

Environmental and Human Rights Considerations for International Energy Companies

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I. INTRODUCTION

Environmental and human rights issues involving energy companies, foreign sovereigns and NGOs are on the rise. This paper looks at the ways environmental and human rights issues have arisen in international disputes over the past few years, as well as discusses recent developments in international human rights claims seeking to curtail fossil fuel production and use based on climate change concerns.

II. ENVIRONMENTAL CONTAMINATION CLAIMS BY STATES

In the international context, the liability of companies for environmental impacts typically arises in the context of an investment case against the host government. The investor company will bring an investment claim against the host state, which will in turn initiate a claim against the company for environmental damage in an effort to reduce or eliminate any potential damages if the State is found liable for breaching its international obligations toward the investor. Following are two examples.

A. ENVIRONMENTAL CLAIMS ASSERTED BY STATES IN RESPONSE TO INVESTOR TREATY CLAIMS

1. *Burlington v. Ecuador* and *Perenco v. Ecuador*¹

The dispute between Burlington Resources Inc. (“Burlington”) and Perenco Ecuador Limited (“Perenco”) arose out of Ecuador’s response to increased oil prices in the 2000’s. Ecuador sought to benefit from the increased oil prices by imposing a 99% “extraordinary profits” tax on oil companies operating in its jurisdiction (among other measures). This tax applied to Burlington and Perenco, who had previously invested together in certain exploration areas or “blocks” in Ecuador.² Burlington and Perenco refused to pay this tax, after which Ecuador seized the companies’ concession.³

In 2008, Burlington and Perenco each filed a bilateral investment treaty (“BIT”) arbitration, claiming that Ecuador illegally expropriated their property, thereby violating the U.S.-Ecuador BIT, and the France-Ecuador BIT, respectively.⁴ Both claimants brought

¹ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Award on Liability (Dec. 14, 2012) [hereinafter, “*Burlington Liability Award*”]; *Perenco Ecuador Ltd. v. Republic of Ecuador and Petroecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability (Sep. 12, 2014) [hereinafter “*Perenco Jurisdiction and Liability Award*”]

² *Burlington Liability Award* ¶ 35; *Perenco Jurisdiction and Liability Award* ¶ 101.

³ *Burlington Liability Award* ¶¶ 53-56; *Perenco Jurisdiction and Liability Award* ¶¶ 153-166.

⁴ *Burlington Liability Award* ¶¶ 5, 67; *Perenco Jurisdiction and Liability Award* ¶¶ 4, 6.

additional claims that Ecuador violated its contractual and treaty obligations, including that Ecuador failed to accord the claimants fair and equitable treatment as required by the applicable BITs.⁵

In an effort to offset any potential liability, Ecuador brought counterclaims against the companies in both cases, seeking to hold each company jointly and severally liable for alleged environmental damage in the former concession area.⁶ Burlington and Perenco agreed to the existing tribunals' jurisdiction to resolve Ecuador's environmental claims, citing the parties' desire for judicial economy and consistency.⁷ In the *Burlington* case, a site visit was held to examine the alleged contamination. The tribunal in the *Perenco* case did not conduct a site visit.

In August 2015, the *Perenco* tribunal issued an Interim Decision in which it made significant legal findings, including defining environmental harm under Ecuadorian law by reference to regulatory limits rather than the "background values" or "base values" (i.e., the normally occurring levels of certain elements found in the natural environment) that Ecuador argued should apply.⁸ In addition, the *Perenco* tribunal made some technical findings, including appropriate means of determining the volume of soil that requires remediation.⁹

While the *Perenco* tribunal found in favor of the claimant on these issues of fact and law, it found that it was "uncomfortable with simply picking one set of experts' conclusions over the other."¹⁰ Instead, the *Perenco* tribunal appointed its own expert to investigate the sites before ruling on the extent of remediation and remediation damages.¹¹ In the interim, the tribunal urged

⁵ See e.g., *Perenco* Jurisdiction and Liability Award ¶ 286 (listing Perenco's claims as included in its request for relief).

⁶ *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim ¶ 53 (Aug. 11, 2015) [hereinafter "*Perenco* Counterclaims Decision"]; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims ¶ 55(i) (Feb. 7, 2017) [hereinafter "*Burlington* Counterclaims Decision"].

⁷ See *Burlington* Counterclaims Decision ¶ 60; *Perenco* Counterclaim Decision ¶ 5.

