investments in low-carbon

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[170] Ibidem.

[171] EPA, United States Environmental Protection Agency, "Target setting", https://www.epa.gov/green-power-markets/target-setting, last accessed April 22, 2023.

[172] Sampo Seppänen, Hanna-Mari Ahonen, et al, "Demand in a Fragmented Global Carbon Market: Outlook and Policy Options", *Norden* (Copenhagen: Nordic Council of Ministers, 2013).

technologies[173]. Other national emission trading schemes exist in New Zealand, South Korea, Québec, and very recently China[174].

These market-based mechanisms have different goals, different rules, and different nature (some are mandatory, others are voluntary)[175], but they are all rooted in the concept of the economic valuation of ecosystems, which believes that any public or private player who pollutes or damages the environment should pay. In the Millennium Ecosystem Assessment, a very important report published in 2005, it is stated that "The best way for governments and societies to perceive the value of nature is to calculate what is worth in dollars and euros"[176]. This perspective promotes the so-called "commodification of nature", which underlying idea is putting a price on ecosystem services in order to internalize the environmental externalities. The supporters of this approach believe that giving a monetary value to ecosystems is the most efficient way to ensure the conservation and restoration of the environment; otherwise, society will always perceive natural services and resources as free[177].

According to the scholar Lisa Benjamin, the main issue that these emission trading schemes have to face is an overall lack of transparency, which results in a problematic monitoring process: it is not easy, for the regulating agent, to estimate the exact level of participation of businesses, neither it is to know how many carbon permits get actually acquired, and consequently how many tonnes of greenhouse gas emissions get released into the atmosphere[178]. Moreover, the mechanism can be flawed with an over-supply of carbon permits: this means that the price of carbon within the system would not increase to a high enough level to effectively disincentivize companies to reduce their GHG

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[173] Benjamin, 2016.

[174] The Chinese Emission Trading Scheme was launched in July 2021.
Jun Liu, Jiayin Hou, Qing Fan, and Han Chen, "China's national ETS: Global and local lessons", *Energy Reports*, Volume 8, Sup. 6 (2022): 428-437.

[175] Seppänen et al., "Demand in a Fragmented Global Carbon Market", 2013.

[176] M.E.A., "A Report of the Millennium Ecosystem Assessment", *Ecosystems and Human Well-Being* (Washington DC: Island Press, 2005), p. 207.

[177] Stefano Soriani, "Beyond the Imperatives of Economic Growth and Business As Usual", Lecture, *Global Change and Sustainability*, Venice, October 28, 2020.

[178] Benjamin.

emissions[179]. The main reason behind this is the insufficient ambition of countries in their mitigation commitments[180]. In chapter four, we will deal more accurately with this mechanism, highlighting its potentialities as well as its limits in the fight against climate change.

The third type of system aiming to regulate TNCs' environmental impact can be comprised within the dimension of voluntary mechanisms. These are *soft law* instruments, therefore not legally binding, and include many famous pacts and conventions, such as the OECD and the Global Compact. These voluntary mechanisms are largely linked to the concept of Corporate Social Responsibility (CSR), which can be defined as a business-initiated commitment to behave ethically and contribute to the well-being of communities and societies at large. By adopting a CSR approach, the private sector aims to incorporate into its own mission the goals of inclusivity, equity, and environmental sustainability[181]. Generally speaking, CSR is an attempt to align the companies' profits with socially responsible behavior[182] and seeks to develop the business' accountability not only to shareholders but also to all the involved stakeholders. This is a crucial distinction to emphasize: while shareholders represent the people owning and sharing a business' capital assets, stakeholders encompass all the different groups that are involved and affected by the actions of a business — including for example employees, customers, suppliers, creditors, governments, banks, and local communities. Traditionally, especially in the U.S. economic and cultural context, companies answer only to the interests of shareholders; corporate social responsibility seeks to eliminate precisely this exclusivity[183].

Recently, CSR has evolved into ESG (Environmental, Social, and Corporate Governance), which is today the most widespread and up-to-date criterion for the assessment of businesses' social and environmental commitments. We are going to

[179] Ibidem.

[180] Seppänen et al., "Demand in a Fragmented Global Carbon Market", 2013.

[181] Soriani, "Beyond the Imperatives of Economic Growth and Business As Usual", Lecture, 2020.

[182] Benjamin.

[183] Stefano Soriani, "Criticisms on the "Green Economy" perspective", Lecture, *Global Change and Sustainability*, Venice, November 4, 2020.

thoroughly examine the ESG framework in the following sections, by investigating its premises and standards and by applying its criteria to concrete examples of transnational companies. What is going to be specifically analyzed is the comparison between TNCs' environmental claims and the policies that get actually implemented.

As mentioned before, some important models of voluntary mechanisms include the Global Compact, developed by the United Nations, and the Guidelines for multinational enterprises, approved by the OECD (Organization for Economic Cooperation and Development)[184]. These latter guidelines point out, inter alia, the substantial impact that TNCs' activities can have on the environmental protection of the host state territory. According to the guidelines, multinational companies should not neglect the damages produced by their operations and are thus asked to justify every investment decision with an environmental impact assessment. They are also asked to adopt all necessary measures in order to have the lowest possible influence on the ecosystems, as well as to adequately inform the local communities about the potential alterations[185].

The Global Compact, on the other hand, is a United Nations pact aimed at enhancing corporate sustainability. It is built on ten principles, encouraging businesses to meet basic standards in the areas of human rights, labor, environment, and anti-corruption. Three of these ten principles relate to environmental responsibilities and are derived from the Rio Declaration on Environment and Development (1992). In particular, Principle 7 states that companies "Should support a precautionary approach to environmental challenges" and Principle 9 seeks to "Encourage the development and diffusion of environmentally friendly technologies"[186].

As can be inferred by the construction of these sentences ("should", "encourage"), all these principles and guidelines are *soft law* acts: they do not produce binding legal effects

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[184] OECD website, Better policies for better lives, https://www.oecd.org/, last accessed May 9, 2023.

[185] Adinolfi, "Cambiamenti climatici e responsabilità degli investitori stranieri in materia ambientale", 2021.

[186] UN Global Compact website, "The Ten Principles of the UN Global Compact", https://unglobalcompact.org/what-is-gc/mission/principles, last accessed May 12, 2023.

on transnational companies, and any responsibility under CSR is just ethical[187]. This is the main limit of voluntary mechanisms, which moreover often lack coherence and credibility. In her work, Lisa Benjamin analyzed five UK-based carbon companies, trying to assess the adequacy of the mechanisms employed to reduce their GHG emissions, and found that no concrete connection could be established between CSR initiatives and carbon emission cuts[188]. Furthermore, she observes that these kinds of voluntary mechanisms "can be manipulated by companies by choosing their own baselines and methodologies for monitoring and enforcement"[189].

Another widespread criticism often moved to the voluntary approach, in fact, is that CSR initiatives are very difficult to be distinguished from the so-called "cosmetic greening". This means that businesses are focused on demonstrating to the public their social and environmental sensitivity, for instance via advertisement and popular initiatives, but they do not actually change their behaviors from a substantial point of view. Since transnational companies are above all concerned with their reputation and public image, then, the divide that should exist between corporate social responsibility and public relations is actually quite thin[190]. We are going to further explore this aspect in the Greenwashing section.

Moreover, it is important to point out the differences existing between developed and developing countries. Corporate social responsibility, in fact, is a widespread practice in affluent societies, where people are more concerned with environmental issues and are more willing to pay, but this does not happen in the Global South. As we have already mentioned, more often than not European and US transnational companies differentiate their behavior according to their geographical position, complying with social and environmental standards only in their home country. For this reason, many critics of voluntary approaches consider CSR as a mask that allows hiding the inequality of a de-regulated global economy[191].

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[187] Adinolfi.

[188] Benjamin.

[189] Benjamin, p. 373.

[190] Soriani, "Criticisms on the "Green Economy" perspective", Lecture, 2020.

[191] Ibidem.

Despite their many limits, voluntary mechanisms can be useful in setting standards for transnational companies, which seem to prefer this kind of regulation and are therefore more willing to comply. Additionally, these mechanisms are very important because they help guide the investment decisions of privates[192] — who, as we are going to see in the following section, play a substantial role in determining a company's performance.

[192] Adinolfi.

2. The role of society, shareholders, and other stakeholders

In this respect, special attention should be paid to shareholders, who are able to influence a company's behavior through their investment decisions. There has been, in fact, an increasingly higher concern with environmental issues in the last decades, at least in occidental affluent societies. This trend is reflected in the investment choices of privates, who prefer to put their money into activities that respect natural ecosystems and operate in an ethical way. The environmental concern and the effort to implement green policies is, overall, an "attractiveness factor" for Western investors, which corporations must take into consideration. At the same time, however, an opposite force exists, driving transnational companies' decisions in another direction: businesses' intrinsic objective is making a profit, and any other social and environmental target will always be placed behind that. This section will therefore seek to analyze a company's choices and performances from a business perspective, studying different theories and approaches that will help us understand corporate choices as well as the role that is and could be played by private investors.

It can be useful to start this analysis with the introduction of the Sustainable and Responsible Investment movement, which developed as a consequence of the above-mentioned investors' concern for the environment and the risks of climate change. It derives from the antecedent movement of Socially Responsible Investment, which goal was encompassing both economic and ethical considerations in investment decisions[193]. It is noteworthy to remark that Sustainable and Responsible Investment is closely linked to the ESG framework: although there is not a single definition, the European Sustainable Investment Forum (Eurosif) describes SRI as "a long-term oriented investment approach which integrates environmental, social and governance (ESG) factors in the research, analysis and selection process […] within an investment portfolio"[194]. In addition, Eurosif lists seven strategies that investors can adopt, all based on the integration of ESG criteria. Among others, we can mention the selection of the best-performing companies,

[193] Benjamin.

[194] Eurosif, "Sustainable Investment", https://www.eurosif.org/sustainable-investment/, last accessed April 29, 2023.

the systematic exclusion of businesses and sectors involved in certain harmful activities, the investment in sustainability-themed funds, and the practice of shareholder engagement with the companies' management[195].

Another important action investors can take — and we will better examine this later with our Chevron case study — is the exercise of voluntary disclosure initiatives. This practice is particularly significant in the fossil fuel industry, which is now facing the risk of a hypothesized "carbon bubble". This theory claims that all fossil fuel investments, amounting to trillions of dollars, will quickly lose their value once the world shifts more decisively to a low-carbon economy[196]. As a result of carbon regulation and the transition to renewable energy, then, these fossil fuel investments may become "stranded assets", unable to be used for profit. Investors, therefore, have been increasingly requesting more disclosure from oil companies, in order to ascertain the value of their assets. These requests are usually presented in the form of shareholder resolutions, such as in the case of the 2015 annual general meeting of Royal Dutch Shell — during which the shareholder resolution was adopted with 98.9% of favors[197].

Furthermore, Professor Adinolfi remarks on the trend line that can be observed in international investment law: she notes that the current arbitration practice, together with the most recent bilateral investment treaties (BIT), seem to demonstrate a strong interest in regulating the behavior of not only host states but also foreign investors. In her essay "Cambiamenti climatici e responsabilità degli investitori stranieri in materia ambientale"[198], the scholar hypothesizes a possible evolution of international investment

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[195] Eurosif, "Responsible Investment Strategies", https://www.eurosif.org/responsible-investment-strategies/, last accessed May 12, 2023.

[196] Fiona Harvey, "What is the carbon bubble and what will happen if it bursts?", *The Guardian,* 2018, https://www.theguardian.com/environment/2018/jun/04/what-is-the-carbon-bubble-and-what-will-happen-if-it-bursts, last accessed May 3, 2023.

[197] Royal Dutch Shell Plc, "Result Of Annual General Meeting", 2015, https://www.shell.com/investors/shareholder-meetings/_jcr_content/root/main/section/simple/list_copy_1086419687/list_item.multi.stream/1663835133238/74d5125d7d117a7b09d70daddd8a68c96c2d54ca/2015-agm-voting-results.pdf, last accessed May 12, 2023.

[198] "Climate change and foreign investors' environmental responsibility". Non-official translation.

law, under which social and environmental obligations are created and assigned to foreign investors by means of interpretation[199].

Altogether, the sustainable and responsible investment movement has significantly matured recently, and private investors are increasingly aware of the active role that they can play to mitigate climate change, especially after the "disinvestment" campaign. Despite this potential, the movement has yet to produce any revolutionary transformation in the financial sector: this is mainly due to opposite forces working within the businesses' system, in particular the so-called shareholder wealth maximization norm.

Shareholder wealth maximization can be defined as a fundamental norm of corporate governance that "Encourages a firm's board of directors to implement all major decisions such as compensation policy, new investments, dividend policy, strategic direction, and corporate strategy with only the interests of shareholders in mind"[200]. It is considered to be both the primary norm at the core of for-profit corporations' governance and the general objective of corporate law[201]. The concept of shareholder wealth maximization emerges from the "law and economics" movement, which is today the dominant approach of corporate law theory. The supporters of this approach, also called "contractarians", consider the company as an intersection of contracts made between private players, with minimal or non-existent space for state regulation. They believe, in fact, that regulation constrains competitiveness and economic growth, and therefore prefer other kinds of mechanisms to counterbalance eventual negative externalities created by business activity[202].

The contractarian approach prioritizes the interests of shareholders, viewed as the primary constituents of the corporation, while largely ignoring the involvement of any other stakeholder. Even though some conflicting evidence exists, there is strong support for the theory that this shareholder primacy results in a focus on short-term profits, "to

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[199] Adinolfi.

[200] Bernard S. Sharfman, "Shareholder Wealth Maximization and Its Implementation Under Corporate Law", *Florida Law Review,* Vol. 66, No. 1, Art. 7 (2014), p. 3.

[201] Ibidem.

[202] Benjamin.

the detriment of the long-term value of the firm", as Lisa Benjamin explains[203]. In fact, the attention and priority that are given to the maximization of profits — which is generally the major objective of shareholders — risk being incompatible with long-term commitments such as climate change action and other environmental concerns. Furthermore, this focus on short-term profitability reduces the role of governmental and judicial regulation, as well as framing the company in a limited, profit-making, perspective[204].

In general, it is safe to say that the shareholder wealth maximization norm undermines the effectiveness of corporate environmental regulation, as it is largely in contradiction with environmental protection targets such as the reduction of GHG emissions. In effect, most transnational companies, especially the ones involved in the oil and gas industry, have an inconsistent approach toward environmental issues. For instance, despite recognizing the relevance of energy transition and green policies, they still hold their carbon assets as a significant part of the energy future, not to mention their profits. As a result, we do not witness a substantial divestment from the fossil fuel industry; quite the opposite, in some cases carbon majors are even increasing their oil and gas production[205]. The importance of sustainability is systematically emphasized and claimed to be used as a founding principle of businesses, but it actually always comes second, behind the company's economic growth: in fact, corporations almost never mention profit-sacrificing activities in their reports, for the sake of the long-term, sustainability goals. This behavior is, hence, entirely consistent with the shareholder wealth maximization model.

On the other hand, it is important to take into consideration also other models and theories that can be useful to explain corporate behavior from other perspectives. To begin with, legitimacy theory is considered to be a very insightful theoretical scheme, focused on the analysis of the relationship that exists between a corporation and the dominant values of a certain society. This theory considers the company as embedded in

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[203] Benjamin, p. 357.

[204] Ibidem.

[205] Ibid.

a socially constructed context, which is characterized by a set of beliefs and social norms[206]. In this framework, the corporation is expected to convince the society to which it belongs that its corporate values are consistent with the dominant ones. In short, it can be referred to as a sort of social contract that gets established between the organization and society[207]. Legitimacy is therefore achieved when the company is able to demonstrate that its actions reflect society's norms and values.

According to the theory, legitimacy is threatened when the company fails in this compliance demonstration, and as a result, different players may take action and jeopardize the very existence of the corporation[208]. This damaging action can be articulated in different practices, for instance in the form of consumer boycotts and reduced demand for a given product, or in the choice of suppliers to stop the provision of certain goods and services. It may also take the form of a law: legislative bodies could impose, for example, new regulatory requirements to carry out business or raise the costs of operating in a market[209]. Scholars Lee and Hutchinson refer to these actions, which are the reflection of a broken social contract, as "discrediting events"[210]. Needless to say, companies try to avoid these occurrences, as they get accompanied by substantial costs for a targeted business. Professor Buccina, in her work, reports several studies that show how the occurrence of discrediting events is positively correlated with subsequent environmental disclosures on the part of the affected company[211]. Usually, only positive environmental information is disclosed: in this case, the objective of corporations is earning social support, therefore they are highly reluctant to expose any adverse detail[212].

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206 Mark C. Suchman, "Managing Legitimacy: Strategic and Institutional Approaches", *The Academy of Management Review,* Vol. 20, No. 3 (1995): 571-610.

207 Craig Deegan, "The legitimizing effect of social and environmental disclosures. A theoretical foundation", *Accounting, Auditing and Accountability Journal*, 15 (2002): 282–311.

208 Buccina et al.

209 Vanessa Magness, "Strategic posture, financial performance and environmental disclosure: An empirical test of legitimacy theory", *Accounting, Auditing and Accountability Journal*, 19 (2006): 540–563.

210 Tanya Lee and Paul Hutchinson, "The decision to disclose environmental information: A research review and agenda", *Advances in Accounting*, 21 (2005): 83–111.

211 Buccina et al., p. 112.

212 Fahmida Akhter, Mohammad Rokibul Hossain, et al., "Environmental disclosure and corporate attributes, from the lens of legitimacy theory: a longitudinal analysis on a developing country", *European Journal of Management and Business Economics* (2022).

Another insightful theory is the stakeholders' one. As we have said before, stakeholders can be defined as the combination of all different groups involved and affected by the actions of a business. Contrarily to legitimacy theory, which considers society at large, this model is useful to inquire about the social dynamics that exist between a company (and therefore its actions) and its most powerful stakeholders[213]. According to this theory, the survival of corporate management depends on its capability to interact with multiple stakeholders and accommodate their interests — which in some cases can be very different, even conflicting. What usually happens is that management seeks to convince at least the most powerful stakeholders that the company shares with them the same values and is able to satisfy their demands[214].

Although dated 1992, it is interesting to report the findings of Robert's research, which tested the framework suggested by another scholar[215] to explain corporate environmental disclosures ("CSR disclosures", in his work). He found evidence that corporate disclosures were strictly linked to three dimensions: the stakeholder power, the strategic posture of the company, and its economic performance. Vanessa Magness, an expert in environmental cost management, also inquired about the subject and demonstrated that environmental disclosures increased among publicly visible companies, particularly if in pursuit of external financing[216].

Conditions slightly change in developing countries: the most important stakeholder here is the government, and it is virtually the only one that gets considered when companies deliver environmental disclosures. Scholar Elijido-Ten explains that this phenomenon is largely due to a lack of environmental awareness among the other important stakeholders, namely investors and creditors, thus their demand for disclosures is

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213 Buccina et al.

214 Edward Freeman, *Strategic management: A stakeholder approach*. (Boston, MA: Pitman, 1984).

215 Arieh Ullmann, "Data in search of a theory: A critical examination of the relationships among social performance, social disclosure, and economic performance of U.S. firms", *Academy of Management Review*, 10:3 (1985): 540–557.

216 Magness, "Strategic posture, financial performance and environmental disclosure: An empirical test of legitimacy theory", 2006.

negligible[217]. In general, however, research focuses almost exclusively on financial stakeholders, to the detriment of non-economic stakeholders like local communities and environmental campaigners[218].

As regards the different types of possible environmental disclosures, Akhter and al. recently investigated the matter in the Bangladeshi market and found that tree plantation is the most common type of reporting, disclosed by 85% of companies. Green management policies and the use of renewable energy are also disclosures favored by businesses (79% and 77%), followed by pollution-related information, energy savings, and green infrastructure projects. On the contrary, fund allotment for climate change is the most disregarded disclosure (42%), as well as "ecological and carbon management policy" (56%)[219].

