

Energy Industry Environmental Law Conference

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Environmental and Human Rights Considerations for International Energy Companies

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**International Environmental and Human Rights
Disputes**

Environmental Counterclaims by States – *Burlington/Perenco v. Ecuador*

- Burlington/Perenco concession was seized by Ecuador after failure to pay new 99% “extraordinary profits” taxes
- Burlington and Perenco filed separate BIT arbitrations in 2008 for expropriation and fair and equitable treatment (FET) violations
- Tribunals found Ecuador violated expropriation and FET provisions, respectively
- Ecuador brought counterclaims for environmental damages, and Burlington/Perenco agreed to ICSID jurisdiction — Tribunal site visit only held in Burlington

Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5;
Perenco Ecuador Ltd. v. Republic of Ecuador and Petroecuador, ICSID Case No. ARB/08/6

Environmental Counterclaims by States - *Perenco v. Ecuador*

- Perenco tribunal issued Interim Decision (August 2015)
- Made significant legal findings, including defining environmental harm under Ecuadorian law by reference to regulatory limits (not background values)
- Made some technical findings, including appropriate means of determining the volume of soil that requires remediation
- But appointed its own expert to investigate the sites before ruling on the extent of remediation and remediation damages; expert inspection ongoing
- Urged the parties to settle; no final Award yet

Perenco Ecuador Ltd. v. Republic of Ecuador and Petroecuador

Environmental Counterclaims by States – *Burlington v. Ecuador*

- Burlington Tribunal issued Decision and final Award in 2017, awarding Ecuador only \$39 million of its alleged \$2.5 billion environmental damages (\$33 million soil remediation, \$5 million groundwater, \$1 million site abandonment)
- Made significant legal findings on environmental harm (regulatory limits, not background); burden of proof (Ecuador's burden to show harm, Burlington to prove absence)
- Extensively engaged in technical issues; did not adopt either parties' technical methodology wholesale but developed its own approach to assess extent of impacted areas and volumes of contaminated soils
- Relied on site visit observations, including land use;
- Ecuador filed Annulment Application; the *ad hoc* Committee lifted the provisional stay of enforcement (August 2017)

Burlington Resources Inc. v. Republic of Ecuador

Environmental Judgment and Environmental Defense to Damages – *Chevron v. Ecuador*

- Ecuadorian court issued a \$9.5 billion environmental Judgment against Chevron
- Chevron filed a BIT arbitration, claiming:
 - the Judgment breached an environmental settlement between Ecuador and Texaco, thus breaching an Investment Agreement (settlement agreement was supplementary to the concession agreement)
 - the Judgment was based on fraud, corruption and fundamental due process violations, thus breaching the BIT
 - the Judgment constituted a denial of justice under customary international law
- Ecuador raised environmental issues as a defense to damages
- Merits hearing held in May, 2015 where environmental testimony and arguments made; Tribunal site visit in June, 2015
- Award Pending

Climate Change – Greenpeace Petition before Philippine Commission on Human Rights

- NATURE OF COMMISSION
 - Fact-Finding and policy recommending body, centered on violations of civil and political rights
 - NOT an adjudicatory body – cannot impose civil or criminal penalties, but can make factual findings
- RELIEF GREENPEACE SEEKS FROM COMMISSION
 - Conduct a comprehensive investigation of climate change
 - Investigate human rights implications
 - Decide whether the “Carbon Majors” (relying on Heede report) have breached their responsibilities towards Filipino people
 - Recommend appropriate legislative “accountability mechanisms” to the Philippine congress
 - Recommend that President “call upon other States, especially where the investor-owned Carbon Majors are incorporated,” to take preventive or remediative steps to prevent human rights violations from climate change.
 - Ask “Carbon Majors” to submit plans on how climate change will be remedied and prevented
- PROCEEDINGS TO DATE AND LIKELY NEXT STEPS
 - Objections to jurisdiction
 - Commission conducting public fact-finding hearings, one hearing completed, seven more planned including NYC and London
 - Expect to issue findings in 2019

Advice on Environmental and Human Rights Issues in International Investments