⁸ *Perenco* Counterclaim Decision ¶ 321 ("After carefully considering the arguments and the evidence, the Tribunal does not accept Ecuador's arguments that its hydrocarbons regulatory regime does not sufficiently protect the environment and therefore should give way to the 'background values' or 'base values' methodology"); see also *id.* ¶ 50.

⁹ *Perenco* Counterclaim Decision ¶¶ 449-456 (concluding that "the general use of delineation in the industry when seeking to determine the existence and extent of contamination, the difficulty exhibited by [Ecuador's expert] when seeking to explain what they had done in the modelling exercise, [Perenco's expert's] contrasting testimony which was clear and convincing, considered together with the demonstrative exhibits employed by the Parties, has created such strong doubt in the Tribunal's mind that it is compelled to reject the mapping exercise in its entirety. Given its view as to the frailties of [Ecuador's expert's] mapping exercise, the Tribunal considers that delineation of contaminated sites is the appropriate means of ascertaining the volume of soil that requires remediation.")

¹⁰ *Id.* ¶ 585.

¹¹ *Id.* ¶¶ 586-587.

the parties to settle based on the findings that the tribunal had already made.¹² The parties are currently waiting for a final award.

In February 2017, the *Burlington* tribunal issued a “Decision on Ecuador’s Counterclaims”¹³ and a “Decision on Reconsideration and Award.”¹⁴ It awarded Ecuador only \$39 million of its alleged \$2.5 billion environmental damages, which consisted of \$33 million soil remediation, \$5 million groundwater remediation, \$1 million for site abandonment.¹⁵

In its decision, the tribunal made significant legal findings on environmental harm. Like the *Perenco* tribunal, the *Burlington* tribunal concluded that regulatory limits, rather than background values should apply to determine the extent of any alleged contamination.¹⁶ The tribunal also concluded Ecuador had the “burden to make a showing of harm plausibly connected to [Burlington’s] activities” but that Burlington “then ha[d] the burden of proving its absence.”¹⁷

The *Burlington* Decision on Ecuador’s Counterclaims is notable because the tribunal extensively engaged in the technical issues in the case. Moreover, it did not adopt either party’s technical methodology wholesale but instead developed its own approach to assess the extent of the impacted areas and volumes of contaminated soils. In addition, the *Burlington* tribunal relied on its own site visit observations, including its observations of the use of land.

Shortly after the *Burlington* tribunal issued its Decision on Ecuador’s Counterclaims and Decision on Reconsideration and Award, Ecuador filed an application to annul the latter.¹⁸ The ICSID Secretary-General then notified the parties of a provisional stay of the enforcement of the award, pending the constitution of an ad hoc committee to consider the annulment. In August 2017, the *Burlington* ad hoc committee lifted the provisional stay of enforcement.¹⁹

The parties settled in December 2017, precluding the need for recognition and enforcement proceedings.

¹² *Id.* ¶ 611(9) (“[T]he Parties are instructed to review the findings made in this Decision and to consult with each other with a view to discussing whether it would be possible to arrive at a settlement of this counterclaim in a manner consistent with this Decision. Any communications or documents exchanged by the Parties in connection with such discussions shall be on a without prejudice basis and shall not be disclosed to the Tribunal or to the Tribunal’s expert in the event that no settlement is reached.”).

¹³ *Burlington* Counterclaims Decision.

¹⁴ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (Feb. 7, 2017).

¹⁵ *Burlington* Counterclaims Decision ¶¶ 889, 1099.

¹⁶ *Id.* ¶¶ 291 (“[I]t is the Tribunal’s view that environmental harm is defined by reference to regulatory criteria. . . . In other words, an oilfield operator could not be considered to have caused environmental harm if permissible limits were observed, since precisely these permissible limits allow determining when a negative impact crosses the threshold of harm.”).

¹⁷ *Id.* ¶ 226.

¹⁸ *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 – Annulment Proceeding, Decision on Stay of Enforcement of the Award ¶ 1 (Aug. 31, 2017).

¹⁹ *Id.* ¶ 8.

2. Investment Claim Involving an Environmental Judgment and Environmental Counterclaims – *Chevron v. Ecuador*

In February 2011, a court in Lago Agrio, Ecuador issued an \$18 billion judgment against Chevron (later reduced to \$9.5 billion) for alleged contamination resulting from crude oil production in the Oriente region of Ecuador.