In conclusion, we can acknowledge that the decision-making of corporate action can be explained by various theories, among which we presented the shareholder wealth maximization model, the legitimacy theory, and the stakeholder model. One could argue that, actually, these theories are not so divergent after all, and can be seen as sharing the same underlying idea formulated from different points of view. Despite presenting the matter from alternative perspectives, in fact, the three theories converge on the fact that the economic interests of the company, as well as its very survival, are at the core of corporate decisions. Even when businesses seek to strengthen their legitimacy status in the eyes of society, in fact, they do so with the clear objective of not losing profits. However, the study of all three theories is still very useful, especially when these are combined together: firstly because they delineate the different factors that are taken into consideration by a company in its decision-making process, and secondly because they help us differentiate when the focus of a business is on long-term rather than short-term profits. In the following section, we are going to utilize the theoretical frameworks of

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[217] Evangeline Elijido-Ten, "Can stakeholder theory add to our understanding of Malaysian environmental reporting attitudes?", *Malaysian Accounting Review*, 8 (2009): 85–110.

[218] Buccina et al.

[219] Akhter et al., "Environmental disclosure and corporate attributes, from the lens of legitimacy theory", (2022), figures 2, 3, and 4.

both the legitimacy theory and the shareholder wealth maximization model to investigate and explain Chevron's disclosure choices regarding the Aguinda lawsuit.

However, before addressing the case study, some additional data can be helpful to gain insight into the energy industry and the trust of people towards business in general. Every year, global communication company Edelman conducts a trust and credibility survey, the so-called "Edelman Trust Barometer". In 2011, for example, the report focused on the US market and found that 85% of working-age Americans expected businesses to create profits in a responsible way (by aligning with societal needs and interests) even if that meant sacrificing some shareholder value[220]. This figure lines up with the legitimacy theory: by choosing responsible action over profits, the interviewed sample emphasized its concern for environmental and social issues and expressed its request for companies to conform to these values as well. Trust in business, however, fluctuated considerably during the last decade: in 2011, only 46% of the interviewed sample trusted corporations to behave ethically, while in 2023 the figure has increased to 62%[221]. Today, in fact, business is the most trusted institution worldwide: it is seen as ethical and competent, in comparison with NGOs (trusted "to what is right" at 59%), government (50%), and media (50%)[222]. The "ethical" score of businesses, in particular, has been rising for the last three years[223].

As regards the energy sector, global trust (of an adult, informed demography) ranged between 55 and 60% during the years 2007-2011, then plummeted to 48% in 2012; it regained 56% in 2013[224], until reaching the current 61%. According to the legitimacy theory, this figure suggests that overall, the energy industry more often than not reflects the values and interests of society. Nevertheless, it is crucial to highlight the difference: despite the recovery, while in 2013 the energy sector scored six points higher than the average of business trust (which was 50%), today the difference has decreased, and the

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220 Buccina et al.

221 2023 Edelman Trust Barometer. Global Report, "Navigating a Polarized World", p. 8.

222 Ibidem, pp. 4-8.

223 Ibidem, p. 26.

224 2013 Edelman Trust Barometer, Global Report, "Crisis of Leadership", p. 15.

trust in the energy industry is even one point below average. The sector, in fact, ranks only fourteenth among the most trusted industries[225].

Furthermore, another valuable piece of data recorded by the 2023 Edelman Trust Barometer is that more societal engagement is expected from businesses. Climate change action ranks first among the expected efforts, with more than half of the interviewed sample stating that business, as an institution, is "not doing enough"[226]. Management's role is also investigated: 82% of people think that CEOs should act and take a public stand on climate change, indicating this issue as the second most important for them to tackle (after the treatment of employees)[227].

2.1. Shareholders' impact in Chevron's case

This section seeks to explain why Chevron behaved the way it did as regards the Aguinda and Ecuador cases from a managerial point of view. We are going to investigate the company's choices concerning the financial disclosure of the lawsuits, as well as its ongoing strategy of denial of any responsibility towards the people of Ecuador. The legitimacy and stakeholder theories will help us in our analysis, together with the research of Buccina, Chene, and Gramlich, upon whose work this section heavily relies.

Chevron, and previously Texaco, avoided disclosing the environmental damage and the Aguinda litigation in their financial statements for fifteen years, until 2009. It is interesting to understand the reasons for this prolonged inaction and what conditions changed in 2009, especially considering that the case had been in the spotlight of newspapers and television years before the disclosure date. The Aguinda and the Ecuador lawsuits, in fact, had received high visibility in terms of environmental damage and had therefore attracted widespread media reporting and international political activism. We can mention multiple manifestations of visibility and public concern, especially as

[225] 2023 Edelman Trust Barometer, p. 46.

[226] Ibidem, p. 29.

[227] Ibidem. p. 32.

regards media coverage: newspapers, television news programs, radio, YouTube videos, and documentaries reported the Chevron case, especially in the U.S., supporting one or the other side. Significant impact was generated in particular by the films "Justicia Now" (2007) and Crude (2008); moreover, the grant of the Goldman Environmental Prize to two Ecuadorian activists in 2008 was widely reported and discussed among the public[228].

In addition to that, other expressions of concern were raised within the political arena. Apart from Ecuadorian politics, which had strongly supported the case and the Lago Agrio plaintiffs since the beginning, U.S. politicians started to be interested and worried about the issue in the early 2000s. As mentioned in chapter II, in 2004 ChevronTexaco had attempted to lobby the U.S. Trade Representative in order to punish Ecuador by revoking its favorable trade arrangement with the United States. Two years later, U.S. Senators Patrick Leahy and Barack Obama were asking the Trade Representative's office not to yield to Chevron's demands[229], and the same thing was then requested by other four Senators and 26 Congressmen[230].

Finally, a strong manifestation of concern was expressed by Chevron's shareholders themselves: since 2004, in fact, several proposals concerning the Ecuadorian case were presented at the company's annual meetings. During the years, shareholders asked for a report on the adequacy of the cleanup operations, for the adoption of a human rights policy, for a document on the policies and procedures "that guide the Company's assessment of the adequacy of host country laws and regulations pertaining to human health and the environment"[231] and for the nomination of an expert in environmental matters (especially in hydrocarbon exploration and production) to become a member of the board. Some of these motions were even presented for multiple years in a row, but none of them was endorsed by Chevron's management. As a result, despite receiving a fair amount of affirmative votes, the proposals failed to obtain the majority and did not pass. Nevertheless, they were unequivocal in showing shareholders' concern for the

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[228] Buccina et al.

[229] The letter was retrieved on 15 September 2010 from http://chevrontoxico.com/assets/docs/obama-letter.pdf. From Buccina et al.

[230] All three letters were retrieved in September 2010.

[231] Buccina et al., p. 116.

Ecuador case and its repercussions, taking into account also the possible wrongdoings of the energy company.

One of the most important shareholders' manifestations of involvement was the already-mentioned proposal submitted by Trillium Asset Management in 2005, together with the New York State Common Retirement Fund and Amnesty International USA. Not only did they request Chevron to disclose the planned actions for the health end environmental problems in Ecuador, but they also asked for a report assessing the costs for the cleanup of drilling sites: the shareholders were worried about possible higher costs in the future if Chevron refused to act right away. Again, the proposal did not pass.

All these different expressions of concern must be taken into consideration in the analysis of Chevron's choices of disclosure, as they may play a significant role in the "social contract" of legitimacy that the company shares with society. In the end, Chevron decided to disclose financial information about the case in its 2009 annual report filed with the Security and Exchange Commission (SEC), relative to the year 2008. The following paragraphs will attempt to determine why and how Texaco and Chevron avoided disclosing any information before that date.

In 1993, when the Aguinda case was filed, Texaco chose not to disclose its exposure to potential loss linked to the case; this decision was maintained until the oil company was acquired by Chevron. The SEC's disclosure rules, namely Regulation S-K Item 103 (17 CFR Part 229.103), require U.S. businesses to "Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject." The instructions further explain that a lawsuit is considered as "material" when the proceeding "Involves […] a claim for damages or potential monetary sanctions […] exceed(ing) 10 percent of the current assets of the company and its subsidiaries"[232]. The Aguinda plaintiffs, in their first petition, asked for damage reparations amounting to over 1 billion dollars, a figure which admittedly exceeded 10% of Texaco's assets. Despite this, the energy company justified its non-disclosure by maintaining that the

[232] United States Federal Register, vol. 47, No. 51, March 16, 1982, pp. 11406–11407.

lawsuit fell under the classification of "ordinary routine litigation incidental to the business", the exception described in the SEC regulation.

Another relevant rule contained in the SEC regulations is the ASC 450-20, which requires companies' management to assess and disclose the likelihood of any loss as "remote, reasonably possible, or probable". In addition to that, these estimations must be charged to income if information about the incurred liability is available and if the amount of loss can be reasonably estimated. In 2001, when Chevron became part of the litigation and the U.S. courts dismissed the case, moving it to Ecuador, it is plausible to suppose that the oil corporation could not have estimated a reasonable range of loss. Nevertheless, in 2003, a calculation of the clean-up costs was conducted by the court's expert, estimating it would be 5 billion dollars — an amount that surpassed 10% of Chevron's assets, and thus met the materiality condition[233].

The oil company, then, should have disclosed the litigation and the related loss contingencies every year, from 2003 to 2009. Like Texaco, Chevron justified its inaction by claiming that the lawsuit was ordinary routine to the business, and adding that the expert's report was not reliable. In fact, in the 2009 Financial Statement Notes Chevron asserted that a reasonable estimation of possible loss was not possible, due to "the defects associated with the engineer's report" and to "the highly uncertain legal environment surrounding the case"[234]. As seen before, several large investors disagreed with the company's management on this matter.

Despite the unambiguous concern of its shareholders, who presented multiple proposals linked to the Ecuador case from 2004 to 2010, Chevron allegedly petitioned the Security and Exchange Commission to omit these motions in the annual proxy statement. The SEC refused, deeming the proposals to be relevant and free from misleading statements[235]. Until the 2009 10K annual report, however, shareholders could only get information concerning the Ecuador case from the press. In general, it can be argued that,

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[233] Buccina et al.

[234] Chevron, "Delivering Energy Now Developing Energy for the Future". 2008 Annual Report. https://www.annualreports.com/HostedData/AnnualReportArchive/c/NYSE_CVX_2008.pdf. Last accessed May 12, 2023. Note 15, p. 76.

[235] Buccina et al.

in its disclosure choices, Chevron was not entirely fair to investors, as it underreported the shareholders' risk related to the litigation from 2003 to 2009.

All in all, this case is insightful for the study of corporate action and is well explained with the application of legitimacy theory and shareholder wealth maximization. Starting with the latter, we have seen before how businesses are legally expected to maximize share value and profits, and how management risks losing its power if it fails to do so. This is especially true in the U.S., where in the vast majority of cases only the shareholders' interests are represented in corporate boards.

Specifically, Chevron is an old corporation, once part of Rockefeller's Standard Oil Company, founded in 1870. As in many U.S. companies, the chairman of Chevron's board of directors is the CEO himself: Buccina and al. explain that in this context, "The interests of shareholders and top management are inextricably linked"[236]. No other type of stakeholder is present or considered, such as environmental activists or community groups. The only decision-makers here are managers and shareholders, interested in the maximization of profits but apart from that, not necessarily impacted by the company's actions. The environmental groups, the Ecuadorian plaintiffs, but also U.S. politicians, on the other hand, are very weak stakeholders and have almost no influence over the company's decisions. From the management's point of view, recognizing these non-shareholder interests would be counterproductive, as disclosing possible financial losses would presumably result in a stock price fall. It can also be argued that any disclosure by Chevron could have been brought in court by the opposing party as evidence for the claimed damages. Chevron's management, therefore, has evident incentives to elude financial disclosures for as long as possible.

At the same time, however, that is only feasible if the corporation manages to keep its "legitimate" status in the eyes of society. While shareholder wealth maximization is particularly useful to explain Chevron's previous omissions, in fact, legitimacy theory helps us better understand the reason why its behavior changed between 2008 and 2009. As mentioned before, since the underlying basis of legitimacy theory is the survival of a

[236] Ibidem, p. 119.

business, and therefore the maximization of its profits, again, we could argue that the 2009 disclosure can also be explained by the shareholder wealth maximization model. However, the legitimacy theory is more insightful in the analysis of this phase because of the reason why Chevron, although with always the same objective, had to change strategy. While before the disclosure date, in fact, the corporation took into account mainly the short-term interests of its shareholders in its decision-making processes, after 2008 it was forced to consider also other actors. Legitimacy theory, in this sense, conveniently illustrates the importance of the social factor: the loss of the social legitimacy status was what forced Chevron to change strategy and disclose the Aguinda lawsuit.

Until late 2008, in fact, the energy company was able to keep its legitimacy and convince society that its values and actions were consistent with the dominant ones, even though its decisions only took into consideration its shareholders' interests. It managed to maintain its legitimacy status through different means, mostly legal and communicative strategies. First of all, as we have studied in the second chapter, the oil company used the framework provided by public institutions (i.e. courts) to challenge key assumptions of the case, such as the very existence of pollution in Lago Agrio, and whether or not it was Chevron's responsibility to pay for the damages caused by Texaco. From a financial point of view, as discussed above, the company justified its non-disclosure by arguing that the lawsuit did not meet the conditions under SEC reporting rules. Finally, Chevron engaged in a long and aggressive communication battle with the plaintiffs first, then with their lawyers and the state of Ecuador as well. Analyzing the litigation in the second chapter, we have seen Chevron's effort at discrediting the judicial process and its players, including the judges, the experts, and the attorneys.

Collectively, all these actions allowed Chevron to maintain its legitimacy status during the litigation years, convincing the American society (to which the company belongs) that its values aligned with the dominant ones. The social reference background also helped: from 2005 to 2008, the Edelman Barometer registered that trust in business in the United States increased from 48% to 58%, an all-time high figure, especially compared

to trust in government, experiencing a steady downfall[237]. Because of all of this, Chevron could afford not to disclose any information about the lawsuit for several years, even though the delegitimizing power of that affair would have normally pushed the company to do so.

We can pinpoint 2009 as a turning point year for several reasons, but essentially, the case had started to receive even higher visibility, with very negative publicity for Chevron. The company's legitimacy started to decrease in particular after the release of the award-winning documentary *Crude*, in January 2009, and after the Goldman Environmental Prize was granted to two Ecuadorian activists for their effort in the cause. Additionally, in March 2008 the Lago Agrio court's expert presented its famous report concerning the environmental conditions of the site, estimating the damage at 16 billion dollars, subsequently adjusted to $27 billion. This report was widely publicized, and the concerns of environmental activists and Ecuadorian communities acquired more credibility and legitimacy. Chevron's position, on the other hand, was beginning to be more seriously compromised, and the oil company was therefore forced to disclose possible financial losses related to the case.

However, after the disclosure, and therefore the capitulation to the investors' request, Chevron did not change its overall legal warfare, which continued to be characterized by a refusal of any responsibility and an aggressive approach in court. Its strategic communication, too, kept focusing on the denial of any wrongdoings and on personal attacks toward any party involved in the case. The company, hence, was still fighting for its legitimacy in society, while the corporate actions indicated its adherence to the norm of shareholder wealth maximization.

In conclusion, our case study was insightful and useful to understand the reasons behind corporate choices, as well as management's interests, the balance of power between shareholders and the other stakeholders, and the noteworthy role that can be played by investors. What can be inferred from this analysis, in fact, is that society has the power to threaten companies' legitimacy, which leads to greater compliance with rules on their

[237] 2008 Edelman Trust Barometer. Global Report, 2008, p. 7.

part. Even though environmental activists and investors are in no way powerful decision-makers, and even though their interests do not always align, together they could still make a difference in Chevron's behavior. If society is consistently critical of a business and acts on it, companies have no choice but to try rectifying their actions, or at least make some concessions. The role of shareholders is particularly crucial, as they have a greater influence on corporate behavior. Considering that, realistically, their major goal is maximizing their share assets, what is needed is then a legislative framework with the appropriate taxes and incentives that is able to stimulate an ethical and more sustainable stance, for both investors and businesses.

3. ESG assessment and TNCs' greenwashing

3.1. Overview, reliability, and challenges of the ESG mechanism

This chapter is going to analyze the instrument of ESG, the most recent and widespread means to assess the social responsibility of companies. After giving a definition, explaining its functioning, and giving a general overview of this tool, we are going to inquire about its application, limits, and reliability, also through the examination of Chevron's ESG ratings and practices.

To begin with, the term ESG refers to standards, policies and behaviors that businesses, but also governments and other organizations, can assume in relation to environmental, social and governance issues. The first pillar of this instrument is the environmental concern and includes, inter alia, climate change action, waste management, pollution, use of natural resources and the preservation of ecosystems. The social component deals mostly with human rights, working conditions, health, equality and inclusion, while governance addresses ethical standards, risk management, transparent reporting, privacy and data protection[238].

Despite the importance of the totality and interconnection of these indicators, our analysis will be primarily focused on the environmental section; partly because of the present work's framing, and partly because it is considered to be the most important pillar of ESG for corporations to concentrate on[239]. Especially compared to governments, in fact, environmental-related actions have the greatest influence on the perception of companies' ESG performance[240]; businesses' efforts in that direction result in the most successful reputation improvement[241]. According to the 2022 SEC Newgate Global Report on ESG, environmental issues are the most frequently mentioned by consumers (46% of total mentions) and are considered to be the most important questions to tackle. On the other hand, social and governance concerns were mentioned at 28% and 10%

[238] SEC Newgate ESG Monitor, Global Report: 2022 Research Findings, p. 20.

[239] Ibidem, p. 17.

[240] SEC Newgate ESG Monitor, Global Report: 2021 Research Findings, p. 41.

[241] SEC Newgate ESG Monitor 2022, p. 34.

respectively[242]. In particular, "sustainability" and "climate change/global warming" rank first in "Top ESG Issues", followed at a distance by "Workers' conditions and pay", an issue belonging to the social pillar.

Generally speaking, despite the geopolitical and economic shocks of the last few years, people are still concerned about ESG issues (with only a slight decrease from 2021): 71% of the interviewed sample agreed on the fact that companies should "make a start on ESG action, no matter how small"[243]. Organizations are expected to act responsibly and are asked, among other things, to be more transparent. Only 9% of the sampled population, in fact, trusts companies' claims about their ESG performances, while 40% neither agree nor disagree and the residual 51% do not trust them at all[244]. It is interesting to point out that, although communities are generally critical of firms' and governments' (dis)honesty about their ESG records and request more public sources of information about their performance, they are also surprisingly willing to forgive organizations that admit their mistakes and commit to better behaviors.

Compared to other kinds of organizations and groups, large companies' ESG performance scores are quite low, placing them in fourth place with only 5.7 points out of 10. The only worse performance is assigned to the national government, with 5.5, while NFP organizations and smaller companies surpass 6.0 points[245]. As regards the performance on specific issues, companies commit more to social and governance issues: the first environmental-related action, "Responsible and sustainable use of natural resources" can only be found in the ninth position[246]. When it comes to specific industries' performance, it can be noticed that the mining and resources sector scored the lowest (24th place), both in 2021 and 2022, with 5.0 and 5.2 points respectively. The industry of energy and utilities ranked 10th, with 5.8 points out of ten[247].

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[242] Ibidem, p. 27.

[243] Ibidem, p. 5.

[244] Ibidem, p. 21.

[245] Ibidem, p. 35.

[246] SEC Newgate ESG Monitor 2021, p. 21.

[247] SEC Newgate ESG Monitor 2022, p. 37.

Despite its positive impact and its considerable potential, ESG has several challenges to overcome. First of all, sustainable reports' data is often unaudited, with no global institution in charge to guarantee the accuracy and authenticity of ESG reports. Moreover, a lack of standardization in disclosure rules persists, as well as specific regulatory guidelines. The reliance on corporations' self-reported ESG disclosures can result in greenwashing behavior on the part of businesses, and can also make it difficult for investors and stakeholders to evaluate accurately the companies' real performances[248]. We are going to further expand on these issues in the following sections of the chapter.

Another substantial limit of the ESG framework is that it has been designed to evaluate the corporate responsibility of a company mostly within its home country — which is, typically, a developed country. The ESG performance in the international context, on the other hand, is much more complex to evaluate: Martina Linnenluecke's work, for example, has demonstrated that ESG scores have very limited applicability to emerging markets and do not usually integrate different voices from the local stakeholders, especially indigenous communities. She claims that, overall, the activities of transnational companies are not comprehensively outlined across the different relocated subsidiaries, despite the fact that it is precisely there where the violations and misconducts are more likely to happen[249]. Another recent study by Salsbery, in fact, examined the ESG compliance of transnational companies, comparing their behavior in their home country versus their subsidiaries abroad. She found that TNCs behave significantly more irresponsibly in emerging markets, rather than in the developed economies of their home countries. This is mainly due to the fact that they can choose to adopt the ESG practices of the host market, instead of exporting the norms of their home country[250].