On September 23, 2009, while the dispute in Lago Agrio was ongoing, Chevron and TexPet (Chevron’s subsidiary that operated in Ecuador) sought relief against Ecuador under the U.S.-Ecuador BIT. The claimants asserted that TexPet had been released from all environmental impact arising out of the former Consortium’s activities and that Ecuador and Petroecuador were responsible for any remaining and future remediation work.²⁰ After the Lago Agrio judgment was issued, the claimants also introduced evidence that fraud and corruption were used to procure the Lago Agrio judgment.²¹ Chevron has asked the tribunal for declaratory relief and for an indemnity related to the potential enforcement of the Lago Agrio judgment against it.

In defense, Ecuador argued that any indemnity the tribunal grants should be offset by the amount of Chevron’s actual liability.²² To this end, Ecuador has argued that the tribunal must conduct its own analysis of the alleged environmental harm.²³

The tribunal has ordered Ecuador to prevent enforcement of the contested judgment while the arbitration proceedings are ongoing. On February 9, 2011, the tribunal ordered Ecuador to take all measures at its disposal to suspend enforcement or recognition of any judgment that the Lago Agrio court would render against Chevron.²⁴ On January 25, 2012, the tribunal reiterated that Ecuador should take all measures available to suspend or cause to be suspended the recognition of the judgment.²⁵ Again, on February 16, 2012, the tribunal once again directed Ecuador to take “all measures necessary to suspend or cause to be suspended the recognition or enforcement both within and outside Ecuador of the Ecuadorian appellate judgment” that confirmed the Lago Agrio judgment.²⁶ On February 7, 2013, the tribunal found that Ecuador had violated the tribunal’s directives and the international law due to its failure to comply with its awards.

²⁰ *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23, Claimants’ Notice of Arbitration, §VI (Sept. 23, 2009).

²¹ *See, e.g., Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23, Claimants’ Supplemental Memorial on the Merits (Mar. 20, 2012).

²² *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23, Ecuador’s Track 2 Counter-Memorial on the Merits ¶ 448 (Feb. 18, 2013).

²³ *Id.* ¶ 450.

²⁴ *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23, Tribunal’s Order on Interim Measures § E (Feb. 9, 2011).

²⁵ *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23, First Interim Award on Interim Measures § (VI) (Jan. 25, 2012).

²⁶ *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23, Second Interim Award on Interim Measures ¶ 3(i) (Feb. 16, 2012)

Ecuador unsuccessfully sought to set-aside the interim measures awards and the partial arbitral awards. On January 7, 2014, Ecuador asked the District Court of the Hague in the Netherlands (the legal seat of the arbitration) to set aside all of the tribunal’s awards. Ecuador argued, inter alia, that (i) there is no valid arbitration agreement; (ii) the awards violate public policy; and (iii) the arbitrators did not comply with their mandate.²⁷ On January 20, 2016, a three-member panel of the Hague District Court denied Ecuador’s petition and ordered it to pay the costs of the proceeding.²⁸ On July 18, 2017, the Hague Court of Appeal denied Ecuador’s appeal seeking to set aside all of the tribunal’s awards to date.

With respect to the environmental claims underlying the dispute, the tribunal determined on September 17, 2013, that the claimants were “Releasees” under the applicable settlement and release agreements.²⁹ It also concluded that, while the scope of those agreements would not extend to any environmental claim made by an individual for personal injury to himself or to his personal property, they did conclusively resolve any collective or diffuse claim made against the companies by Ecuador under the Ecuadorian Constitution or by any individual not claiming personal harm.³⁰

A merits hearing was held in May 2015, where the tribunal heard testimony on the merits of the dispute, including environmental issues. The tribunal also conducted a site visit in June 2015. An award on those issues is pending.

B. STRATEGIES FOR ENERGY COMPANIES TO DEFEND AGAINST INTERNATIONAL ENVIRONMENTAL CONTAMINATION CLAIMS

1. Common Environmental Damage Allegations

Staying informed as to types of environmental claims made in international cases is key to minimizing the risk of ultimately facing such a claim. Some of the most common claims center on the extent of the remediation historic operations might require, which depends on the applicable standards, as well as, a State would argue, the alleged misconduct of the oil company.

First, a State will typically assert that the energy company’s operations failed to comply with industry standards and historic laws. As seen in *Burlington v. Ecuador* and *Perenco v. Ecuador*, a State may argue that its own regulations do not apply, and that instead, the tribunal should apply a stricter standard, such as remediating to “background” or “base” levels—i.e., the level of a contaminant that naturally occurs in the environment.

As evidence, States in arbitration against energy companies will seek internal company documents during document production attempting to argue that they are evidence of non-compliance with industry and company standards and host country laws. In pursuit of this

²⁷ *Republic of Ecuador v. Chevron Corp.*, Case No. C/09/477457 / HA ZA 14-1291, Judgment, District Court of the Hague, Jan. 20, 2016, § 3.2.

²⁸ *Id.* §§ 5.1-5.3.

²⁹ *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23, First Partial Award on Track 1 ¶ 112 (Sept. 17, 2013).

³⁰ *Id.*

strategy, the State will seize on any language that suggests indifference or callousness toward environmental concerns.

The State will typically argue that substandard operations caused large-scale contamination, which the energy company knew about and covered up. It will then argue that this contamination has caused or has the potential to cause significant health and ecosystem impacts.

In the context of a State's counterclaim against an energy company in an investment dispute, the State will argue that extensive and costly remediation is needed to restore the environment to original or safe conditions. On this basis, the State will seek compensation from the energy company to conduct the remediation, which would obviously lessen or completely offset the damages the oil company is seeking against the State.

2. Strategies to Defend against State's Claims of Environmental Contamination

One strategy in defending against potential State environmental contamination claims is to think long-term. History has shown that disputes over historic exploration and production operations are likely to occur. The more thoughtful and well-documented a remediation – whether in response to an operational spill or upon exiting an asset – the better armed the company will be to defeat subsequent environmental damage claims.

Next, an energy company should evaluate whether to conduct environmental due diligence on an asset it is preparing to transfer. Similar to the practice in the United States, this would allow the company to understand potential future liabilities and address those liabilities by conducting remediation before transfer or addressing through contractual language.

Third, if an energy company conducts remediation, either through ongoing operations or a transfer, it should use defensible remediation standards and technology, especially if the host country does not have a robust regulatory remediation program. If the remediation is subsequently challenged, very likely comparisons will be made with the company's U.S. remediations and any subsequent host country remediation standards and methods. The company should also evaluate coordinating with regional or local stakeholders.

In line with the previous point, energy companies should coordinate all remediation activities and decisions with the host country and, as applicable, with the national energy company. By coordinating with them and obtaining approval of all remediation decisions, including remediation standards and methods, (and documenting such approval) companies can minimize their risk of liability. Energy companies should additionally seek a release for the remediation, as well as from liability for any residual environmental impacts.

Even after remediating the area to the satisfaction of the host State, energy companies should anticipate claims related to residual environmental impacts in the area, if not from the State then potentially NGOs or other third parties. It is likely that environmental impacts will remain post-remediation because, for example, risk-based standards do not require complete elimination of all environmental impacts or because of subsequent operators. Companies should therefore anticipate legal or media claims based on residual impacts and be prepared to explain

why such impacts that remain are not harmful or distinguish its operations from subsequent operators.

During due diligence and remediation, evaluate using the most defensible data collection and analysis techniques, such as analytical test methods, quality assurance and quality control (“QA/QC”) and the potential need for non-traditional analytical reports. These issues will be scrutinized in any subsequent proceeding.

In addition, companies engaged in remediation should be mindful of documents generated leading up to and during the remediation as those documents could come into play in subsequent disputes. The decisions made in selecting and implementing the assessment or remediation of operations should be clear, follow company policy and applicable regulations. If any sensitive issues arise or could arise out of the assessment and remediation process, it is also important to lay the foundation to claim privilege.

Depending on the circumstances it may also make sense to involve neutrals during the remediation process. To this end, companies should evaluate potential collaboration with a reputable non-governmental organization or similar local neutral, to develop and present the most reasonable remediation approach. Including such entities ensures that the remediation will be carried out successfully and lend additional credibility to the company’s remediation efforts.

C. SPECIAL CONSIDERATIONS FOR ENVIRONMENTAL CONTAMINATION CLAIMS

1. Does the Tribunal have Jurisdiction over Counterclaims?

It is likely that an investment treaty tribunal will have jurisdiction over counterclaims by the State against the investor. However, a tribunal’s decision on jurisdiction over a State’s counterclaim will turn on the scope of the parties’ agreement to arbitrate, i.e., the language of the applicable treaty. The language of the dispute resolution provision of investment treaties typically refers to any disputes arising between the State party to the treaty and an investor of the other party to the treaty (although there are some cases in which tribunals have found that the treaty does not contemplate counterclaims by States).