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[248] Ellen Pei-yi Yu, Bac Van Luu, and Catherine Huirong Chen, "Greenwashing in environmental, social and governance disclosures", *Research in International Business and Finance,* Vol. 52 (2020): 101192.

[249] Martina K. Linnenluecke, "Environmental, social and governance (ESG) performance in the context of multinational business research", *Multinational Business Review*, Vol. 30 No. 1 (2022): 1-16.

[250] Julie A. Salsbery, "The ESG behaviors of multinational enterprises: an exploration of emerging and developed market norms", Dissertation, Georgia State University, 2021.

It is also important to investigate ESG's effectiveness on the side of the corporate response. Of course, there is not a single reaction to the ratings, nor a unique way to respond to society's pressure on corporate responsibility: corporations may conform or resist (actively or passively) to the evaluations, and their reaction may depend on many different factors. An insightful research conducted by Ester Clementino and Richard Perkins seeks to explore these questions, analyzing a broad sample of companies operating in Italy. The results of their investigation showed that the majority of the sampled companies reacted positively to ESG ratings, altering their behavior in conformity with ESG criteria[251]. According to the research, the most common response of companies was disclosure, while just a few firms reacted by making substantial changes in their ESG-related policies. Not only are disclosures less expensive and time-consuming than changing the actual practices of a business, but they are also much less disruptive. For a number of companies, thus, ESG assessment and the consequent disclosures have not resulted in an improved sustainability performance: Clementino and Perkins conclude that ESG, like other forms of "externally imposed organizational evaluations", can result in gaming-type behavior on the part of the assessed companies[252]. Furthermore, in some cases, the reaction of businesses is to resist ESG rating, instead of conforming to it. A number of firms engage in passive resistance, characterized by a defiance strategy and the attempt to ignore institutional requirements, while some others pursue active resistance, trying to exert power over the sources enforcing the ESG criteria.

Another important contribution brought by Clementino et al.'s work is the explanation of the variability of corporate conformity through the belief in business benefits. They pointed out that the more a company believes that complying with ESG standards and scoring well leads to positive economic outcomes, the more they are willing to conform. These positive effects can take the form, for example, of an improved reputation in the eyes of investors. On the other hand, the degree of conformity or resistance to ESG criteria also heavily depends on corporate strategy: if management believes that

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[251] Ester Clementino and Richard Perkins, "How Do Companies Respond to Environmental, Social and Governance (ESG) ratings? Evidence from Italy", *Journal of Business Ethics*, 171 (2021): 379-397.

[252] Ibidem, p. 391.

internalizing the ratings and engaging in ESG-related efforts is instrumental for the business value, the company will be likely to comply. Conversely, if the manager's perception is that ESG evaluation does not contribute to corporate goals, he will ignore or challenge the ratings[253].

Finally, Clementino's research provides interesting insights into the key players of ESG effectiveness. First of all, the role of investors is underlined, as proof of the already-mentioned interconnection between corporate action, investment, and engagement — a claim also supported by Professor Michael Cappucci, in his 2018 work[254]. Another crucial player in ESG assessment is the company itself, which can use the rating in order to self-govern its performance. Clementino and Perkins, in fact, found that ESG scores were used by some companies for "benchmarking purposes", comparing their ratings with competing firms and committing to performing well in order to get a competitive advantage[255].

3.2. Greenwashing strategies

As quickly mentioned before, one of the main challenges that the ESG assessment must face is the practice of greenwashing. This term was originally coined in 1986 by environmentalist Jay Westerveld, who accused the hotel industry of falsely promoting the reuse of towels as an environmental-friendly measure when it was actually just devised as a cost-cutting operation[256]. Due to its multidisciplinary character, there is not a single accepted definition of greenwashing today. We can mention the Encyclopedia of Corporate Social Responsibility, which defines the phenomenon as "The practice of falsely promoting an organization's environmental efforts or spending more resources to

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[253] Clementino and Perkins, "How Do Companies Respond to Environmental, Social and Governance (ESG) ratings?", 2021.

[254] Michael Cappucci, "The ESG integration paradox", *Journal of Applied Corporate Finance*, 30:2 (2018): 22–28.

[255] Clementino et al., p. 392.

[256] Erica Orange and Aaron M. Cohen, "From eco-friendly to eco-intelligent", *The Futurist*, 44:5 (2010): 28–32.

promote the organization as green than are spent to actually engage in environmentally sound practices"[257]. It refers, therefore, to marketing campaigns that voluntarily diffuse false and deceptive information with regard to the environmental objectives, strategies, and actions of a company. Scholars Delmas and Burbano, instead, define the phenomenon as the combination of "poor environmental performance and positive communication about environmental performance"[258]. In this case, greenwashing is seen as composed of two complementary actions: retaining negative information on one side, while exposing favorable data regarding corporate goals and achievements on the other. De Freitas Netto, in his systematic review of greenwashing, refers to this kind of two-folded behavior as "selective disclosure"[259].

The practice of greenwashing is quite frequent nowadays, as corporations try to exploit the consumers' sensibility about environmental issues for their business purposes. We can link this practice to legitimacy theory, as its goal is convincing society that the companies' values align with the dominant ones — and therefore boosting the business' public image. Recently, however, consumers and investors have become increasingly aware of this practice, and many instruments are being created for the identification of inconsistencies between corporate green claims and their real behaviors.

Many greenwashing techniques exist in today's practice. Greenpeace has listed and explained some of the most common: we can spot the classic green buzzwords and images, like packages and ads featuring trees and natural scenes, or the use of words like "non-toxic", "all-natural", "eco-conscious" and "chemical-free", which are often pointless without an explanation. Another related greenwashing strategy is the redundant claim: for instance, the advertisement of a product as vegan or plant-based when it would have been like that anyway. We can also mention the so-called "token gestures", which

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[257] Karen Becker-Olsen and Sean Potucek, "Greenwashing", In *Encyclopedia of Corporate Social Responsibility*, ed. by Liangrong Zu, Samuel O. Idowu, Ananda Das Gupta, and Nicholas Capaldi (Berlin: Springer, 2013).

[258] Magali Delmas and Vanessa Burbano, "The drivers of greenwashing", *California Management Review*, 54:1 (2011): 64–87, p. 67.

[259] Sebastião Vieira De Freitas Netto, Marcos Felipe Falcão Sobral, et al., "Concepts and forms of greenwashing: a systematic review", *Environmental Science Europe,* 32:19 (2020).

seek to promote a small green feature while ignoring the broader context, and other more important environmental issues[260].

Abundant literature on this topic exists, and many classifications of greenwashing forms have been compiled by different scholars. Contreras-Pacheco and Claasen, for instance, found five corporate-level greenwashing forms, namely "dirty business", "ad bluster", "political spin", "it's the law, stupid!", and "fuzzy reporting". We can identify a *dirty business* when sustainable practices or products are promoted by a company but are not representative of the whole business, which is inherently unsustainable. The *ad bluster* greenwashing, instead, diverts the attention from the main environmental issue at hand through the advertisement of other minor and unrelated achievements. *Political spin* is as subtle as it is dangerous: it happens when companies promote a green image while at the same time influencing governments to obtain benefits that negatively affect sustainability. *It's the law, stupid!* is the name of the corporate practice that proclaims and brags about sustainability accomplishments that are actually already compulsory by the law. Finally, *fuzzy reporting* is a transgression that "takes advantage of sustainability reports and their nature of one-way communication channel, in order to twist the truth or project a positive image in terms of CSR corporate practices"[261].

Another generic form of greenwashing is manifested when a company is purposefully not specific enough in its claims and definitions so that they can be easily misunderstood by consumers in their vagueness. Additionally, the practice of not providing easily accessible evidence to support one's green claims is extremely widespread: reliable third-party certifications are very rare, despite the numerous percentages and statistics boosted by companies in their ads and packages. In general, corporate green claims can be false, misleading, irrelevant, deceptive, partial, or unaccredited[262].

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[260] Leah Das, "Greenwash: what it is and how not to fall for it", *Greenpeace,* April 2022, https://www.greenpeace.org.uk/news/what-is-greenwashing/, last accessed April 28, 2023.

[261] Orlando E. Contreras-Pacheco and Cyrlene Claasen, "Fuzzy reporting as a way for a company to greenwash: perspectives from the Colombian reality", *Problems and Perspectives in Management,* 15 (2017): 525-535, p. 527.

[262] De Freitas Netto et al., "Concepts and forms of greenwashing: a systematic review", p. 8-9.

3.3. Information asymmetries and market failures

Another substantial limit that the ESG assessment faces is the presence of informative asymmetries in relation to investors. These asymmetries are largely due to the fact that corporate disclosures are often unaudited, as we have just seen, and in general the information is not always reliable. The practice of greenwashing is thus doubly detrimental to society: not only does it mislead consumers, but it also hampers accurate investors' choices. Therefore, this section seeks to investigate the relationship that exists between greenwashing and corporate disclosures with regard to the choices of investors, while also exploring which factors and mechanisms have the potential to reduce ESG asymmetric information.

To begin with, it is important to establish what asymmetries are. Information asymmetries are a possible cause of market failures — such as adverse selection — taking place when the sets of information available to sellers and buyers are unbalanced. The most important type of market failure, in this context, is the negative externality, discussed in the first section of this chapter. As regards informative asymmetries, we can distinguish between two different forms: hidden information, which occurs when one side of the economic transaction possesses more and better information than the counterparty, and keeps it for itself, and hidden action, wherein one party's actions are not observable by the other, despite being of interest[263]. Both types of informative asymmetries can be present in the context of corporate disclosures and substantially impact the investment choices of privates.

On the one hand, hidden information (also known as hidden attributes) is linked to the problem of adverse selection. This type of market failure emerges when the terms offered by one party of the exchange to the other will result in the dropout of some actors[264]. In the case of medical insurance, for example, if the price is high, individuals who are generally healthy will choose not to purchase the insurance, leaving only ill people in the market. As the insurance company cannot know the health status of its insurees, it will

[263] Valerio Dotti, "Market failures", Lecture, *International Political Economy 1*, Venice, September 2021.

[264] Stevens et al., "Markets, Efficiency, and Public Policy", *The Economy*, 2017.

try to protect itself and minimize costs by further increasing the insurance price — which, in turn, will result in an additional drop out of partners. In our case, the risk of adverse selection emerges at the initial phase of investment: in the absence of transparent and symmetric information (and this problem is intensified by greenwashing practices, as we have seen), investors cannot easily distinguish between good companies and bad companies. Therefore, they will choose to grant investments only at a high enough rate that can compensate for the potential losses. This, in turn, may result in a worsening of the range of companies that ask for external financing[265].

On the other hand, hidden action leads to the problem of moral hazard: a situation in which economic actors make profit-maximizing decisions that are not actually efficient, because of the fact that they act with the knowledge that the costs associated with their conduct will be borne by another party. The clearest and most classic example is that of the insurance industry, where the insurer cannot verify how the insuree will behave privately[266]. For instance, in the case of car insurance, people may take less care in avoiding harm and may drive recklessly, thus increasing the risk of damage as compared to what it would have been without insurance.

In the context of investment choices and corporate behavior, we can detect the problem of moral hazard from different points of view. From the perspective of investors, the risk of moral hazard exists because companies may use the granted investment in a way that does not conform with the financiers' preferences, or they may take riskier decisions that jeopardize the repayment[267]. In the absence of transparent disclosures, for example, the firm may violate environmental norms, which will cause an economic impact in the long run. The features of the regulatory framework and the role of government are particularly crucial in this respect, as they significantly influence investment choices. In fact, investors may choose to finance companies (or single projects) without taking into adequate consideration the negative externalities that are created — in this case,

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[265] Ari Hyytinen and Lotta Vddndnen, "Where Do Financial Constraints Originate from? An Empirical Analysis of Adverse Selection and Moral Hazard in Capital Markets", *Small Business Economics*, Vol. 27 (2006): 323-348.

[266] Stevens et al., "Markets, Efficiency, and Public Policy", *The Economy*, 2017.

[267] Hyytinen and Vddndnen, "Where Do Financial Constraints Originate from?", 2006.

environmental damages: this usually occurs when they have reason to believe that future governments will redress such externalities, thereby bearing the cost[268]. On the contrary, an investor that supposes that the environmental damage created by a company will be sanctioned and fined by the regulatory system will be less likely to support such an activity, because the final costs will affect him directly.

Moral hazard is particularly studied in the context of Environmental Liability Insurance: ELI policies, in fact, depending on various factors, can have positive or negative effects on corporate environmental performance. While some scholars, such as Boomhower[269], find that insurance requirements lead to significant improvements environmentally, other studies suggest that environmental liability insurance results in moral hazard, especially in the case of emerging economies. Shiyi Chen et al., for instance, analyzed the Chinese market and found that the adoption of ELI policies caused a reduction of environmental effort on the part of Chinese firms. According to the authors, this risk is mitigated in the case of companies with a stronger environmental awareness and stricter supervision from the government or, in general, a more robust legal-enforcement framework[270]. Finally, the problem of moral hazard also emerges in the case of tradable pollution emission permits, a possible solution to the issue of corporate environmental impact — already mentioned in the first section of this chapter. In chapter four, we will further expand this mechanism, analyzing its potentialities and limits.

All in all, the literature on this topic suggests that moral hazard and adverse selection are among the primary causes of friction in capital markets[271]. We can thus infer that the possible presence of these phenomena in the decision-making of private investors should not be underestimated, especially when these latter try to engage in sustainable and

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[268] Jonathan Bonnitcha, "The problem of moral hazard and its implications for the protection of 'legitimate expectations' under the fair and equitable treatment standard", *International Institute for Sustainable Development*, 2001, https://www.iisd.org/itn/en/2011/04/07/the-problem-of-moral-hazard/, last accessed June 6, 2023.

[269] Judson Boomhower, "Drilling like there's no tomorrow: bankruptcy, insurance, and environmental risk, *American Economic Review*, Vol. 109, No. 2 (2019): 391–426.

[270] Shiyi Chen, Xiaoxiao Ding, Pingyi Lou, and Hong Song, "New evidence of moral hazard: Environmental liability insurance and firms' environmental performance", *Journal of Risk and Insurance*, 89 (2022): 581-613.

[271] Ibidem.

responsible investments. Therefore, solutions and mechanisms must be sought not only to avoid TNCs' potential violations, but also to redress these market failures.

What is clear is that corporate transparency is required and paramount, and would solve many of these problems, at least partially. Coming back to ESG, ESG reports could have a very positive effect in this sense, as they are potentially able to reduce information asymmetries. Nevertheless, as previously discussed, disclosure is usually voluntary, serious sanctions are lacking, not to mention the reporting market is internationally diverse and virtually unregulated. This jeopardizes the potential beneficial effect of the ESG assessment, and generates the need for increased monitoring and more effective control[272]. Investors and other stakeholders, therefore, are requesting unequivocally reliable and transparent ESG ratings from businesses, which are absolutely needed to enhance information efficiency. Moreover, as already mentioned, improving the ESG score and the environmental disclosures proves beneficial also to a firm's valuation.

It is interesting to point out that when companies have to face environmental scandals (or "discrediting events"), their market value declines and the public image worsens, and therefore the need for more transparent disclosures increases. As a result, in his work, Sebastian Utz claims that scandals often have the positive outcome of expediting the demand for mandatory monitors and ESG reporting. Again, this demand should come primarily from shareholders and investors, if it wishes to be effective[273].

Ellen Pei-yi Yu, Bac Van Luu, and Catherine Huirong Chen have conducted very insightful research on this topic, and have found that companies, in fact, engage less in ESG greenwashing when investors and other relevant stakeholders exert high scrutiny over their transparency and performance. They identify a couple of factors that can significantly pressure businesses to avoid ESG greenwashing behaviors, namely the presence of independent directors and institutional investors, who effectively oversight corporate behavior and deter greenwashing attempts, and the absence of corruption in the

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[272] Sebastian Utz, "Corporate scandals and the reliability of ESG assessments: evidence from an international sample", *Review of Managerial Science*, No.13 (2019): 483-511.

[273] Ibidem.

country, which leads to increased public interest and scrutiny[274]. In their cross-country analysis, comprising 1925 large-cap firms, Pei-yi Yu et al. sought to measure the extent of greenwashing activities, and examined the best and worst-performing industries. They found that companies belonging to the "Materials" sector are the most likely to engage in ESG greenwashing, with the highest peer-relative score, closely followed by the Energy and the Utilities sectors.

Overall, an increasing number of institutional investors, sovereign funds, and pension scheme trustees today take into consideration ESG assessments to evaluate their investment risks and opportunities, but they are also asking for more monitoring and transparency. A good example of a possible solution is provided by the European Union, which on January 2023 introduced the new Corporate Sustainability Reporting Directive. This instrument, replacing the previous Non-Financial Reporting Directive, extends to 50.000 the number of large companies that are required to report on sustainability and reinforces the ESG reporting rules for businesses.

Among other things, these new rules ensure access to investors and stakeholders to the information needed for the assessment of investment risks, particularly with regard to climate change and other environmental concerns. The CSRD also promises companies to decrease reporting costs and seeks to enhance transparency in relation to the corporate impact on societies and ecosystems. Finally, these new rules make it compulsory for companies "to have an audit of the sustainability information that they report"[275]. The efficacy of this instrument will be tested in the next few years, as the first corporate reports complying with the new rules will not be published until 2025.

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[274] Ellen Pei-yi Yu et al., "Greenwashing in environmental, social and governance disclosures", 2020.

[275] European Commission, "Corporate sustainability reporting", https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en, last accessed May 4, 2023.

3.4. Analysis of Chevron's ESG assessment and greenwashing practices

This section will attempt to investigate more concretely the issues so far presented, focusing on Chevron Corporation, our case study. We will examine the company's ESG scores, its sustainability rhetoric, pledges, and actions, as well as its greenwashing behaviors. The main objective of this subchapter is to analyze on a deeper level the environmental strategies of a company from a business point of view, comparing in particular what companies claim to do with how they actually act.

Starting with the ESG reporting from Chevron itself, it is no surprise that the company presents itself as proudly sustainable and immaculately ethical. On the first page of its 2022 corporate sustainability report, it is claimed that the intention is "To provide lower carbon energy to meet demand today while building the energy system of tomorrow". It is also affirmed, although very vaguely, that "(The company is) getting results the right way", as well as "delivering the future of energy"[276]. As regards environmental issues, Chevron boasts apparently impressive targets in various sectors, such as the monitoring of emissions, carbon intensity reduction, and alternative investments, with large figures and data displayed. In reality, what look like achievements at first glance, are actually just projects and estimations for the future. There are several interesting footnotes, in the report, in small font indeed, that clarify this, such as: "This report contains forward-looking statements relating to Chevron's operations that are based on management's current expectations, estimates and projections"[277] or "These statements are not guarantees of future performance and are subject to certain risks, uncertainties and other factors, many of which are beyond the company's control"[278]. Moreover, in Chevron's ESG report, we can recognize several techniques discussed above. For instance, the company strongly highlights its good performance in the Social and Governance domains, in an attempt to perhaps overshadow the scarce environmental-related results. This behavior also confirms the trend analyzed by the Sec Newgate study on ESG, which

[276] Chevron, "Enabling human progress", Corporate Sustainability Report, 2022, p. II.

[277] Ibidem, p. 3.

[278] Ibidem. p. 59.

reported that businesses act more and perform better in the social and governance sections, while environmental concerns are often disregarded.

If investors were to seek out information about Chevron's ESG assessment, they would find that Sustainalytics rates the energy company's ESG as "high risk", ranking it 67 among all oil and gas producers in the world[279]. Climate Action 100 is another very insightful website, dedicated to the assessment of corporate greenwashing for interested investors. The framework's objective is to evaluate "The adequacy of corporate disclosures in relation to key actions companies can take to align their businesses with the Climate Action 100+ and Paris Agreement goals"[280]. A thorough analysis of Chevron reveals that the company meets all the required criteria only in two targets out of nine, namely the decarbonization strategy (which again, refers to future commitments) and the TCFD disclosures (Task Force on Climate-related Financial Disclosures). Chevron does not meet any criteria whatsoever with regard to Net Zero GHG Emissions by 2050 ambition, and the same can be said for the Capital Alignment target. According to the report, the company is not working to decarbonize its capital expenditures, nor is disclosing the methodology used to determine its alignment with the Paris Agreement in relation to its investments. In the remaining five targets, mostly relative to GHG reduction and climate governance, Chevron's compliance is only partial, meeting "some criteria". For example, in the section on Climate Policy Engagement, the company meets the requirements of just one subcategory out of six ("The company discloses its trade associations memberships")[281]. This is a widespread tendency: businesses claim that they are successfully engaging in ESG actions even when they are complying with just a part of the requirements, which are usually not substantial, and therefore insufficient to properly address the issues at hand.

As regards the rhetoric employed by Chevron, it is indisputable that today, the energy TNC is trying to build a public image that is as green as possible. However, a significant

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[279] Sustainalytics, "Chevron Corp.", Company ESG Risk Ratings, https://www.sustainalytics.com/esg-rating/chevron-corp/1007976752, last accessed May 10, 2022.

[280] Climate Action 100, https://www.climateaction100.org/, last accessed May 11, 2023.

[281] Climate Action 100, "Chevron Corp.", https://www.climateaction100.org/company/chevron-corporation/, last accessed May 9, 2023.

evolution can be traced in its reports and speeches, especially in relation to the stances taken and the type of communicative strategies used during the years. The scholar Fanny Domenec, in her interesting research, studied three large oil companies and analyzed in which ways environmental issues and discourses have been used by CEOs to promote a positive image of the companies. In particular, she focused her examination on corporate annual letters, which are meant to provide readers (usually investors and other stakeholders) with information regarding the financial performance of a company as well as its CSR-related progress. The findings confirmed that environmental issues heavily influence corporate discourse. The oil industry, in particular, has always been associated with environmental damage and pollution: as a result, there has been an attempt to reverse this negative perception, using environmental issues and green discourse as "valorization tools" for the corporate image[282].

Generally speaking, this communicative approach aims at presenting companies as green, sustainable, and accountable, usually omitting unfavorable information or re-framing it in a more positive light. For example, mentions of oil spills, representing one of the major threats to the reputation of oil companies, were incredibly scarce — Chevron mentioned it only once in its annual letters, in the period between 2003 and 2009. Another very common rhetorical strategy, employed by Chevron too, is shifting the focus to the international context. As Fanny Domenec explains, "Setting environmental issues in a wider context enabled the CEOs to leave aside their sometimes controversial environmental record to focus on another aspect, favorable to the company"[283]. For instance, the systematic mention of the global need for energy, usually expressed with the word "demand", has the purpose of legitimizing corporate activities. In 2003, for example, Chevron wrote "Finally, our company is focused on another key global challenge – finding ways to meet growing energy demand while reducing the environmental impacts of energy development and use"[284]. The subtext, here, is that oil remains crucial to the world's functioning, despite the environmental dangers.

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[282] Fanny Domenec, "The "greening" of the annual letters", *Journal of Communication Management*, Vol. 16, Issue 3 (2012): 296 - 311.

[283] Ibidem, p. 301.

[284] Chevron, 2003, Letter to stakeholders. From Domenec.

Linked to this, another common strategy is the reference to external, international regulation, emphasizing the fact that climate change is a global issue, not something that a single company can solve on its own. This approach is reflected in several statements by Chevron, such as: "These principles recognize, among other things, the need for national frameworks and global engagement by the top emitting countries of the world, […] equitable treatment of all emitting sectors of the economy"[285]. In general, Chevron's CEO tried to show proactive and responsible intentions in relation to environmental concerns, implying that the company was willing to act in the most correct way.

Another very interesting finding of Domenec's analysis is that the rhetorical strategies in Chevron's green communication changed substantially from 2003 to 2010. In the early 2000s, the environmental risks were downplayed, and the causal link between energy consumption and environmental damage was disputed. In 2003, Chevron wrote that "One of the greatest challenges our industry faces is the widespread view that energy development is at odds with a healthy environment"[286]. In 2006, Chevron's claims were still focused on scientific uncertainty, but showed a more cautious stance: "Given the potential widespread impacts to society, the costs, risks, trade-offs and uncertainties associated with climate policies must be thoughtfully assessed and openly communicated"[287]. In the following years, the approach evolved further, and environmental issues became a major opportunity for energy companies to picture themselves as responsible and engaged. Corporations, thus, were pictured as the solution to the problem, as Chevron's CEO underlined "the imperative to manage the impact of energy consumption on the environment"[288].

Moreover, companies used the green discourse as a tool to distance themselves from other oil companies, awarding themselves a leadership position. In 2008, Chevron's CEO emphasized the external recognition granted to the company: "I'm also pleased that we are ranked N11 US-based oil and gas companies and N12 worldwide in the 2006 Carbon

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[285] Chevron, 2006, Letter to stakeholders. From Domenec.

[286] Chevron, 2003, Letter to stakeholders.

[287] Chevron, 2006, Letter to stakeholders.

[288] Chevron, 2007, Letter to stockholders. From Domenec.

Disclosure Leadership Index"[289], and the following year he reiterated that "In the 2009 Carbon Disclosure Leadership Index, Chevron ranked first among global companies in the energy sector"[290]. By the end of the decade, environmental responsibility had been fully incorporated among the primary goals of the company — at least in the corporate discourse[291]. The relationship between financial and environmental accomplishments, in fact, started to be systematically included in the communication strategy of Chevron: "We strive for world-class performance across every aspect of our business – from our technical and financial capabilities to our social and environmental performance"[292].

Now that the communicative strategy of Chevron has been clearly displayed, the following section will delineate the gap between its green claims and pledges versus the actual policies implemented. The 2022 research by Mei Li, Gregory Trencher, and Jusen Asuka has proven to be extremely helpful for this task, as it evaluates the decarbonization efforts and investment choices of four major oil companies, including Chevron. Despite the widespread green discourse and the multiple pledges in support of sustainability, many studies have documented how big oil corporations have "strategically spread misinformation and aggressively obstructed progress toward climate action"[293]. Inter alia, the largest U.S. and European oil majors continue to invest millions of dollars lobbying governments to delay carbon pricing policies, weak environmental regulations, and secure fiscal support for their industry. They also attempt to redirect the climate change responsibility onto consumers and private citizens. For these reasons, Mei Li et al. deemed it necessary to exhaustively examine carbon majors' recent green claims. Their analysis found that the greenwashing accusations made to the majors are actually founded, because the transition to clean energy is not occurring and the green discourse of companies is not matched by their investments and actions[294].

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[289] Chevron, 2008, Letter to stakeholders. From Domenec.

[290] Chevron, 2009, Letter to stakeholders. From Domenec.

[291] Domenec, "The "greening" of annual letters", 2012.

[292] Chevron, 2006, Letter to stakeholders.

[293] Mei Li, Gregory Trencher and Jusen Asuka, "The clean energy claims of BP, Chevron, ExxonMobil and Shell: A mismatch between discourse, actions and investments", *Plos One*, 17(2), 2022, p. 2.

[294] Ibidem.

We have already seen the incorporation of environmental themes in Chevron's discourse until 2009; Mei Li's analysis conveniently focuses on the period between 2009-2020, completing our picture. Her work traces corporate green discourse by tracking the frequency of climate and clean energy keywords in companies' reports. While her findings confirm this trend for all four oil majors, the scholar remarks that Chevron is the only one showing only a modest increase, especially in the "climate" and "transition" categories.

As regards the business strategy perspective, meaning the pledges and actions articulated by the company, Li's findings show a more substantial increase over the study period[295]. Nonetheless, the difference between Chevron's pledges and the volume of its concrete actions is remarkable. Not only did the company never acknowledge the need to reduce dependence on fossil fuels, but it also argued the contrary on some occasions. In 2019, for example, it stated that "A decrease in overall fossil fuel emissions is not inconsistent with continued or increased fossil fuel production by the most efficient producers"[296]. Furthermore, as mentioned before, Chevron has not announced the goal of net-zero emissions yet, nor has it disclosed any concrete and transparent information about the volumes spent on low-carbon technologies.

Finally, Mei Li's research focuses on the production and earnings from fossil fuels and the investment in clean energy during the study period. Putting together the capital expenditure and electricity generation amounts, the results find no evidence of a substantial shift to the renewable market. Chevron, in particular, shows the largest increase in upstream oil production from 2016 to 2020, around a 40% rise. In fossil fuel reserves, as well, Chevron displayed the strongest rising trend, expanding the volume of liquid and gas reserves for future production[297]. As regards renewable and clean energy investments, Mei Li et al. report that no oil major disclosed useful periodical information, therefore third-party data was used. According to IEA reports, Chevron's total capital

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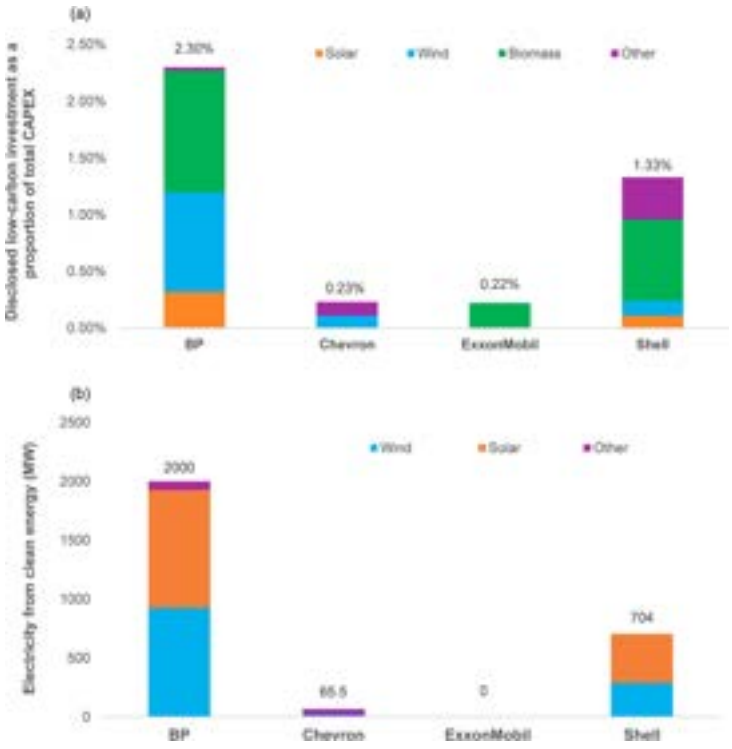
[295] Ibidem.

[296] Chevron, "Update to Climate Change Resilience. A framework for decision making", 2019, https://www.chevron.com/-/media/shared-media/documents/update-to-climate-change-resilience.pdf, last accessed May 12, 2023, p. 9.

[297] Li et al., "The clean energy claims of BP, Chevron, ExxonMobil and Shell", 2022.

expenditure on renewable energy makes up only 0.23% of investments between 2015 and 2019[298] (see table below for confrontation with the other three oil majors).



All in all, considering the mismatch between Chevron's pledges and its concrete actions and investment choices, we can conclude that the oil giant is not engaging in a clean energy transition, and much of its claims can be considered to be part of a greenwashing strategy. The financial analysis, in particular, exposed a business model which is still heavily dependent on fossil fuels, where the renewable investment spendings are insignificant and no willingness to change is demonstrated. Supporting climate change action through simple declarations and pledges is not sufficient to compensate for the environmental impact of oil and gas activities: it is necessary that concrete strategies get formulated and implemented, and that clean energy investments match with the promises of green discourses.

[298] IEA, "The Oil and Gas Industry in Energy Transitions. Insight from IEA analysis", 2020, https://iea.blob.core.windows.net/assets/4315f4ed-5cb2-4264-b0ee-2054fd34c118/The_Oil_and_Gas_Industry_in_Energy_Transitions.pdf, last accessed May 11, 2023.

CHAPTER IV

1. Considerations on soft law mechanisms and the proposal of an interdisciplinary approach

One of the main objectives of this thesis work was to investigate the extent to which transnational companies are held accountable for the environmental damages they create with their activities, from soil and water pollution to carbon emissions. The first three chapters, then, have attempted to give an overview of the phenomenon, tackling the issue from different perspectives, in order to have a complete and exhaustive picture of the context in which multinational corporations exist. We have found that, for multiple reasons, transnational companies have been virtually unconstrained in their actions, especially when they operate in countries belonging to the Global South. The flexible and ambiguous structure of TNCs, the looser environmental regulations of developing markets, the power misbalance between large, wealthy companies and small states, the entrenched tradition of colonization and exploitation, the absence of compulsory environmental laws in the international arena, as well as the vagueness and inadequacy of those at the regional and national levels, all contribute to very scarce corporate accountability.

Our case study has been extremely useful and insightful for our analysis: *Aguinda v. Chevron* distinctly demonstrated how difficult it can be, especially for a developing country, to hold transnational companies accountable for their misconduct from a legal point of view: in particular, if the corporation chooses to fight the case in courts and adopt an aggressive strategy, the assets and tools at its disposal are considerably larger than its counterpart's. On the other hand, Chevron's example has also helped us to better comprehend the efficacy of voluntary mechanisms such as the ESG. Despite its potential and despite the efforts of many well-intentioned actors, this voluntary instrument is not sufficient to entirely monitor and regulate the behavior of large companies. The practice of greenwashing continues to be widely diffused among businesses, and the examination

of Chevron's pledges compared to the policies implemented and the composition of its investment portfolio clearly illustrated this.

All in all, the case study has demonstrated that large transitional companies take advantage of their power, and do not feel the need to question and challenge their corporate culture. When they do take responsibility for environmental issues, it is in the form of statements and pledges, and it is almost exclusively a communication strategy, an attempt to straighten their public image. The arrogance of TNCs and the dismissing attitude they display toward other parties is clearly expressed in this quotation by an anonymous Chevron lobbyist: "The ultimate issue here is Ecuador has mistreated a U.S. company. […] We can't let little countries screw around with big companies like this – companies that have made big investments around the world"[299]. As Professor Sarah Joseph comments, the "large investments" of these large corporations do not justify their wrongdoings around the world, nor excuse the denial of justice to the people of those "little countries"[300].

What is absolutely evident is that without the contribution of large transnational companies, the accomplishment of any environmental target is unattainable, especially clean water and the reduction of carbon emissions. Their indisputable impact on ecosystems, combined with their ever-growing political power, make TNCs central players in the environmental battle, players that can no longer be ignored. In general, the immense influence exerted by TNCs in the international arena is something that must be accepted and addressed as such. In 1991, Susan Strange — one of the most influential international relations scholars of her time — had already noticed the lack of attention given to this question:

> *[I]t seems to me that so many writers and teachers in conventional international relations are like the orthodox theologians in Galileo's time. They are like Flat Earthers who refuse utterly to recognise that the earth is round and revolves around the sun. Similarly, they refuse to see that the relations between states is but one aspect of the*

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[299] Michael Isikoff, "Chevron Lobbyists Fight Ecuador Toxic-Dumping Case", *Newsweek*, 2008, https://www.newsweek.com/chevron-lobbyists-fight-ecuador-toxic-dumping-case-93189, last accessed May 14, 2023.

[300] Joseph, p. 27.

international political economy, and that in that international political economy, the producers of wealth – the transnational corporations – play a key role[301].

Today, over thirty years later, her observation is still very relevant. The emergence and strengthening of TNCs have fundamentally changed the power balance in the global arena during the last few decades, yet several scholars still argue that the role of business in the international political system is largely neglected[302]. This oversight has repercussions not only in the discipline of international politics but also in the concrete solutions that get developed to deal with global problems. Without a systematic encompassing of large businesses' role in the international mechanisms, any achievement will be partial and fragile.

The role of the oil and gas industry, in particular, is crucial in the fight against climate change and environmental devastation. For instance, concerning carbon emissions, it has already been mentioned how carbon major corporations are deemed to be responsible for over 30% of industrial GHG emissions worldwide[303], and how the advertised transition of energy companies towards renewables, although necessary, is not happening[304]. The global production of oil is still expanding today, and projections tell us that it will continue to increase at least until 2028. The oil production estimated value for 2022/2023 is 101 million barrels per day, and it will reach 105 million barrels in 2028, with a compound growth of 0.78%[305].

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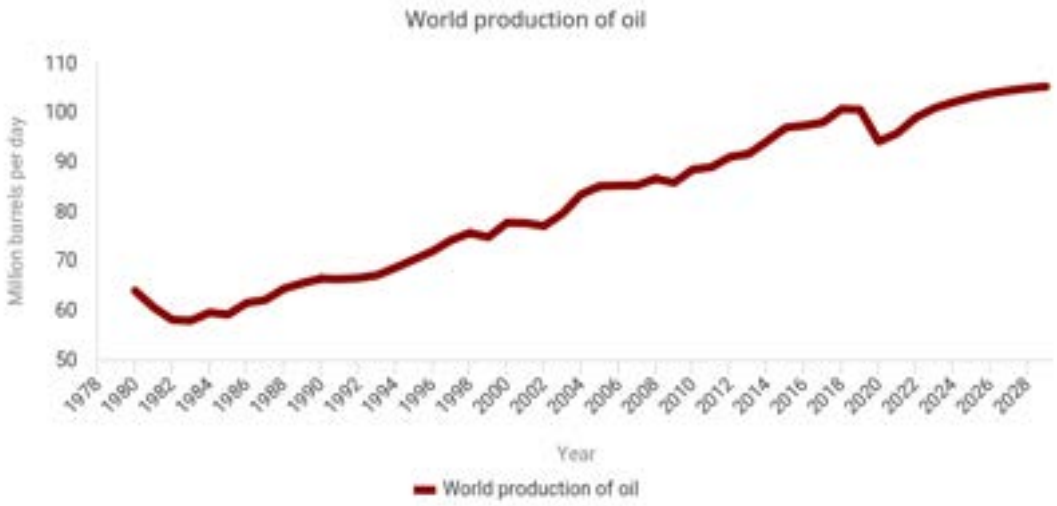
[301] Susan Strange, "Big Business and the State", *Millennium Journal of International* Studies, vol. 20, no. 2 (1991): 245–250, p. 246.

[302] Babic et al.

[303] Benjamin, p. 353.

[304] Li et al.

[305] IBIS World, "Business Environment Report A5522. World production of oil", August 2022. Data and projections are sourced from the US Energy Information Administration and the Organization of the Petroleum Exporting Countries (OPEC).



Given that the role of carbon transnational companies in the environmental struggle is so crucial, identifying targeted and effective mechanisms that can monitor and govern TNCs' behavior internationally becomes paramount. We have already thoroughly examined the voluntary approach in the third chapter, with a special focus on the ESG assessment. Despite their many limits, soft regulations and voluntary mechanisms are not worthless and have played a very important role in the environmental fight. In their way, voluntary instruments have contributed to filling the international regulatory vacuum, especially when states are not able or not willing to adopt binding measures within their territories. In general, soft law instruments are a good starting point precisely because, as voluntary, businesses are more willing to accept their guidelines. They are relevant also because they can help outline new directions in environmental regulatory practice, and, in the long run, could evolve into more stringent and binding measures.

The most important forms of soft regulations for transnational companies existing today at the international level are the UN Global Compact and OCSE Guidelines. We have already seen their functioning and their founding principles in the previous chapter, and it can be affirmed that they are indeed innovative mechanisms that are slowly modifying the global system of governance. However, as they are still experimental instruments, undergoing the implementation and diffusion phase, their efficacy has yet to be thoroughly examined by the academic community. For this reason, Professor Alessia Donà has contributed to the research on this topic analyzing the application and

adaptation of the UN Global Compact and OCSE Guidelines to the Italian context. Her work identified multiple critical issues, which are largely due to the insufficient effort by the Italian state to activate the appropriate procedures in order to align with international recommendations. In addition to that, Donà's analysis identified a lack of human rights institutional structures that are adequately transparent and open to stakeholders' participation[306].