As an example, the tribunal in *Urbaser v. Argentina*, concluded that it did have jurisdiction over the State’s counterclaim. The relevant provision of the BIT in that case provided:

Disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement, shall as far as possible, be settled amicably between the parties to the dispute [before proceeding to arbitration].³¹

The tribunal reasoned that “[t]his provision is completely neutral as to the identity of the claimant or respondent in an investment dispute arising ‘between the parties.’ It does not indicate that a State Party could not sue an investor in relation to a dispute concerning an investment.”³²

³¹ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award ¶ 1143 (Dec. 8, 2016) (quoting the Spain-Argentina BIT).

³² *Id.* ¶ 1143.

However, there is some authority holding that the counterclaim must have a “close connection” with the investors’ primary claim.³³ But the tribunal in *Urbaser v. Argentina* found that the fact that both the claim and the counterclaim were based on the same investment and related to the same concession was sufficient to establish such a connection.³⁴

In any event, a company may find it beneficial to resolve any environmental disputes in front of a neutral forum, such as an international tribunal, for the same reasons that it hopes to benefit from having its investment dispute resolved in a neutral forum. Depending on the circumstances of the case, the resulting decision may be binding on domestic courts and therefore prevent the company from being sued in a less favorable forum. The *res judicata* effect of an arbitral award is a complex issue that would require analysis before determining that an international award would have such *res judicata* effect. But the issue is worth investigating before opposing a State’s counterclaim based on the jurisdiction of the tribunal. If it is reasonably certain that a State’s environmental counterclaim would be finally resolved in a preclusive manner by the tribunal, it may be advantageous for a company to accept the jurisdiction of the tribunal.

2. Applicable Environmental Standards

One issue that will always arise is the applicable environmental standard. Similar to U.S. litigation, those asserting environmental damage usually claim per contract or statute that the property should be remediated to background or original condition. This was Ecuador’s position in *Burlington Resources* and *Perenco*, which the tribunals rejected. Sometimes the environmental standards that currently apply may be more stringent than those that applied at the time of remediation. In a transfer of the property that situation should be considered and addressed through contractual language and/or through analysis of the most appropriate standard at the time of remediation. More likely than not, any environmental contamination claim will involve justification of the remediation standard that was used.

3. Use of Experts

Environmental disputes typically involve party experts to analyze the presence and extent of any environmental impacts and/or evaluate prior remediation. Depending on the environmental media involved, this could include a need for a number of scientific disciplines. In addition, following the civil law tradition, the tribunal may appoint its own expert.

4. Use of Site Visits

Tribunals in environmental cases, such as *Burlington*, have conducted site visits as part of the arbitration process. If this occurs, close attention should be given to the numerous issues that the parties will need to negotiate, including travel and site logistics, security, recordings and whether the visit becomes part of the arbitration record.

³³ See, e.g., *Paushok B.V. v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over Czech Republic’s Counterclaim ¶ 27 (May 7, 2004).

³⁴ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award ¶ 1151 (Dec. 8, 2016).

III. CLAIMS AGAINST STATES FOR MEASURES OSTENSIBLY AIMED AT ADDRESSING ENVIRONMENTAL CONCERNS

While the most obvious international environmental dispute may arise out of claims against private entities for environmental impacts, companies should also be aware of *their* rights against host States that may overreach when regulating or otherwise taking measures to address environmental concerns. It is uncontroversial that States have the right to take measures to protect the environment and to prevent private actors from harming the environment. However, States may not use environmental concerns as a mere pretext to favor companies or industries within their jurisdiction. In other words, the mere invocation of environmental concerns is not a silver bullet that eliminates a State's obligations toward investors (typically enshrined in the applicable BIT, multi-lateral treaty, or, in some cases, public international law).

A. STATES MAY REGULATE ENVIRONMENTAL ISSUES BUT MUST HAVE LEGITIMATE ENVIRONMENTAL CONCERNS AND REFRAIN FROM DISCRIMINATING AGAINST FOREIGN INVESTORS

The need to balance a State's right to regulate in response to environmental concerns and its obligation to promote and protect foreign investment is evident in a series of decisions that exemplify a tribunals' need to balance these competing interests. In two of the cases discussed below, the tribunals found that State measures ostensibly taken to protect the environment did not actually seek to protect a legitimate environmental interest but instead benefited local companies at the expense of foreign investors. But in the third case, the tribunal found that the United States (in particular the State of California) had a legitimate interest in taking measures to protect the environment. These cases make clear that States may not rely on environmental concerns to benefit domestic companies at the expense of foreign investors.