Soft law mechanisms, in fact, intrinsically present many limitations. By definition, these instruments cannot provide sanction mechanisms, therefore their efficacy is based on long-term processes, such as the diffusion of best practices, peer learning, and the pressure on governments on the part of non-institutional actors[307]. Although these are all valid devices, they are not sufficient to tackle the complex, transboundary issue of TNCs' environmental accountability — especially without ambitious goals and rigorous standards and controls. Merely requiring corporations to report their carbon emissions, for example, does not ensure that they will be reduced. Moreover, as we have seen, the shareholder wealth maximization norm and corporate law subvert the effectiveness of voluntary instruments[308].

It is thus necessary to improve these soft law mechanisms, identifying more concrete and defined targets and making them more easily implemented in different contexts. Increased transparency in corporate disclosures is one of the most urgent measures to deal with, as well as the effort of harmonizing standards and criteria at all different levels. Furthermore, it is crucial to take into account the characteristics of developing countries and their markets, and include those specificities in the monitoring and reporting mechanisms, for instance. Finally, we have seen the substantial role that can be played by shareholders and investors: on the one hand, higher incentives should be created to further encourage their active involvement in the cause, and, on the other, fossil fuel investments could be deterred with the formulation of fees or penalties.

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[306] Alessia Donà, "Business internazionale e rispetto dei diritti umani: dal volontarismo alla regolamentazione delle multi-nazionali?", *Rivista Italiana di Politiche Pubbliche*, n. 3 (2019): 411-438.

[307] Ibidem.

[308] Benjamin.

The question that naturally arises is whether or not voluntary measures, even with the above-mentioned improvements, can be impactful enough to adequately deal with the issue and regulate TNCs' conduct. Not everyone believes in the efficacy of soft law mechanisms: since the 1980s, a heated debate has developed on the *voluntarism versus regulation* question[309]. On the one side, supporters of CSR, ESG, and other soft law instruments endorse self-regulating practices and trust businesses to voluntarily adopt good policies and, in general, behave responsibly toward society; on the other side, the skeptics ask for more coercive control and regulation, through the institution and application of hard law instruments[310].

Beyond the sterile dichotomy, what is important to focus on is the contribution that each type of system can bring to the table. The climate challenge may, in effect, require higher engagement and commitment from large corporations, which is more easily achieved through stricter regulations. However, as we have explained, soft law can bring a noteworthy contribution, especially today, when hard law mechanisms are yet to be created. We can also imagine the development of mixed solutions, such as soft law instruments that contain some elements of hard law[311]. Furthermore, it can be argued that perhaps legal mechanisms as a whole may not be enough to address the issue: some scholars, in fact, claim that what is needed is a radical change in the functioning of carbon TNCs', "a feat that law may be inherently unsuited to tackle"[312]. Company law in general and the shareholder wealth maximization norm specifically should be more seriously challenged, with the introduction of a new, longer-term corporate perspective that focuses on the future, instead of solely on the short-term profits of managers and shareholders. As Lisa Benjamin puts it, "The very purpose of the company may need to

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309 Sorcha MacLeod, "Reconciling Regulatory Approaches to Corporate Social Responsibility: The European Union, OECD and United Nations Compared", *European Public Law*, 13:4 (2007): 671-702.

310 Donà, "Business internazionale e rispetto dei diritti umani: dal volontarismo alla regolamentazione delle multi-nazionali?", 2019.

311 Ibidem.

312 Benjamin, p. 377. See also: Veerle Heyvaert, "What's in a Name? The Covenant of Mayors as Transnational Environmental Regulation", *Review of European, Comparative and International Environmental Law*, 22:1 (2013): 78–90, p. 81.

be rethought"[313], and that is something that only an internal, business type of insight can achieve.

All in all, what this thesis humbly proposes is an interdisciplinary approach, that deals with the issue from multiple angles. A legislative transformation is necessary, both locally and internationally, but it should also be accompanied by increased attention to the managerial and business perspective — especially through the creation of incentives to enhance the positive influence that can be exerted by shareholders. Furthermore, market-based solutions such as the cap and trade mechanism or the Pigouvian carbon tax are full of potential, especially in the battle against climate change. At the same time, the role of society and consumers is too often disregarded, as it is considered to be of minor importance. On the contrary, the power of the people can be extremely impactful, particularly if it is well-organized and structured. In our case study, it is only thanks to the determination of the poor Ecuadorian farmers and indigenous people that the lawsuit against Chevron started, and the environmental damage caused by Texaco became known all around the world. In the following section of this chapter, we are going to study other significant examples of civil society resistance, and the considerable role that it can play in the TNCs' environmental accountability fight. We are then analyzing economic-based solutions in the third subchapter, and in the fourth, we will conclude with some innovative proposals at the legislative level. Ultimately, it is only through the combination of all these different approaches and viewpoints that concrete and substantial results can be reached in the fight against TNCs' unaccountability.

[313] Benjamin, p. 377.

2. Civil society resistance movements

Civil society, as a concept, is not easily defined because it can take many different forms, as well as changing and evolving over time. Political philosopher Michael Walzer, in 1995, defined it as the space of "uncoerced human associations" and the set of relational networks[314]. In his vision, thus, the focal point of civil society is the voluntary nature of the associations it creates. In this respect, Professor Haque Khondker emphasizes the intrinsic bond existing between civil society and democratization, assuming that it is less likely to find these voluntarily formed associations under non-democratic conditions[315]. Seeking a more technical definition of the term, we can rely on the World Bank, which identifies civil society as a broad array of not-for-profit associations that are present in public life, including "community groups, non-governmental organizations, labor unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations"[316]. We can also recognize civil society in more flexible structures, which can nonetheless participate in the bettering of society. The main contribution of civil society movements is expressing the values of a community, while at the same time attempting to promote their interests — in direct or indirect ways.

Civil society groups have been playing a crucial role in the fight against TNCs' environmental unaccountability for a long time: we can date the origins of the Environmental Justice Movement back to 1982, in North Carolina, when a group of African American activists protested against toxic waste dumping in their neighborhood[317]. Now more than ever, with the emergence of new media instruments and enhanced climate awareness, civil society is potentially very impactful in advocating corporate social responsibility. As flexible and resourceful, in fact, citizen movements

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[314] Michael Walzer (ed), *Toward a Global Civil Society* (Providence: Berghahn books, 1995).

[315] Habibul Haque Khondker, "Environmental Movements, Civil Society and Globalization: An Introduction", *Asian Journal of Social Science,* Vol. 29, No. 1 (2001): 1-8.

[316] Adam Jezard, "Who and what is 'civil society?'", *World Economic Forum*, 2018, https://www.weforum.org/agenda/2018/04/what-is-civil-society/, last accessed May 16, 2023.

[317] Antônio Jeovah de Andrade Meireles et al, "Environmental Injustice in Northeast Brazil: The Pecém Industrial and Shipping Complex", in *Environmental Impacts of Transnational Corporations in the Global South,* Research in political economy, volume 33: 171-187 (Bingley: Emerald Publishing Limited, 2019), p. 172.

can effectively pressure companies and governments alike to achieve their objectives[318]. They also have the possibility to act on different levels: local, national, regional, and global. Moreover, the impact of civic movements expanded after the so-called third democratization wave, occurring in the late XX century. We have mentioned above the close connection between civil society and democratic systems: the protest against TNCs' misconduct and unaccountability, indeed, substantially increased when formed colonial territories became independent[319].

The influence of civil society movements is strongly linked to the legitimacy and stakeholders' theories, already discussed in the third chapter. Communities of TNCs' host countries, in fact, are heavily impacted by corporate activities occurring in their own territories, and can thus be identified as key stakeholders — although not powerful ones. If they stop perceiving these activities as beneficial, they can start to question and challenge the legitimacy of the corporations. This dissatisfaction can be expressed through various means, such as vocal opposition, social unrest, violent protests, or, as we have seen in the *Aguinda v. Chevron* case, through the submission of petitions and lawsuits. Yusuf and Omoteso point out that, from a legitimacy model's perspective, many TNCs have failed to demonstrate adherence to the host countries' values (or even to the domestic ones, as a matter of fact). Consequently, these companies lose their legitimate status, and local stakeholders feel entitled to "exercise their right", opposing the TNCs and attempting to terminate any corporate operation within their territory[320].

Of course, the dissatisfaction within the local communities is often not enough to cease TNCs' activities, as there are other factors in play: namely, the host government's interests and the shareholder wealth maximization norm. Despite these opposite pressures, sometimes the need to secure its societal legitimacy is crucial for a business and can weigh more than the corporate normative legitimacy. For example, in Nigeria, the oil company Shell had entirely lost legitimacy in the eyes of the local communities,

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[318] Eric Kolodner, "Transnational corporations: Impediments or catalysts of social development?", *World Summit for Social Development*, No. 5, United Nations Research Institute for Social Development (UNRISD), Geneva, 1994.

[319] Yusuf and Omoteso.

[320] Ibidem.

who have fought the carbon major in the courts for years. As the protest had moved to Europe and the U.S. too, in 2013 Shell was forced to surrender and decided to withdraw from the area[321]. This episode clearly showed how impactful civil society can be, and how vital legitimacy is for companies.

Civil society's operations can assume many different forms, in the attempt to foster TNCs' responsibility: inter alia, targeting and pressuring the board of directors, spreading negative publicity for the business, mobilizing local communities in various ways, opening lawsuits, pressuring governmental agencies and institutions, and many others[322]. The following section will be focused on the introduction and explanation of some of the most important and effective forms of social activism in the fight against corporate unaccountability.

The most impactful way in which civil society can react is through legal instruments, with the so-called "judicial activism". Citizens can, in fact, denounce transnational companies' misconduct before courts, seeking justice, remediation, and pecuniary compensation. This is, usually, the first course of action undertaken by citizens; however, it is a procedure available only to direct victims of alleged corporate violations. *Aguinda v. Chevron* is one of the most exemplary cases, showing all the potentialities, but also the obstacles, that this avenue presents. Another fascinating example is the above-mentioned protest in the Niger Delta, where intensive oil exploration and exploitation had caused poverty, diseases, and environmental degradation. In the beginning, during the first half of the 1990s, the local communities chose to mobilize with peaceful protests, all unified under the Movement for the Survival of Ogoni People (MOSOP). These demonstrations had the effect to suspend further explorative operations in the region, but they were also brutally repressed by the Nigerian government (and allegedly by Shell, too), resulting in the deaths of many unarmed protesters[323].

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321 Ibidem.

322 Kolodner, "Transnational corporations: Impediments or catalysts of social development?", 1994.

323 Yusuf et al.

As a result of these agitations, the protests spread to the U.S. and to Europe and the Ogoni activists started to be supported by human rights and environmental groups such as the Center for Constitutional Rights[324] and EarthRights International[325] in the United States and Vereniging Milieudefensie[326] in the Netherlands, as well as by several human rights attorneys. The case was thus brought before several courts during the years, including Dutch, American, and British courts, where the petitioners demanded compensation for the environmental despoliation and asked to hold Shell accountable for its human rights violations. Like Chevron, Shell attempted to have the cases dismissed through various motions on *forum non-conveniens* grounds and employed many tactics to delay the proceedings, such as refusing to provide the requested documents, systematically challenging the jurisdiction of the courts, and objecting to the participation of the environmental organizations to the case[327]. In 2013, when the judgment in the Netherlands was finally delivered, Shell decided to completely withdraw from the region. Therefore, it can be claimed that, despite the opposition of the Nigerian government, based on national economic interests, and despite the fact that the Dutch court's decision ended up being the only one favorable to the Ogoni people, the efforts of local activists and the legal instruments proved successful in the case[328].

Another very useful instrument employed by civil society is resorting to corporate boycotts, meaning the concerted act of "(Refusing) to buy a product or take part in an activity as a way of expressing strong disapproval"[329]. The main advantage of this tactic is that anyone in the world can use it, as well as being virtually free and not time-consuming. One of the most successful examples is the famous boycott of Nestlé's infant formula, in the 1980s, which resulted not only in the modification of the company's harmful practices but also in the institution of the International Code of Marketing of

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[324] Center for Constitutional rights, https://ccrjustice.org/, last accessed May 17, 2023.

[325] Earth Rights International, "People. Power. Justice", https://earthrights.org/, last accessed May 17, 2023.

[326] "Environmental Defence Association", Friends of the Earth Netherlands. Milieudefensie, https://milieudefensie.nl/, last accessed May 17, 2023.

[327] Yusuf et al.

[328] Ibidem.

[329] Cambridge dictionary, "Boycott", https://dictionary.cambridge.org/it/dizionario/inglese/boycott, last accessed May 16, 2023.

Breast Milk Substitutes from the World Health Organization. Another very effective application of the boycott strategy, this time related to environmental themes, concerned Heinz Corporation, when U.S. consumers forced the company to change its method of tuna fishing, which had caused the killing of many dolphins[330]. More recently, it is easy to think about the palm oil boycott, which spread globally the awareness and demand for sustainable sources.

A third, often ignored form of civil society activism is characterized by the use of artistic means. There is, actually, a long and fascinating history of creative arts used to seek social change, support political positions, or protest against injustices[331]. Art has played a significant role also in many resistance movements, particularly the ones engaged in racial struggles and anti-colonization[332]. Australian Professors Seán Kerins and Kirrily Jordan have conducted very insightful research on the role of visual art and music expression in the Aboriginal protests. We have mentioned, in the first chapter, the environmental and social devastation brought to Northern Territory by Glencore's McArthur River Mine. In addition to fighting for their rights in the courts, many Aboriginal people, such as the Garawa, Gudanji, Marra, and Yanyuwa, are using their artwork to express their protest against the mine project. More generally, their protest challenges the essence of transnational capitalism, which causes the destruction of land, culture, and sacred places, all in the name of money[333]. Some important artists mentioned in Kerins and Jordan's work include musician Gadrian Hoosan, non-Indigenous photographer Therese Ritchie, and painters Nancy McDinny and Jacky Green. This latter artist, in particular, uses his art to engage in a strong political protest, exposing the damaging impact that mining has on the environment and on the Aboriginal people of the area. Below, an extract of his commentary on his story is reported.

> *When I was young there was no whitefella schooling for us Aboriginal kids [...] This is the reason I don't read and write. I'm not ashamed of this. I started painting so I can get*

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330 Kolodner.

331 Marta C. Nussbaum, *Political emotions: Why love matters for justice* (Harvard University Press, 2013).

332 Jennifer Turpin, "Art as political culture", *Peace Review*, 5:2 (1993): 139-140.

333 Kerins and Jordan, "Mining giants, Indigenous peoples and art: challenging settler colonialism in Northern Australia through story painting", 2019.

> *my voice out. I want to show people what is happening to our country and to Aboriginal people. No one is listening to us. What we want. How we want to live. What we want in the future for our children. It's for these reasons that I started to paint. I want government to listen to Aboriginal people. I want people in the cities to know what's happening to us and our Country*[334].

With their artistic protests, these artists are on the one hand raising awareness of the environmental and Aboriginal struggle across the country, while on the other they are also raising money for the cause. For instance, the sales of works by the above-mentioned painters are used to finance an independent investigation estimating the remediation costs linked to the McArthur River Mine[335].

All in all, the use of creative arts is a very powerful tool in the hands of civic society. Scholar Jennifer Turpin argues that, since culture is more flexible and fluid compared to social, political, and economic systems, it has an advantage in undermining the legitimacy of those stricter structures[336]. Reorienting our culture is the first step in creating any kind of social change: art, in this sense, can be "more effective in breaking down barriers than official political acts"[337]. In our case, TNCs' accountability can be enhanced through artistic means by exposing the wrongdoings and violations of companies, denouncing the injustices to the public with a stirring efficacy.

Ça va sans dire, the power of civil society is rooted in the force of the union. Not only should an effective resistance movement be structured and have precise targets, but it also requires a certain size to be impactful. Consequently, one of the most important strategies of civil society organizations, today, is the alliance of different movements, usually engaging in the same fight but belonging to different countries. The potential impact of this internationalization is immense, and was already pointed out by Arrighi, Hopkins, and Wallerstein in 1989, in their "Anti-Systemic Movements" book.

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334 Jacky Green, "Flow of voices", *Arena Magazine*, Vol. 124 (2013): 29–32, p. 32.

335 Kerins and Jordan, 2019.

336 Turpin, "Art as political culture", 1993.

337 Ibidem, p. 139.

> *The more […] the popular movements join forces across borders (and continents) to have their respective state officials abrogate those relations of the interstate system through which the pressure is conveyed, the less likely they are to weaken, and the more likely they are to strengthen, the pivotal class-forming process of the world-economy*[338].

This project is, indeed, ambitious and very complex, and displays a history of many failures. The challenges that these alliances face are multiple: the peculiarities and subjectivities of each movement, the divergence of their political positions and demands, and the different cultures of each group, all contribute to making this union tricky, especially when a wide variety of actors is involved[339]. Nevertheless, there are some successful examples to be mentioned. In South America, particularly, this practice is more widespread than elsewhere; there are, for instance, two regional organizations with environmental objectives that bring together different national realities of the region: The Mesoamerican Movement against the Extractive Mining Model (M4), which represents the most ambitious initiative to contrast mega-mining in Latin America and the Caribbeans, and the Andean Coordinator of Indigenous Organizations (CAOI), that assembles groups from Argentina, Bolivia, Chile, Colombia, and Peru, and advocates for the establishment of an International Court of Environmental Crimes[340].

Another interesting example, relative to our case, is the Global Campaign to Reclaim People's Sovereignty, Dismantle Corporate Power and Stop Impunity, launched in 2012 and originating from "Enlazando Alternativas". This project can be defined as a global structured response to unaccountable corporate power, and it is composed of over 250 groups between social movements, civil society organizations, and trade unions, all fighting the unaccountability of transnational companies. Among other Ecuadorian civil society groups, the Unión de Afectados por Texaco (UDAPT) is also part of this umbrella organization. In general, the Campaign attempts to unify all the communities affected by TNCs' activities around the world, with a specific focus on Africa, Asia, and Latin America. Its purpose is described as "(Providing) facilitation for dialogue, strategizing,

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[338] Giovanni Arrighi, Terence Hopkins, and Immanuel Wallerstein, *Anti-systemic movements* (London: Verso, 1989).

[339] Sacher Freslon and Cooney, "Transnational Mining And Accumulation By Dispossession", p. 25.

[340] Ibidem.

exchanging information and experiences, acting as a space for visibility of resistance and deepening of solidarity and support for struggles against TNCs"[341].

Furthermore, this organization supports the institution of a new treaty, called the "International Peoples Treaty", for which it also elaborated a text proposal. This project seeks to fight corporate impunity by providing a stricter political framework to support the resistance of the affected communities and offering alternative instruments to the TNC model of the economy. In 2014, during a session of the U.N. Human Rights Council, a motion concerning the elaboration of this internationally binding treaty for TNCs was officially proposed by Ecuador and South Africa. The proposal was approved, with Resolution 26/9: 20 countries were in favor, 14 against, and 13 abstained. In 2017, the Treaty entered the negotiations phase, marking the beginning of a very important path toward corporate accountability. Since then, an Open-Ended Intergovernmental Working Group meets once a year for drafting the text of the treaty, with the active participation of governments and civil society organizations alike. It is significant to mention that today, even G7 summit leaders and employment ministers acknowledge the reality of Resolution 26/9 and use its language[342].

The impacts of this binding treaty are potentially revolutionary, as it could have the power to impose direct obligations on transnational companies and confront their systematic violations, while in a broader perspective also challenging the structure of neoliberal capitalist globalization[343]. It is significant to emphasize that this result was achieved, in all respects, by the efforts of the global civil society. Therefore, this last example showed us a final, extremely important instrument in our hands: the possibility to formulate ideas, propose solutions, elaborate legal texts and codes of conduct; in general, envisage new, innovative tools in the struggle against corporate unaccountability. The role of civil society is bigger than most think, in the establishment

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[341] Stop Corporate Impunity, "Dismantle Corporate Power and Stop Impunity", https://www.stopcorporateimpunity.org/list-of-signatories/, last accessed May 18, 2023.

[342] Stop Corporate Impunity, "10 years ago, 10 years ahead. The Global Campaign towards 2032", https://www.stopcorporateimpunity.org/wp-content/uploads/2022/10/10th-Anniversary-of-the-Global-Campaign.pdf, last accessed May 18, 2023.

[343] Ibidem.

of socially responsible policies: the pressure on both businesses and governments has the power of undermining their legitimacy, thus urging action.

3. The Pigouvian Tax and the Emission Trading System

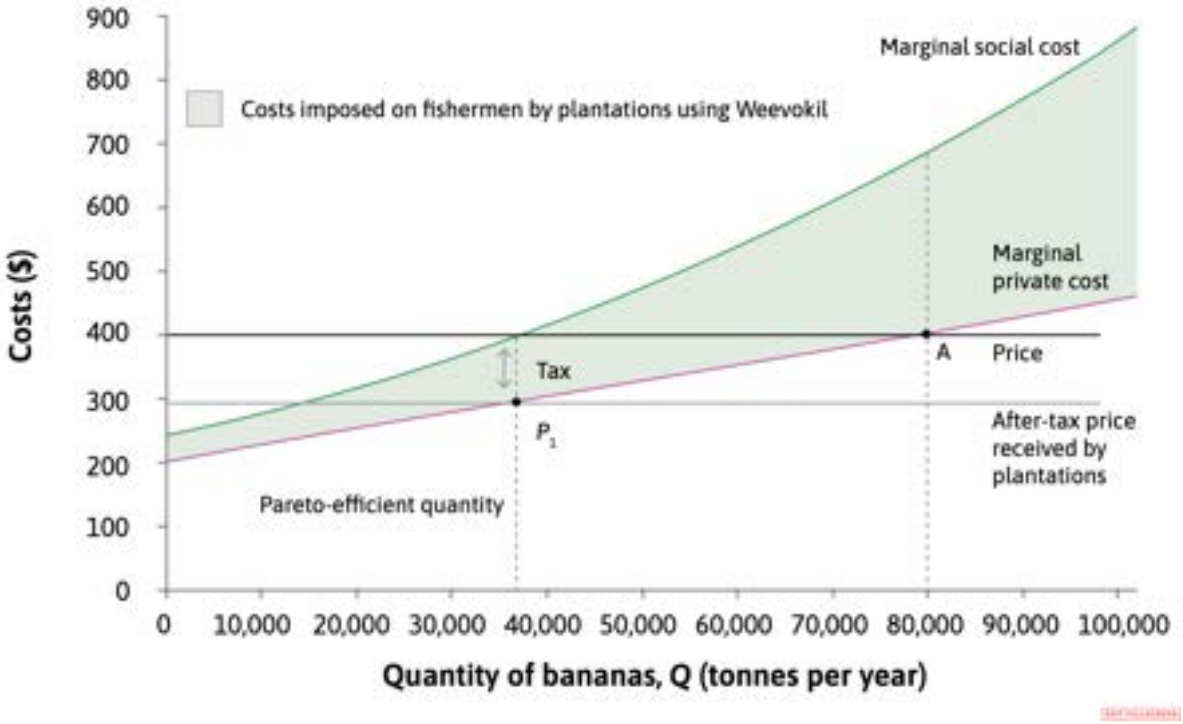
In addition to the (crucial) use of voluntary mechanisms such as the ESG assessment, and the role that can be played by civil society, it is indisputable that a favorable, solid legal framework is only beneficial for the regulation of TNCs' activities. It is especially at the national and regional levels that governing agencies have the instruments to impose compulsory measures on businesses. Of course, given that environmental issues are intrinsically transboundary, the problem emerges when the effects of companies' polluting operations spill over to other regions and countries, which can be legislatively less protected. Still, a resolute attitude at the local level can make a difference, especially when economic motivations are present, and may be useful to limit the damage. States and regional organizations should thus be more purposeful and deliberate in their environmental stance, because they can play a considerable role in disincentivizing corporate contaminating practices.

One of the most direct and immediate instruments that governments can work with is the imposition of taxes on businesses. In the climate change fight, an often-invoked solution is the so-called carbon tax, which penalizes those firms emitting high levels of polluting gases. Economically speaking, a carbon tax is a Pigouvian tax, a notion originally conceived by Arthur Cecil Pigou, the influential British economist of the first half of the XX century. The Pigouvian tax is imposed on activities and products that generate a negative externality, thus aiming to correct a Pareto-inefficient market outcome. The concept of the Pigouvian subsidy is also important to mention: on the contrary, a subsidy seeks to encourage economic activities with positive externalities, via a government contribution that lowers the final price of a product[344].

Mathematically, if we were to apply the Pigouvian tax to a market failure caused by pollution, for example, we would need to evaluate the marginal social cost of a given polluting activity. While the operating firms will choose to produce a certain quantity of the product (Q_p) so that their marginal private cost is equal to the market price ($C'_p(Q_p) = P^w$), the actual social surplus is maximized at an output quantity for which the market

[344] Stevens et al., "Markets, Efficiency, and Public Policy", *The Economy*, 2017.

price is equal to the marginal social cost. This level of output (Q^*) is the Pareto-efficient quantity, and it is lower than the output level that would be chosen by the firm (Q_p). A Pigouvian tax, then, could be applied (for example, X amount of money for each tonne of CO_2 emitted), so that the firm's production cost increases ($Cp\ (Q)+xQ$), as well as its private marginal cost ($C'p(Q)+x$). In these new conditions, the firm will still choose its production output so that the price is equal to the marginal private cost, but now this cost is higher, and so will be the price ($C'p(Q^{\dagger})+x = P^W$). The Pigouvian tax has then the effect of forcing the polluting firms to reduce the quantity of the product, thereby getting closer to the socially optimal level: the higher the tax, in fact, the higher the price, and the lower the output produced. Below is a figure that visually clarifies the concept[345].



The Pigouvian tax, nevertheless, has to face different limits in its implementation. First of all, the information is never completely transparent and symmetrical, therefore the government (or the regulating agency) is not able to evaluate the degree of harm suffered

[345] Ibidem.

by third parties due to the externality. Consequently, the creation of the best compensating policy is hampered. Secondly, the above-mentioned marginal social cost is difficult to measure, especially when we are dealing with pollution. Thirdly, political dynamics are to be taken into consideration: governments usually favor the most powerful party in each setting, thus imposing a balance that may be efficient but not fair to all actors[346]. Furthermore, when dealing with environmental issues, it is difficult to distinguish taxes with a purely environmental goal from taxes that also have redistributive effects, for example. This may confuse the impact analysis of an alleged environmental tax. In his work, the economist Firouz Gahvari argues that these different components of a tax are not truly separable, but rather intrinsically interconnected and interacting with one another, thus challenging the identification of a purely environmental Pigouvian tax[347].

According to the theoretical literature, environmental taxes can be interpreted in two alternative ways: the Pigouvian hypothesis, discussed above, and the Leviathan hypothesis. While the former interpretation sustains that the environmental tax is used to internalize and correct the negative externalities, the latter argues that governments resort to environmental taxes just because they are the least unpopular type of tax among citizens, and therefore exploit them in order to maximize the revenues given their low political cost. Isabelle Cadoret, Emma Galli, and Fabio Padovano empirically examined the way European governments actually use environmental taxes, testing the two alternative hypotheses to verify which one best represents reality. The scholars used a sample of 28 EU countries, analyzing data from the 2005-2017 period, and compared the intensity of recourse to environmental taxes with the degree of success in GHG emissions reductions. The results showed a positive correlation between the countries' distance from the GHG reduction target and the resort to environmental taxes, thus confirming the Pigouvian hypothesis and the appreciable effect of the tax on correcting the negative environmental externality. Moreover, the economists found that

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346 Ibidem.

347 Firouz Gahvari, "Second-Best Pigouvian Taxation: A Clarification", *Environmental and Resource Economics*, 59 (2014): 525–535.

environmental policies tend to stay embedded in the fiscal systems even after certain targets are reached[348].

Another very popular economic answer to corporate environmental negative externalities is the "cap and trade" policy, also known as the market of tradable emission permits. The purpose of this approach is the abatement of GHG emissions, balancing pollution and profits. We have briefly mentioned this mechanism at the beginning of the third chapter, in the overview of TNCs' environmental regulatory framework. We will now proceed with a deeper examination of the cap and trade instrument as a possible solution to environmental corporate unaccountability, underlying its strengths and weaknesses and afterward suggesting concrete proposals to be implemented.

Simply put, this policy combines an incentive-based approach with a legal limit on the GHG emissions that can be produced by a company. Firstly, the government or regulatory agency will decide the total level of abatement required (the "cap" side of the policy) and then a number of permits will be produced: all together, they will amount to the total emissions allowed by the cap. In the following phase, the regulatory agency will allocate the permits, distributing or auctioning them to the polluting businesses. At that point, the permits get traded among the different firms (the "trade" side of the policy): businesses that produce low levels of pollution, or for which emission cuts are relatively cheap, will sell part of their permits, which will be bought by businesses that have high abatement costs. Of course, this exchange will continue until the gains generated by trade exist and will stop at the equilibrium point. Now, for each tonne of GHG emission produced, a polluting firm will be required to submit one of the permits to the government; if this does not happen, the business will be sanctioned with a fine[349].

As already mentioned, these market-based kinds of mechanisms are inspired by the concept of the economic assessment of ecosystems and promote the commodification of nature: giving a monetary value to natural resources is the most efficient way to

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[348] Isabelle Cadoret, Emma Galli, and Fabio Padovano, "Environmental taxation: Pigouvian or Leviathan?", *Journal of Industrial and Business Economics*, 48 (2021): 37–51.

[349] Juan Camilo Cárdenas, Marion Dumas, et al., "Economics of the environment", Unit 20 in The CORE team, *The Economy*, ed. By Samuel Bowles, Wendy Carlin, and Margaret Stevens, 2017.

internalize environmental externalities, thereby anyone who pollutes is required to pay, in order to compensate for the damage[350].

Despite its undeniable potential, the cap and trade policy presents some limits in its implementation. The major issue is, again, a general lack of transparency: it is not easy for regulatory agencies to accurately estimate participation in the carbon market and to account for the precise number of permits acquired by each firm. As businesses are not efficiently monitored, this often results in the release of a significant amount of non-compensated emissions[351]. We can see this situation as a moral hazard problem: when firms own the carbon permits that legally allow them to produce emissions, and they have an informational advantage over the regulator about their own behavior, they could be tempted to be less careful and pollute more than necessary, if the carbon price is not so high. In their work, economists Francisco Álvarez and Ester Camiña argue that "As long as the abatement effort is decided by each firm and not observed by the environmental regulator, a moral hazard problem arises"[352]. They also examined the distinction between restrictive and permissive policies and found that in a market scenario characterized by a high amount of permits (permissive policy), trade among businesses does not improve the welfare of the agents. Only when the policy is restrictive (a lower number of permits is allocated) the trade market is able to improve the agents' welfare and may also save informational costs for the regulator[353]. This is, in fact, another problematic issue of the tradable emission schemes, emphasized also by Professor Benjamin in her research: cap and trade systems are often compromised by an over-supply of permits[354]. The main cause behind this is the fact that, usually, governments are not ambitious enough when it comes to their mitigation commitments. As long as the carbon price is kept low (through

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350 Stefano Soriani, "Beyond the Imperatives of Economic Growth and Business As Usual", Lecture, *Global Change and Sustainability*, Venice, October 28, 2020.

351 Benjamin.

352 Francisco Álvarez and Ester Camiña, "Moral hazard and tradeable pollution emission permits", *The B.E. Journal of Theoretical Economics*, vol. 14, issue 1 (2014): 1-30.

353 Ibidem.

354 Benjamin.

a high number of permits), businesses will not be seriously disincentivized to cut their GHG emissions[355].

Nevertheless, the emission trade scheme can be a very valid instrument, and there are successful examples to be mentioned. The sulfur dioxide cap and trade mechanism, for example, was one of the earliest cases of emission trading: launched in the 1990s in the United States, its goal was to reduce the phenomenon of acid rain. In around twenty years, the sulfur emissions have been reduced by 43%, marking a fruitful start for this market-based instrument. Today, the largest cap and trade scheme in the world is the already-mentioned European Union Emissions Trading Scheme (EU ETS). It was instituted in 2005 and covers 11,000 polluting installations, amounting to approximately 50% of the total European emissions. Some interesting elements of this scheme include the partial financing of low-carbon energy projects through the permits' auction revenues and the fact that the total emission cap is reduced every year[356]. Despite this, the EU Emission Trading Scheme has not always been as successful as the U.S. sulfur dioxide mechanism.

Some analysts, such as Will Catton, Lisa Benjamin, and Sampo Seppänen, argue in their works that the main cause behind the EU ETS' partial fiasco was the delineation of an excessively high cap, with an over-supply of permits that allowed businesses to emit large amounts of gases[357]. The economists of The CORE Team (The Economy) also support this analysis and report that after the 2009 financial crisis, a lower aggregated demand caused the contraction of the electric power demand, as well as the shrinkage of companies' profit-maximizing emissions levels. As supply exceeded demand, the carbon permits' price plummeted, and as a result, firms were not effectively incentivized to engage in serious abatement expenditures. This emphasized a limitation of the cap and trade system and its dependence on the price signal; in Germany, for instance, the drop in the permits' price resulted in the re-opening of multiple high-emitting coal industries,

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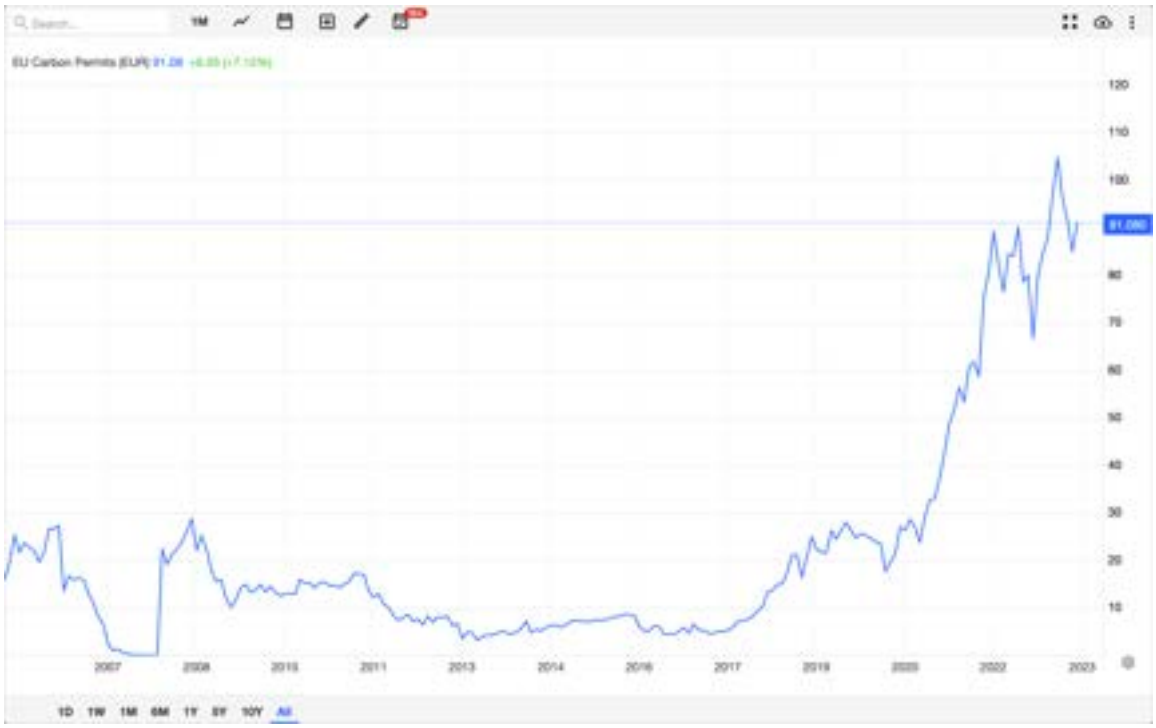
[355] Seppänen et al., "Demand in a Fragmented Global Carbon Market", 2013.

[356] Cárdenas, Dumas, et al., "Economics of the environment", *The Economy*, 2017.

[357] Will Catton, "Dynamic Carbon Caps. Splitting the Bill: Fairer Solution Post-Kyoto?", *Energy Policy,* Elsevier, vol. 37:12 (2009): 5636-5649.
See also Seppänen and Benjamin.

because polluting technologies started to be profitable again. Recently, the EU carbon price has significantly risen, but the risk of it dropping again highlights the limit of this market-based mechanism. Nonetheless, some precautions can be implemented: for example, in order to avoid this free-pollution effect in case of a price fall, the UK set a "carbon price floor" for British participants in the EU ETS[358]. Below is a figure reporting the carbon permits' price in the EU Emissions Trading Scheme in the period comprised between 2007 and 2023[359]. On February 21, 2023, as we can see, the price surpassed for the first time €100 per tonne[360], and overall, we are witnessing an upsurge in the last two years which bodes well for the future of corporate carbon emissions.



All in all, both the Pigouvian carbon tax and the cap and trade scheme can be very valid instruments for reducing firms' GHG emissions, either on their own or combined together. Of course, the effectiveness of these mechanisms strongly depends on their

[358] Cárdenas et al., "Economics of the environment", *The Economy*, 2017.

[359] EU Carbon Permits, *Trading Economics*, https://tradingeconomics.com/commodity/carbon last accessed on June 10, 2023.

[360] Camilla Hodgson and David Sheppard, "EU carbon price tops €100 a tonne for first time", *Financial Times*, 21 February 2023, https://www.ft.com/content/7a0dd553-fa5b-4a58-81d1-e500f8ce3d2a, last accessed on June 10, 2023.

ambition and intensity: the carbon tax must be high enough to adequately compensate for the environmental externalities, and the cap needs to be low enough to incentivize businesses to cut emissions. A large debate among academics exists concerning which instrument is superior; with no clear consensus reached. Overall, the emission trading system is slightly more widespread, probably because of its flexibility. On the other hand, a Pigouvian tax has the advantage of high stability, but may be more politically unpopular[361]. Nonetheless, the preferable application of one or the other instrument depends on a number of factors, including the specificity of each sector and each country, the short or long-term focus of analysis, and the stability of the market. Other elements to take into consideration in the choice are the levels of uncertainty and asymmetric information faced by governments, the market entry cost, and the preferred ratio between environmental protection and revenues[362]. An insightful research conducted by Takayoshi Shinkuma and Hajime Sugeta, for instance, suggested that in a long-term perspective, emission trade systems may be preferable to a Pigouvian tax, but only when the entry cost is low, the size of the output market is large, and the asymmetry of the information is significant. The larger the magnitude of uncertainty of asymmetric information and the larger the size of the output market, the more advantageous a trade and cap system will be. The economists also highlight the fact that while a carbon tax scheme can increase total profits to the detriment of environmental protection, an emission trade system sacrifices those profits for more substantial protection of the environment[363].

As of 2022, there are twenty-five emission trading schemes globally, including Europe, China, New Zealand, Québec, Mexico, and some states of the US (such as California, Massachusetts, and Oregon). Today, they cover around 17% of total emissions, but many other cap and trade mechanisms are being discussed and developed elsewhere[364]. As

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361 Cárdenas et al., "Economics of the environment", *The Economy*, 2017.

362 Takayoshi Shinkuma and Hajime Sugeta, "Tax versus emissions trading scheme in the long run", *Journal of Environmental Economics and Management*, 75 (2016): 12–24.

363 Ibidem.

364 International Carbon Action Partnership, "Emissions Trading Worldwide: 2022 ICAP Status Report", 29 March 2022, https://icapcarbonaction.com/en/publications/emissions-trading-worldwide-2022-icap-status-report#:~:text=As%20of%20the%20start%20of%202022%2C%20there%20are%2025%20operational,the%20ninth%20ICAP%20Status%20Report, last accessed June 10, 2023.

regards the use of carbon tax, several European countries (but not all) have implemented it since the 1990s, as well as some Latin American countries. Uruguay displays the higher carbon tax price (US$ 137 per metric tonne of CO_2), closely followed by Switzerland, Sweden, and Liechtenstein. The majority of countries, however, keep their rates below $50 per tonne[365].

Emission trade schemes and carbon taxes can also be combined. Many hybrid solutions have been proposed by academics; I will present below one of the most interesting ones as an example. Hybrid systems are especially useful when the magnitude of asymmetric information is considerable and when the industry under analysis creates strictly convex damage. Under these circumstances, in fact, not only is harder for regulators to choose between one of the mechanisms, but also neither linear taxation nor an emission trade system is able to achieve the optimal solution[366]. The combination of these schemes is, thus, one valid option to attain efficient regulation. Moreover, hybrid solutions are very interesting because they combine the best features of the two systems: the taxation side leads businesses to internalize environmental costs, while the market element guarantees an optimal distribution of the damage payment[367].