1. *S.D. Myers v. Canada*

This issue arose in the late 1990's when a family-owned American company's investment in Canada was affected by Canada's environmental policies.³⁵ The company, S.D. Myers International ("S.D. Myers"), remediated transformer oil and equipment to remove a contaminant called polychlorinated biphenyl ("PCB"), which required the destruction of PCBs and PCB waste material.³⁶ In the 1970's PCBs were recognized as highly toxic substances and were therefore heavily regulated by both domestic law and internationally by treaties (including the Basel Convention)—which restricted the import and export of PCBs.³⁷

S.D Myers, which was located only 100 kilometers from the Canadian border, entered the Canadian market for remediation of PCBs when only one Canadian competitor existed and was located thousands of miles from the majority of Canada's PCB inventory and thousands of miles from S.D. Myers.³⁸ At this point, it was unclear whether national or international law would

³⁵ *S.D. Myers, Inc. v. Gov't of Canada*, UNCITRAL, Partial Award ¶¶ 89, 123-127 (Nov. 13, 2000).

³⁶ *Id.* ¶¶ 91, 94.

³⁷ *Id.* ¶¶ 98-109.

³⁸ *Id.* ¶ 112.

permit S.D. Myers to transport PCB from Canada to the U.S. for remediation.³⁹ However, the U.S. Environmental Protection Agency provided S.D. Myers with express permission to import PCBs and PCB waste from Canada into the U.S. for disposal.⁴⁰ As a result of EPA's decision, Canada had to determine whether it would also permit PCBs to be exported to the U.S. in light of its internal policies and treaty obligations.⁴¹ Ultimately, Canada resolved to close the Canada-U.S. border to PCB transport in 1995.⁴²

S.D. Myers brought claims in international arbitration against Canada, alleging that Canada violated its NAFTA obligations to S.D. Myers by failing to treat S.D. Myers equally with Canadian companies and without discrimination and that it failed to treat S.D. Myers fairly and equitably.⁴³ In particular, it argued that Canada's decision to close the border for the transport of PCB waste was a protectionist measure that granted better treatment to S.D. Myer's Canadian competitors.⁴⁴

In November 2000, an international tribunal ruled in favor of S.D. Myers and held Canada liable for breaching NAFTA. It concluded that the ban prohibiting exports of PCBs "were intended primarily to protect the Canadian PCB disposal industry" and that "there was no legitimate environmental reason for introducing the ban."⁴⁵ Moreover, "the practical effect [of the ban] was that [S.D. Myers] and its investment were prevented from carrying out the business they planned to undertake, which was a clear disadvantage in comparison to its Canadian competitors."⁴⁶ Although the tribunal recognized that Canada had a legitimate interest in ensuring that it had the ability to process PCBs within Canada in the future by ensuring the development of the PCB disposal industry in Canada, it considered that the State could have taken other measures to protect that interest that would not have disproportionately benefited Canadian companies over foreign companies. For example, Canada could have offered subsidies to Canadian companies or require that all government remediation work be granted to local companies.⁴⁷

Thus, *S.D. Myers* is a prime example of an investor asserting its rights in the face of discriminatory regulations based on environmental issues.

³⁹ *Id.* ¶¶ 98-109.

⁴⁰ *Id.* ¶ 118.

⁴¹ *Id.* ¶ 121.

⁴² *Id.* ¶¶ 123-26. Canada did re-open the border for transport of PCB waste in February 1997. However, a U.S. Ninth Circuit decision closed the border again in July 1997.

⁴³ *Id.* ¶ 130.

⁴⁴ *Id.* ¶¶ 131, 134-35.

⁴⁵ *Id.* ¶¶ 194, 195.

⁴⁶ *Id.* ¶ 193.

⁴⁷ *Id.* ¶¶ 253-257.

2. *Tecmed v. Mexico*

A few years later, in 2003, another tribunal found that Mexico violated the Spain-Mexico BIT by refusing to renew a Spanish company's permit to operate a waste disposal site.⁴⁸ In *Tecmed v. Mexico*, the investor, Técnicas Medioambientales S.A. ("Tecmed"), a Spanish company, claimed that the Instituto Nacional de Ecología's (National Ecology Institute or "INE") refusal to renew Tecmed's license to operate a hazardous waste facility resulted in an act tantamount to expropriation in violation of the BIT.⁴⁹ In response, Mexico argued that INE's exercise of its regulatory power to grant and revoke licenses could not constitute a measure tantamount to expropriation and was not subject to the legal review of an international tribunal.⁵⁰ In addition, Mexico claimed that Tecmed had not fulfilled certain requirements necessary to maintain its license and had paid fines for improperly transporting toxic waste from a plant in Baja California.⁵¹