Scholar Helge Berglann, for example, proposes a simple but effective model: he envisages a system in which "Each firm's income is controlled by a tax that depends on the firm's own output and on a parameter construed as a share permit"[368]. These ''shares of total expected output" lead to a reduction of businesses' tax burden, and can be acquired in the permit market; this competitive market will ensure an *ex-post* optimal partition of share permits. Firms will deal with a tax schedule that aims at internalizing the caused damage, therefore each business will determine the emissions levels for which its outcome is efficient. As the scholar clearly explains, "In this equilibrium, the amount that each firm is willing to allocate for permits and the amount that it pays for its

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365 Statista, "Carbon tax rates worldwide as of April 1, 2022", 6 February 2023, https://www.statista.com/statistics/483590/prices-of-implemented-carbon-pricing-instruments-worldwide-by-select-country/, last accessed June 11, 2023.

366 Helge Berglann, "Implementing optimal taxes using tradable share permits", *Journal of Environmental Economics and Management*, 64 (2012): 402–409.

367 Ibidem.

368 Ibidem, p. 402.

emissions add up to the total amount the company would spend when facing a full information Pigouvian unit tax"[369]. The scheme also prescribes that a reward should be granted when a business' emission levels stay below their targeted amount. The strength of this model, as compared to many other hybrid schemes, resides in its uncomplicated applicability and in its low information requirements: the only knowledge required by the planner, in fact, is the marginal damage. Moreover, the author claims that the enforcement of his model is able to increase expected social welfare, as opposed to a traditional emission trade system where all firms comply[370].

All in all, the potentiality of these two mechanisms is manifest and should not be overlooked. Despite presenting some marginal flaws, especially in the application phase, they are an essential instrument in the hands of today's policymakers interested in the protection of the environment. Moreover, they are among the few mechanisms that are addressed specifically to corporations, small and large, which we have seen compete with the biggest states in their emissions levels. As their trajectory is clearly upward, and their efficiency will be further enhanced in the future, they should be embedded in a legislative framework that increasingly takes them into consideration and makes them compulsory.

[369] Ibidem, p. 403.

[370] Ibidem.

4. Legislative instruments for TNC regulation at national and international levels

Alongside self-assessing voluntary measures, the active role of investors, market-based instruments, and civil society participation, an adequate legal framework is beneficial, if not necessary, for successfully tackling the complex TNCs' unaccountability issue. We have already seen, during the first chapter, some of the reasons why transnational companies are so difficult to govern: their increasingly larger economic and political power, their flexible and elusive nature, and the free, globalized context in which they move, all contribute to making them virtually impermeable to hard law regulation. This is especially true for the control of TNCs' activity in Global South host countries. Where domestic law cannot reach due to the transnational structure of the companies, international law has no power because of their lack of legal personality. Nevertheless, some instruments targeting TNCs have been developed during the last few decades, with varying degrees of success, and others are still being formulated today, evolving and adapting to an ever-changing international context. The objective of this final section is thus to provide a brief overview of some of the most interesting paths that could be pursued to enhance TNCs' environmental accountability from a legal perspective — both nationally and internationally.

At the domestic level, we can start by mentioning the simple yet effective extraterritorial application of home country laws. This had been envisioned already in 1994 by Eric Kolodner, writing for the United Nations Research Institute for Social Development[371]. More recently, other scholars have reconsidered the validity of this mechanism, deemed as a possible solution for the minimization of environmental damage in developing host countries[372]. This approach clearly builds on the idea that environmental requirements are

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[371] Kolodner, "Transnational corporations: Impediments or catalysts of social development?", 1994.

[372] Tetsuya Morimoto, "Growing industrialization and our damaged planet. The extraterritorial application of developed countries' domestic environmental laws to transnational corporations abroad", *Utrecht Law Review,* Vol. 1, Issue 2 (2005): 134-159.
See also: Andrew Eckert, R. Todd Smith, Henry van Egteren, "Environmental Liability in Transboundary Harms: Law and Forum Choice", *The Journal of Law, Economics, and Organization*, Volume 24, Issue 2 (2008): 434–457.

generally stricter in TNCs' home countries rather than in the host states. Kolodner mentions the example of US pesticide companies, which should obtain the approval of the Federal Drug Administration not only for selling their product in the domestic market but also for selling abroad, in the case of an extraterritorial application of laws[373]. Attorney Tetsuya Morimoto points out that, while such an extraterritorial application would be challenged on the basis of traditional sovereignty claims, these can be overcome via indirect extraterritorial regulation. For example, domestic environmental rules may be applied through a multilateral action by the OECD member states[374]. This measure, although fascinating, is of course limited: it would be useful applied to some specific industries, but it does not represent an exhaustive solution tackling transnational corporate unaccountability as a whole.

Another possible solution that could be enforced at the national or regional level is the law of due diligence. France was the pioneer of this approach when in 2017 introduced the Duty of Vigilance Law, the first "comprehensive and legally binding human rights due diligence regulation worldwide"[375]. It marked the beginning of a European "due diligence wave": the French law, in fact, inspired many actors to propose similar measures, mobilizing a dozen of initiatives among campaigns and parliamentary motions around Europe. The Netherlands followed France's example in 2018, and Germany in 2021; in 2020, the European Union stated that it would have introduced mandatory human rights due diligence regulations applicable to all EU states[376]. Professor Radu Mares suggests that part of the credit should go to the adoption of the United Nations Guiding Principles, in 2011, which seems to have facilitated the regulatory process of TNCs at the national and regional level[377].

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[373] Kolodner.

[374] Morimoto, "Growing industrialization and our damaged planet", 2005.

[375] Almut Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?", *Human Rights Review*, 22 (2021):109–127.

[376] Radu Mares, "Regulating transnational corporations at the United Nations – The negotiations of a treaty on business and human rights", *The International Journal of Human Rights*, 2022.

[377] Ibidem.

The adoption of the duty of Vigilance Law had the goal of increasing French corporate accountability abroad. The law is interesting for our analysis because it encompasses not only human rights but also environmental obligations, and establishes a regime of legal liability for corporations. It applies to all companies headquartered in France that employ a minimum of 5000 employees domestically or at least 10.000 worldwide, including subsidiaries, as well as to foreign companies that have French subsidiaries employing at least 5000 employees in France[378]. The law binds these large companies to elaborate and effectively implement a plan of vigilance (formulated with stakeholder participation[379]), which must include appropriate measures for the identification and prevention of human rights and health risks, environmental damages, and corruption hazards[380]. Among the measures, the plan must include "a risk mapping, regular evaluation procedures, appropriate actions to mitigate risks or prevent severe impacts, an alert and complaint mechanism within the company, and a system to supervise the implementation of measures and evaluate their effectiveness"[381].

What is essential to highlight here is that this risk assessment and prevention regards both direct and indirect activities of the targeted company, including the operations of its subsidiaries, its subcontractors, and its suppliers[382]. Liability, however, still depends on the extent to which the parent corporations decide to control or intervene in the activities of their subsidiaries[383]. Another fundamental element to mention is the possibility of legal remediation for victims: according to the law, anyone harmed by the TNC's activities can bring civil tort action and claim remedy[384]. The French Due Diligence Law also envisages sanctions — *periodic penalty payments* — for companies that fail to

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[378] Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context", 2021.

[379] Ibidem.

[380] Cees Van Dam and Filip Gregor, "Corporate responsibility to respect human rights vis-à-vis legal duty of care", in *Human Rights in Business Removal of Barriers to Access to Justice in the European Union,* ed. by Juan José Álvarez Rubio and Katerina Yiannibas (New York: Routledge, 2017).

[381] Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context", 2021.

[382] Van Dam and Gregor, "Corporate responsibility to respect human rights vis-à-vis legal duty of care", 2017.

[383] Mares, "Regulating transnational corporations at the United Nations", 2022.

[384] Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context", 2021.

release or enforce the plan of vigilance. Moreover, the French parent company can be held liable in the case of harm caused by a defective plan or its inadequate implementation — *civil liability action*.

Despite its pioneering role in regulating TNCs and its undeniable contribution to the cause, the French Due Diligence Law presents some limits, that can be clustered into the two categories of stringency and enforcement. First of all, as concerns the former, the bill underwent several readings in the French National Assembly and in the Senate, which weakened its original amplitude. For instance, we have seen that the law is addressed exclusively to very large corporations: this was not the case in the first draft, which proposed to target all companies based in France, regardless of the employees' number[385]. However, it can be argued that the larger a corporation, the bigger its impact, especially as regards the environment; therefore the selection may be limited, but is efficient.

Secondly, the original proposal envisaged a rebuttable presumption, which correlated any harm to the fault of the company and its plan of vigilance. According to the final, adopted version, instead, the burden of proof is left to the victim: the corporation is liable for damage only if the victims can prove the tort[386]. This issue has been critical in litigation cases, and it represents a significant obstacle to the enforcement of the Due Diligence Law[387]. French lawyers Stephane Brabant and Elsa Savourey have thoroughly examined the law, focusing precisely on the two types of penalties envisioned for companies. They found that the impact of civil liability is significantly weakened by a number of issues (most notably the burden of proof and the use of ambiguous concepts) and does not offer victims complete, unrestricted access to remediation. This is particularly true for foreign victims seeking to bring cases to the French courts[388]. In this regard, the scholar Schilling-Vacaflor also points out that a major issue is determined by the high asymmetry

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[385] Ibidem.

[386] Van Dam and Gregor, "Corporate responsibility to respect human rights vis-à-vis legal duty of care", 2017.

[387] Schilling-Vacaflor.

[388] Stéphane Brabant and Elsa Savourey, "Loi relative au devoir de vigilance, des sanctions pour prévenir et réparer?", *Revue internationale de la compliance et de l'éthique des affaires*, 2017.

of power and information, between TNCs and victims, which affects both corporate reporting and litigation cases[389]. It is very difficult for claimants from the Global South — usually part of marginalized and poor communities — to prove the environmental impact they suffered as a result of the corporate operations. It is indisputable, in fact, that a considerable gap exists between the technical "corporate science" of oil and gas companies[390] and the experimental local knowledge of the claimants' communities; not to mention the different types of assets available to the parties for attorneys' expenses.

As concerns the enforcement issues, the efficiency of the French Duty of Vigilance Law has been undermined by a weak implementation, at least so far. This is partly due to political dynamics: the law was implemented by François Hollande's government (center-left orientation) but the current president, Emmanuel Macron, has always been an upfront opposer of mandatory human rights rules imposed on businesses. His administration, thus, has shown a "negative attitude" and a lack of commitment to the law, neglecting both to check its correct implementation and to sanction companies in case of non-compliance[391]. Furthermore, as mentioned before, the text of the law exhibits many ambiguous terms and concepts, with few clear definitions, thus preventing immediate and unequivocal enforcement. In particular, the conditions for establishing the concrete occurrence of civil liability are rather uncertain[392].

All things considered, the French Due Diligence Law has undoubtedly some limits in its drafting and application; nevertheless, its contribution to the fight against TNCs' unaccountability is significant. Even though the penalties envisioned do not provide the best remediation instruments for victims, they are still quite effective as monitoring and deterrent tools[393]. If anything, the law is deemed to be a good starting point for the enhancement of foreign corporate responsibility at a national and regional level.

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389 Schilling-Vacaflor.

390 Stuart Kirsch, *Mining capitalism: The relationship between corporations and their critics* (Berkeley: University of California Press, California, 2014).

391 Schilling-Vacaflor.

392 Brabant and Savourey, "Loi relative au devoir de vigilance, des sanctions pour prévenir et réparer?", 2017.

393 Schilling-Vacaflor.

At the international level, many environmental treaties, agreements, and conventions exist, trying to fight climate change and prevent environmental damage. However, most of these regulations do not have transnational companies as their specific target: they usually address and seek to regulate states, the primary and original subjects of international law. We have already mentioned, in chapter three, the main international instruments specifically aimed at TNCs, trying to encourage corporate responsibility, namely the UN Global Compact and the OECD Guidelines for multinational enterprises. Both of these documents are, however, soft law instruments: they are not legally binding for businesses, and thus they cannot be contested and brought to courts, in case of violations.

In order to subject transnational companies to hard law at the international level, they should be awarded international legal personality: in this way, TNCs would effectively become entities bearing rights and obligations in the realm of international law. This is, however, still quite a remote possibility. A heated debate around the issue exists among academics, and although many scholars believe that this lack of personality leads to a partial, if not unsuccessful, application of international law principles to TNCs, the majority of the academic community denies this possibility[394]. The notion of international legal personality has expanded considerably during the last century, alongside the development of international law, abandoning the original doctrine that saw states as the exclusive subjects, and finally came to include also non-state entities — such as individuals and international organizations[395]. Multinational companies are still excluded, despite their role and impact in the global scenario. However, what can be said is that they are not even mere objects of international law anymore: they are slowly

[394] Dmitry Ivanov and Maria Levina, "Prospects of International Legal Cooperation of States Under U.N. Auspices in Developing a Treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights", *BRICS Law Journal*, Vol. 8, Issue 1(2021): 135–161.

[395] Alice de Jonge, "Transnational corporations and international law: bringing TNCs out of the accountability vacuum", *Critical Perspectives on International Business*, Vol. 7, No. 1 (2011): 66-89.

transitioning to agents possessing at least some of the qualities of international subjectivity[396].

Some scholars that oppose the awarding of international legal personality to TNCs, such as Brownlie, Cassese, and Shaw[397], argue that the status of legal personality requires the consideration of the interrelation between rights and duties, and requires the capacity to enforce claims. Others, such as Lukashuk, consider the possibility as fundamentally impractical[398]. The scholar Velyaminov comes to judge the potential scenario as a "grave mistake since it opens the way to dissolution of the very concept and nature of international law"[399]. On the other hand, academics in favor of an extension of the international legal personality, such as Dupuy, Ponte, and Friedmann[400], advocate for a limited functional personality for TNCs: they believe, in fact, that in specific situations, scopes, and purposes a multinational company might obtain rights and duties.

While the most common conceptions in doctrine are rather strict in the definition and attribution of legal personality, there are two approaches that are more flexible and open-ended: the Formal and the Actor conception of legal personality. The Formal approach was formulated by jurist Hans Kelsen and considers international law as an open system, in which any entity can potentially participate. Roland Portmann defines it as a conception that formulates no *a priori* presumption as to who is a legal person; he explains that "The mechanism by which international personality is acquired is by

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396 Matthew Craven and Rose Parfitt, "Statehood, Self-Determination, and Recognition", in *International Law*, ed. By Malcolm D. Evans (Oxford: Oxford University Press, 5th ed. 2018): 177-226.

397 Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2012); Antonio Cassese, *International La*w (Oxford: Oxford University Press, 2005); Malcolm Shaw, *International Law* (Cambridge: Cambridge University Press, ed. 2017).

398 Igor Lukashuk, *International Law.* General Part: Textbook, 2005.

399 Ivanov and Levina, "Prospects of International Legal Cooperation of States Under U.N. Auspices in Developing a Treaty on Transnational Corporations", 2021, citing George M. Velyaminov, *International Economic Law and Process*, 2004, 389.

400 Pierre-Marie Dupuy, *L'unité de l'ordre juridique international: cours général de droit international public* (Leiden, M. Nijhoff, 2003); Bishop Wolfgang Friedmann, "General Course in Public International Law", *Michigan Law Review*, Vol. 66, Issue 2, 1967; Karen G. Del Ponte, "Formulating Customary International Law: An Examination of the WHO International Code of Marketing of Breastmilk Substitutes, *Boston College International and Comparative Law Review*, 277, Vol. 5, Issue 2, 1982.

interpreting international norms: any entity on which the international legal system confers rights, duties or capacities is an international person"[401]. The Actor conception, instead, rejects the notion of international personality as traditionally interpreted, and prefers using terms such as "participant" and "actor", determining the assumption that any effective actor of international relations is relevant for the international legal system. This approach thus considers all types of entities that exercise "effective power" in the international arena and participate in the decision-making processes[402]. The Actor approach is usually associated with Rosalyn Higgins, former President of the International Court of Justice, who followed the notion formulated by Myers S. McDougal and Harold D. Lasswell at the end of the Second World War[403].

These two notions of legal personality originated precisely because of the emergence and development of non-states entities in the international arena. As Professors Mohammad Owais Farooqui and Sheer Abbas sustain, these conceptions are flexible and futuristic, and they can envision the possibility of an expansion of legal personality also to different entities, such as multinational companies[404]. Indeed, state sovereignty remains the major obstacle to TNCs' legal recognition; nonetheless, the massive role played by these entities in the international market, and therefore their presence in international economic law, makes it difficult to ignore the issue. Even the United Nations has occasionally raised the matter, preparing the ground for a possible future evolution of the international legal system[405].

Considering that at present this possibility still looks unfeasible, other solutions must be sought in the meanwhile. Nowadays, as mentioned before, any direct regulation addressed specifically to transnational companies has the form of voluntary or advisory codes of conduct, yet new innovative answers to corporate unaccountability are being

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401 Roland Portmann, *Legal personality in International Law* (New York: Cambridge University Press, 2010), p. 174.

402 Ibidem, p. 208.

403 Ibidem.

404 Mohammad Owais Farooqui and Sheer Abbas, "Changing Dimensions of International Legal Personality in the Contemporary International Community", *Special Education*, Vol. 1, Iss. 43, 2022.

405 Ibidem.

created — especially as regards human rights violations. As the largest multilateral organization with a human rights mandate, the United Nations can be considered the primary arena for renewed efforts to regulate TNCs' activities and advance corporate accountability. In particular, the Human Right Council can be recognized as the most important locus for the development of a normative framework targeted at TNCs, together with the UNCTAD body, providing trade and investment insights. Besides its unique position in the international scene, the United Nations has fifty years of experience "wrestling with the TNC problem", devising regulatory framework and standards for this purpose[406].

The first UN attempts to regulate TNCs, in fact, dates back to the early 1970s, when the recently decolonized states urged for a "New International Economic Order"[407]. The necessity to control TNCs was affirmed in the resulting Draft Code of Conduct on Transnational Corporations, which negotiations lasted eighteen years and were eventually shelved in 1992, due to a different political world order and a lack of unity[408]. After the adoption of several voluntary codes of conduct — the OECD guidelines, the ILO Tripartite Declaration of Principles Concerning Multilateral Enterprises and Social Policy, and the UN Global Compact, respectively in 1976, 1977, and 2000 — a second attempt to adopt a stricter instrument failed again in 2004, with the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights[409]. These norms, in fact, written in a treaty-like language and setting standards for companies in a wide range of fields, as well as providing effective remedies for victims, met strong resistance from the business world. As a result of such resistance, the UN Secretary-General appointed a Special Representative (John Ruggie) to further elaborate on the matter and to submit views[410]. The result was the elaboration

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406 Mares, "Regulating transnational corporations at the United Nations", 2022.

407 Ivanov and Levina, "Prospects of International Legal Cooperation of States Under U.N. Auspices in Developing a Treaty on Transnational Corporations", 2021.

408 Mares, "Regulating transnational corporations at the United Nations", 2022.

409 Ionel Zamfir, "Towards a binding international treaty on business and human rights", European Parliament Research Service, April 2018, https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI(2018)620229_EN.pdf, last accessed June 14, 2023.

410 De Jonge, "Transnational corporations and international law: bringing TNCs out of the accountability vacuum", 2011.

of an alternative, less controversial framework, the Guiding Principles on Business and Human Rights Implementing the United Nations, also called the "Protect, Respect and Remedy" framework. These Guiding Principles were endorsed in 2011, and deserve credit for accelerating the reformation of corporate policies and for clarifying the rules of conduct that companies are expected to comply with[411]. Nevertheless, this framework, just like the previous ones, fails to provide effective remedies for human rights victims, and it does not create new international law obligations for transnational companies[412].