However, the Tribunal concluded that INE's decision to revoke Tecmed's license was not actually based on concerns over a serious threat to public health or to the environment caused by Tecmed's actions, but rather, a measure taken pursuant to political and social pressure from the residents of Hermosillo, Sonora, who objected to the location of the toxic waste plant.⁵² In reaching this conclusion, the tribunal noted that the consultations between INE and the governor of Sonora mainly concerned the location of a plant and the social and political concerns of INE, and not public health and environmental reasons.⁵³ The tribunal also found it relevant that Tecmed had agreed to re-locate its plant as long as it could continue to operate while searching for a new location.⁵⁴ For these reasons, the tribunal found that the revocation of the license was an arbitrary measure that deprived Tecmed of the value of its investment.⁵⁵ In addition to finding that Mexico expropriated Tecmed's investment, it found that Mexico's actions were arbitrary and non-transparent and therefore violated the fair and equitable treatment standard imposed by the BIT.⁵⁶

3. *Methanex v. United States*

Finally, in *Methanex v. United States*, Methanex (a Canadian corporation and the world's largest producer of methanol) claimed that the United States illegally expropriated its investment

⁴⁸ *Tecnicas Medioambientales Tecmed S.A v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award ¶ 201 (May 29, 2003).

⁴⁹ *Id.* ¶¶ 41-45.

⁵⁰ *Id.* ¶¶ 46-51.

⁵¹ *Id.* ¶ 50.

⁵² *Id.* ¶ 131.

⁵³ *Id.* ¶¶ 131-34.

⁵⁴ *Id.* ¶ 142.

⁵⁵ *Id.* ¶ 151.

⁵⁶ *Id.* ¶ 174.

under NAFTA when California banned the sale of MTBE.⁵⁷ California banned MTBE based on a study that it requested, which showed the health risks of the compound—an oxygenate added to petroleum in order to lower vehicle emissions.⁵⁸ However, California did not ban a competing petroleum additive based on ethanol—ETBE—which was manufactured mainly by a single U.S. company, Archer Daniels Midland.⁵⁹ The claimant in this case, Methanex, did not actually produce MTBE but produced methanol—an ingredient used in the production of MTBE.

Methanex argued that the Governor of California conspired with Archer Daniels Midland to provide beneficial treatment to ethanol over MTBE. This argument rested on fantastic allegations involving the Californian Governor that bordered on unlawful conduct.⁶⁰ The tribunal, however, rejected Methanex claims, finding that California had a legitimate interest in banning MTBE:

To our minds, the scientific and administrative record establishes clearly that Governor Davis and the California agencies acted with a view to protecting the environmental interests of the citizens of California, and not with the intent to harm foreign methanol producers.⁶¹

In reaching its conclusion, the tribunal considered the evidence that Methanex presented that allegedly showed that the ban resulted from the Governor of California’s intent to solicit campaign contributions from Methanex’s competitor. It concluded that the “evidential record establishes no ill will towards Methanex or methanol.”⁶² Instead, “[f]aced with a widespread and potentially serious MTBE contamination of its water resources, California ordered a careful assessment of the problem and thereafter responded reasonably to independent findings that large volumes of the state’s ground and surface water had become polluted by MTBE and that preventative measures were called for.”⁶³

B. BREACH OF HOST COUNTRY ENVIRONMENTAL LAW AMOUNTED TO BREACH OF MINIMUM STANDARD OF TREATMENT AND NATIONAL TREATMENT – *BILCON V. CANADA*

In another investment case dealing with the environmental policy of a host State, a group of Canadian investors brought a NAFTA claim against Canada for refusing to allow the development of a proposed quarry and marine terminal in Nova Scotia, Canada, for

⁵⁷ *Methanex Corp. v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, ¶ 1 (Aug. 3, 2005).

⁵⁸ *See Id.* at Part I, Chapter A - ¶ 1, Part III – Chapter A - ¶ 102.

⁵⁹ *See Id.* at Part I, Chapter A - ¶ 1, Part II – Chapter E - ¶ 5, Part III – Chapter A - ¶ 102.

⁶⁰ *See e.g., Id.* at Part II – Chapter E - ¶ 5.

⁶¹ *Id.* at Part IV – Chapter E - ¶ 20.

⁶² *Id.* at Part IV – Chapter E - ¶ 20.