The necessity to create a legally binding framework for TNCs remained, and renewed efforts were put into the cause, particularly endorsed by civil society. As mentioned in the second section of this chapter, in fact, a global campaign composed of over 250 social groups from all around the world, aiming at "dismantling corporate power" and "stopping impunity", played a major role in supporting the institution of a new UN treaty, for which it elaborated a text proposal. On 26 June 2014, with the adoption of Resolution 26/9 by the Human Right Council, the process of treaty-making officially started. The resolution decided "To establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" and was adopted by a recorded vote of 20 to 14, with 13 abstentions[413]. The appointed Intergovernmental Working Group (IGWG) is chaired by Ecuador, meets annually, for sessions of five days, and has so far submitted three revised drafts of the treaty text[414]. The last session was held in March 2023[415].

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411 Ivanov and Levina, 2021.

412 De Jonge; Ivanov and Levina.

413 UN Human Rights Council, Res. 26/9, Agenda item 3, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, 14 July 2014.

414 Mares, "Regulating transnational corporations at the United Nations", 2022.

415 UN Human Rights Council, "Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights", https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc#:~:text=At%20its%2026th%20session%2C%20on,to%20elaborate%20an%20international%20legally, last accessed on June 15, 2023.

The treaty, as can be imagined, has been contested by several actors since the beginning, most notably the business community. It is significant to note that also Western, developed states received coldly the treaty proposal: the US actively boycotted the initiative, while the EU observed the deliberations without intervening[416]. The analyses of many scholars, among whom Radu Mares and Dmitry Ivanov, pointed out that since 2014, the treaty text has significantly lowered its ambition. The IGWG, in its latest revised drafts, aligns with the traditional human rights law, and seems to have cast aside the idea of creating both direct obligations on transnational companies and stronger oversight instruments to hold them accountable[417]. Moreover, as regards our field of interest, the concept of "environmental rights" contained in the text is excessively vague, just like other universal human rights treaties, which "do not refer to a specific right to a safe and healthy environment"[418]. Also, in the article focused on the rights of victims, the treaty provides for measures of "ecological restoration" and "environmental remediation", yet they are unclear and very difficult to implement, considering that no specific definition or clarification is given on how states may actually restore an ecosystem[419].

On the other hand, some positive amendments from the initial drafts can also be spotted, such as the inclusion of more precise provisions on human rights activists, indigenous people, and gender issues. Scholars Ivanov and Levina also detected some modifications concerning terminology and definitions, which exhibit fuller coordination with other UN documents, including for example the Sustainable Development Goals and the Guiding Principles on Business and Human Rights[420]. Despite the downgraded ambition and some overly vague concepts, the treaty is still interesting because it ensures victims access to justice and remedy and also stresses the importance of mutual legal assistance

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[416] Mares, 2022.

[417] Ibidem.

[418] UN Human Rights Council, "Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights", 15 January 2009, A/HRC/10/61, https://www.refworld.org/docid/498811532.html, last accessed June 15, 2023.

[419] Ivanov and Levina, 2021.

[420] Ibidem.

and international judicial cooperation (article 12)[421]. Furthermore, the article on Legal Liability challenges the separation principle and the doctrine of separate legal entity, which usually prevent transnational companies to be liable for the activities of their foreign subsidiaries. Article 8.1, in fact, has not been modified in the different drafts and prescribes:

> *States Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, within their territory, jurisdiction, or otherwise under their control, for human rights abuses that may arise from their own business activities, including those of transnational character, or from their business relationships*[422].

This approach marks a significant point of divergence from the domestic due diligence laws discussed earlier in the chapter. Neither the examined French law, the European parliamentary draft, nor the Dutch or German due diligence laws, had any intention to lift the corporate veil; they only devised new forms of administrative supervision. In order for victims to hold parent companies liable for what a subsidiary did, they need to rely on general tort law principles[423]. In the UN draft treaty, instead, we can observe an attempt to lift the corporate veil, the same veil that was so difficult to remove for Ecuadorian plaintiffs in the case study of chapter two.

All in all, the adoption of this "international legally binding instrument on transnational corporations and other business enterprises with respect to human rights" would be an undeniable step forward in enhancing corporate accountability in the Global South, although the limitations outlined above and the general downgrade since the original draft should not be ignored. The insufficient elaboration of several concepts, in fact, risks undermining the progressive character of the treaty. As concerns the probability of adoption, considering the non-negligible opposition that this instrument faces, we can not exclude the possibility that it could be abandoned and never see the light, like the Draft Code in 1992. Politically, the world is more divided than it was in the 1970s, when the

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[421] UN Human Rights Council, *Text of the third revised draft legally binding instrument with textual proposals submitted by States during the seventh and the eighth sessions of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights**, 23 January 2023, A/HRC/52/41/Add.1, p. 43.

[422] Ibidem, p. 33.

[423] Mares, 2022.

New International Economic Order was proposed. The solidarity among states and the willingness to cooperate should be reinforced: these are essential ingredients, without which the success of such an aspirational project is seriously jeopardized. The choices that the Intergovernmental Working Group will make in the next few years will determine the outcome of this draft binding treaty and its impact on corporate regulation.

Finally, what is important to highlight, for our research scope, is that this treaty is focused on human rights as a whole: environmental rights are included, of course, but as often happens they are insufficiently determined and, overall, are left on the margins of the legislative framework. This is why a hybrid, comprehensive approach is fundamental, encompassing not only a favorable international framework but also effective instruments at the domestic level, market-based mechanisms that can incentivize TNCs, and the active participation of investors and society as a whole. In the words of John Ruggie,

> *Any successful regime needs to motivate, activate, and benefit from all of the moral, social, and economic rationales that can affect the behavior of corporations. This requires providing incentives as well as punishments, identifying opportunities as well as risks, and building social movements and political coalitions that involve representation from all relevant sectors of society, including business*[424].

[424] John Gerard Ruggie, "Business and Human Rights: The Evolving International Agenda", *Corporate Social Responsibility Initiative*, Working Paper No. 31, Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2007, p. 29.

Conclusions

We have started this dissertation with a two-fold research question in mind: on the one hand, we wanted to understand how and to what extent transnational companies escape environmental liability in the Global South, and on the other, we aspired to find the optimal solutions to reduce their unaccountability. By reviewing the existing literature and by analyzing the case of Chevron, this thesis has confirmed that, despite the considerable progress observed over the last decade, TNCs are still largely unaccountable as regards the environmental damage they create in poor countries.

We have seen how the loose environmental regulations of developing markets, the flexible nature of TNCs, the power and economic imbalance between large companies and small states, and the absence of legally binding laws for multinational corporations at the international level, all contribute to creating a framework in which TNCs move almost entirely unhindered. The case study has been particularly insightful in showing how difficult it is to fight these companies in court and to hold them accountable for their misconduct, especially for communities belonging to the Global South. At the same time, many voluntary instruments such as the ESG assessment have been implemented over the years in an attempt to influence TNCs' decision-making: their contribution is fundamental and has led to considerable steps forward, but they present the intrinsic limits of soft law. Our investigation, in fact, has shown that while some companies may conform to the targets, others will engage in greenwashing practices, eluding any real change.

The initial hypothesis, thus, has been mostly confirmed, as we have demonstrated a general inadequacy of the instruments that today seek to regulate TNCs' activities. At the same time, however, the picture is not as bleak as the early stages of the investigation had suggested: much work is still needed, but the overall trajectory is upward, and we are starting to see the first results of the global efforts put in this sense. We have also examined other instruments, still under-developed and under-utilized, that have immense potential and could be better exploited in the future.

In conclusion, this dissertation proposed an interdisciplinary approach to the issue. Voluntary measures play a significant role that should not be disregarded, but they need to be complemented with stricter norms at the national, regional, and international levels, which provide sanctions for transgressors and remedy for victims. At the same time, market-based mechanisms such as emission trade schemes have great prospects and should be further encouraged, primarily through a braver and more ambitious attitude of governments. Additionally, carbon taxes and subsidies could also fit the picture, as well as other types of instruments able to effectively incentivize businesses to behave in a different way. Finally, the role of investors, consumers, and of society as a whole is too often neglected, despite being the binding force that enables the implementation of all the solutions presented so far.

It is only through the combination of all these measures, stemming from different perspectives and disciplines, that TNCs' environmental unaccountability can be successfully defeated. The victims of corporate environmental damage cannot be truly protected until a legislative transformation at the international level occurs, which can only be achieved with a strong political commitment, which in turn cannot be created without the public support of society. In the same way, trying to formulate laws and measures that do not take into account the reasoning of businesses is pointless, as there will be the opposition of very powerful players.

This work has indeed many limitations. The research field was wide, the objective was probably over-ambitious, and the solution proposed is still at an early stage and needs to be further developed. Nevertheless, this thesis sought to demonstrate the complexity of the issue in question and the importance to employ an interdisciplinary and multilevel perspective, especially in a solution-seeking effort. The hope is that future researchers will expand the investigation and will be able to delineate a more precise, multi-level solution to TNCs' environmental unaccountability.

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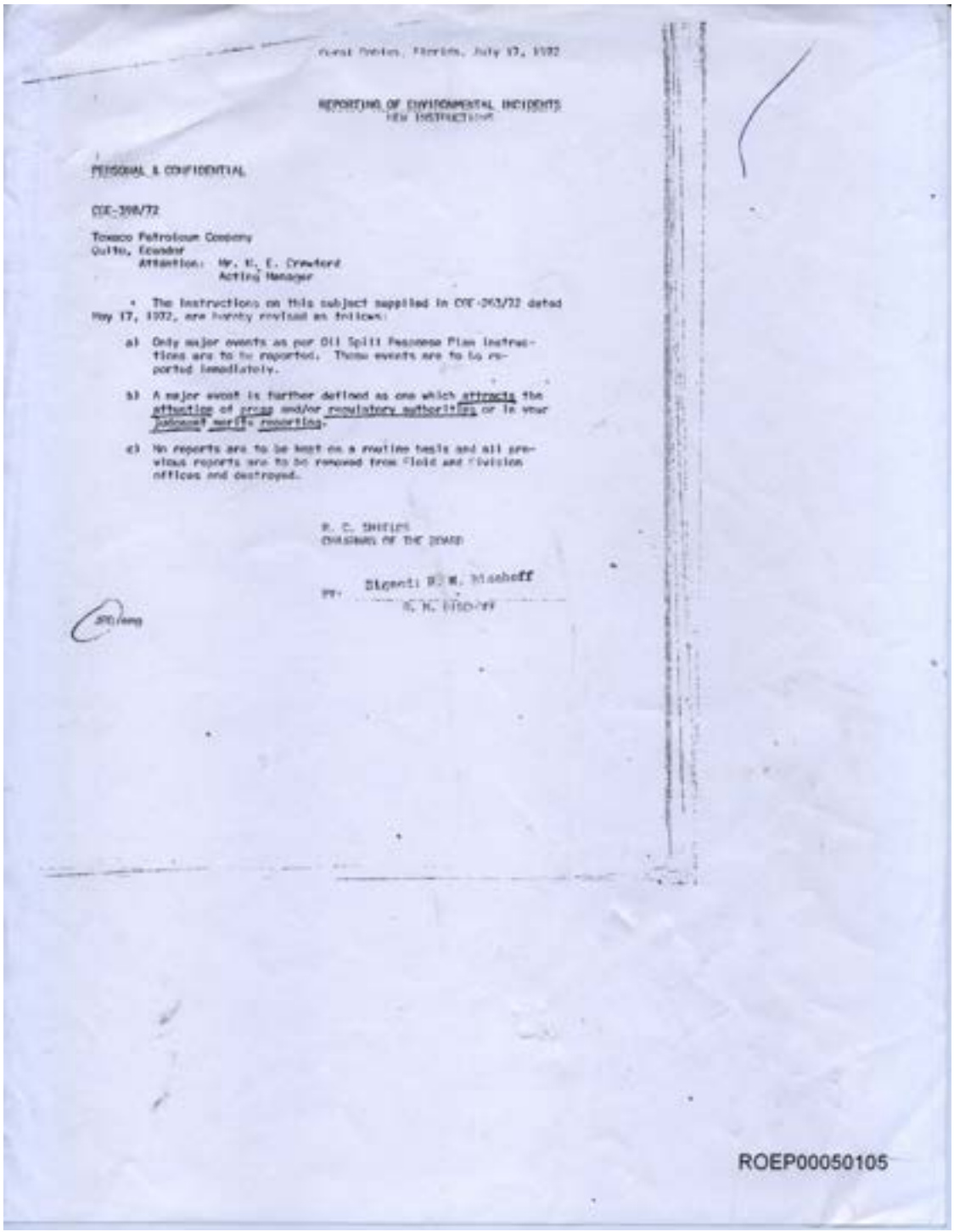
Appendix A

Rank	Name	Revenue (USD)	Type
1	United States	3,336,000,000,000	Government
2	China	2,591,000,000,000	Government
3	Japan	1,678,000,000,000	Government
4	Germany	1,598,000,000,000	Government
5	France	1,446,000,000,000	Government
6	United Kingdom	984,400,000,000	Government
7	Italy	884,400,000,000	Government
8	Brazil	819,400,000,000	Government
9	Canada	623,700,000,000	Government
10	Walmart	500,343,000,000	Corporation
11	Spain	492,400,000,000	Government
12	Australia	461,000,000,000	Government
13	State Grid	348,903,000,000	Corporation
14	Netherlands	344,800,000,000	Government
15	Sinopec Group	326,953,000,000	Corporation
16	China National Petroleur	326,008,000,000	Corporation
17	Korea, South	318,000,000,000	Government
18	Royal Dutch Shell	311,870,000,000	Corporation
19	Mexico	292,800,000,000	Government
20	Sweden	274,800,000,000	Government
21	Toyota Motor	265,172,000,000	Corporation
22	Volkswagen	260,028,000,000	Corporation
23	Russia	253,900,000,000	Government
24	Belgium	249,700,000,000	Government
25	BP	244,582,000,000	Corporation
26	Exxon Mobil	244,363,000,000	Corporation
27	Berkshire Hathaway	242,137,000,000	Corporation
28	India	229,300,000,000	Government
29	Apple	229,234,000,000	Corporation
30	Switzerland	223,500,000,000	Government
31	Norway	214,300,000,000	Government
32	Samsung Electronics	211,940,000,000	Corporation
33	McKesson	208,357,000,000	Corporation
34	Glencore	205,476,000,000	Corporation
35	UnitedHealth Group	201,159,000,000	Corporation
36	Austria	194,800,000,000	Government
37	Saudi Arabia	185,600,000,000	Government
38	Daimler	185,235,000,000	Corporation
39	CVS Health	184,765,000,000	Corporation
40	Amazon.com	177,866,000,000	Corporation
41	Turkey	173,900,000,000	Government
42	Indonesia	173,600,000,000	Government
43	Denmark	173,500,000,000	Government
44	EXOR Group	161,677,000,000	Corporation
45	AT&T	160,546,000,000	Corporation

46	General Motors	157,311,000,000	Corporation
47	Ford Motor	156,776,000,000	Corporation
48	China State Construction	156,071,000,000	Corporation
49	Hon Hai Precision Indust	154,699,000,000	Corporation
50	AmerisourceBergen	153,144,000,000	Corporation
51	Industrial & Commercial	153,021,000,000	Corporation
52	AXA	149,461,000,000	Corporation
53	Total	149,099,000,000	Corporation
54	Ping An Insurance	144,197,000,000	Corporation
55	Honda Motor	138,646,000,000	Corporation
56	China Construction Bank	138,594,000,000	Corporation
57	Trafigura Group	136,421,000,000	Corporation
58	Chevron	134,533,000,000	Corporation
59	Cardinal Health	129,976,000,000	Corporation
60	Costco	129,025,000,000	Corporation
61	SAIC Motor	128,819,000,000	Corporation
62	Verizon	126,034,000,000	Corporation
63	Allianz	123,532,000,000	Corporation
64	Argentina	123,200,000,000	Government
65	Kroger	122,662,000,000	Corporation
66	Agricultural Bank of Chin	122,366,000,000	Corporation
67	General Electric	122,274,000,000	Corporation
68	China Life Insurance	120,224,000,000	Corporation
69	Walgreens Boots Alliance	118,214,000,000	Corporation
70	BNP Paribas	117,375,000,000	Corporation
71	Japan Post Holdings	116,616,000,000	Corporation
72	Bank of China	115,423,000,000	Corporation
73	JPMorgan Chase & Co.	113,899,000,000	Corporation
74	Fannie Mae	112,394,000,000	Corporation
75	Gazprom	111,983,000,000	Corporation
76	Prudential	111,458,000,000	Corporation
77	BMW Group	111,231,000,000	Corporation
78	Alphabet	110,855,000,000	Corporation
79	China Mobile Communic	110,159,000,000	Corporation
80	Nissan Motor	107,868,000,000	Corporation
81	Nippon Telegraph & Tele	106,500,000,000	Corporation
82	China Railway Engineerir	102,767,000,000	Corporation
83	Home Depot	100,904,000,000	Corporation
84	China Railway Constructi	100,855,000,000	Corporation
85	Assicurazioni Generali	100,552,000,000	Corporation
86	Bank of America Corp.	100,264,000,000	Corporation
87	Express Scripts Holding	100,065,000,000	Corporation
88	Wells Fargo	97,741,000,000	Corporation
89	Greece	95,360,000,000	Government
90	Lukoil	93,897,000,000	Corporation
91	Boeing	93,392,000,000	Corporation

92	Dongfeng Motor	93,294,000,000	Corporation
93	Taiwan	93,000,000,000	Government
94	Portugal	92,990,000,000	Government
95	Israel	92,820,000,000	Government
96	South Africa	92,380,000,000	Government
97	Siemens	91,585,000,000	Corporation
98	Phillips 66	91,568,000,000	Corporation
99	Carrefour	91,276,000,000	Corporation
100	Nestle	91,222,000,000	Corporation
101	Poland	90,800,000,000	Government
102	Anthem	90,039,000,000	Corporation
103	Microsoft	89,950,000,000	Corporation
104	Huawei Investment & Hc	89,311,000,000	Corporation
105	Petrobras	88,827,000,000	Corporation
106	Valero Energy	88,407,000,000	Corporation
107	Bosch Group	87,997,000,000	Corporation
108	Citigroup	87,966,000,000	Corporation
109	Banco Santander	87,401,000,000	Corporation
110	Colombia	85,930,000,000	Government
111	Ireland	85,410,000,000	Government
112	Hyundai Motor	85,259,000,000	Corporation
113	Hitachi	84,559,000,000	Corporation
114	Comcast	84,526,000,000	Corporation
115	Deutsche Telekom	84,481,000,000	Corporation
116	Credit Agricole	84,222,000,000	Corporation
117	Enel	84,134,000,000	Corporation
118	Czechia	83,620,000,000	Government
119	SK Holdings	83,544,000,000	Corporation
120	United Arab Emirates	83,440,000,000	Government
121	SoftBank Group	82,665,000,000	Corporation
122	China Resources	82,184,000,000	Corporation
123	China National Offshore	81,482,000,000	Corporation
124	Uniper	81,428,000,000	Corporation
125	ENI	80,006,000,000	Corporation
126	HSBC Holdings	79,637,000,000	Corporation
127	Thailand	79,600,000,000	Government
128	China Communications C	79,417,000,000	Corporation
129	IBM	79,139,000,000	Corporation
130	Dell Technologies	78,660,000,000	Corporation
131	Hong Kong	78,510,000,000	Government
132	Electricite de France	78,490,000,000	Corporation
133	State Farm Insurance Cos	78,331,000,000	Corporation
134	Iran	77,220,000,000	Government
135	Pacific Construction Grou	77,205,000,000	Corporation
136	Sony	77,116,000,000	Corporation
137	Sinochem Group	76,765,000,000	Corporation

Appendix B



Coral Gables, Florida, July 17, 1972

REPORTING OF ENVIRONMENTAL INCIDENTS
NEW INSTRUCTIONS

PERSONAL & CONFIDENTIAL

CEE-398/72

Texaco Petroleum Company
Quito, Ecuador
Attention: Mr. W. E. Crawford
Acting Manager

The instructions on this subject supplied in CEE-263/72 dated May 17, 1972, are hereby revised as follows:

a) Only major events as per Oil Spill Response Plan instructions are to be reported. These events are to be reported immediately.

b) A major event is further defined as one which attracts the attention of press and/or regulatory authorities or in your judgment merits reporting.

c) No reports are to be kept on a routine basis and all previous reports are to be removed from field and division offices and destroyed.

R. C. SHIELDS
CHAIRMAN OF THE BOARD

By: Signed) W. Washoff
W. W. Washoff

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