⁶³ *Id.* at Part IV – Chapter E - ¶ 20.

environmental reasons.⁶⁴ This case is notable because the outcome has been described as a “remarkable step backwards in environmental protection.”⁶⁵

Bilcon arose out of the claimants’ environmental application to build a quarry and marine terminal in Nova Scotia. That application was ultimately submitted to a joint review panel (a “JRP”)—“the most rigorous, protracted and expensive kind of review” in Canada.⁶⁶ Claimants argued that this kind of environmental review was never used for its kind of project and was instead reserved for projects of greater magnitude and entailing greater environmental risk.⁶⁷ They alleged that, in order to address the issues raised in the review, they engaged 35 experts and produced an Environmental Impact Statement that spanned over 3,000 pages.⁶⁸ However, according to the claimants, an anti-American discriminatory bias infected the public process, and the resulting JRP Report relied on the “core community values” expressed during the public hearings to assess the project.⁶⁹ The JRP did not assess whether the project would leave “significant adverse effects after mitigation,” which was the standard required under the applicable Canadian law.⁷⁰

Canada defended its decision to subject the claimants’ application to a JRP, noting the sensitivity of the marine environment that could have been affected by the proposed quarry and marine terminal and the concerns expressed within the local community.⁷¹ Canada also argued that claimants were notified of the “community core values” approach adopted by the JRP, which was consistent with Canadian law.⁷²

The tribunal found that Canada did breach Article 1105 of NAFTA, which provides that a State’s conduct must meet the minimum standard of treatment under international law, even though the tribunal acknowledged the high threshold for the conduct of a host State to breach Article 1105 must be sufficiently serious or “grossly unfair” in order to amount to a breach.⁷³ In finding that the State failed to meet the minimum standard of treatment, the tribunal noted that the claimants were encouraged to invest in the proposed quarry, including by spending millions of dollars on an Environmental Impact Assessment, based on Canada’s representation that they needed to comply with all current applicable laws.⁷⁴ Instead, the JRP adopted an unprecedented

⁶⁴ *Bilcon of Delaware, Inc. et al. v. Gov’t of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015).

⁶⁵ *Id.* ¶ 51.

⁶⁶ *Id.* ¶ 15.

⁶⁷ *Id.* ¶ 16.

⁶⁸ *Id.* ¶ 18.

⁶⁹ *Id.* ¶¶ 18-20.

⁷⁰ *Id.* ¶ 21.

⁷¹ *Id.* ¶¶ 29-33.

⁷² *Id.* ¶ 35.

⁷³ *Id.* ¶¶ 442-446.

⁷⁴ *Id.* ¶¶ 447-449.

approach to its review of the Environmental Impact Assessment and failed to sufficiently notify the claimants of this approach in advance of the review.⁷⁵ The tribunal concluded:

[T]he Investors were encouraged to engage in a regulatory approval process costing millions of dollars and other corporate resources that was in retrospect unwinnable from the outset, even though the Investors were specifically encouraged by government officials and the laws of federal Canada to believe that they could succeed on the basis of the individual merits of their case. . . . In the end, the JRP’s decision was effectively to impose a moratorium on projects of the category involved here—a kind of zoning decision.⁷⁶

The tribunal concluded that Canada had violated the treaty and moved to the quantum phase of the case. The tribunal recently heard the parties arguments on quantum in February 2018, in a public hearing held in Toronto.⁷⁷

In his dissent, Canada’s appointment to the tribunal, Donald McRae, disagreed that the “high standard” for breach of Article 1105 can be “met simply by an allegation of a breach of Canadian law.”⁷⁸ He further argued that the implications of the majority’s decision would have far-reaching effects for environmental reviews in Canada, as well as in other countries. He pointed out that the claimants could have sought review of the JRP’s decision within Canada, but they did not. Instead, according to McRae, “the majority has . . . add[ed] a further control over environmental review panels” noting that “[f]ailure to comply with Canadian law by a review panel now becomes the basis for a NAFTA claim allowing a claimant to bypass the domestic remedy provided for such a departure from Canadian law.”⁷⁹ In McRae’s opinion, this was a “serious intrusion into domestic jurisdiction and will create a chill on the operation of environmental review panels.”⁸⁰

Canada is currently seeking to set aside the tribunal’s decision, arguing that the tribunal exceeded its jurisdiction.

C. COMPENSATION DUE FOR EXPROPRIATION TAKEN FOR ENVIRONMENTAL PURPOSE – *SANTA ELENA V. COSTA RICA*

As can be seen above, a State’s interest in the environment is not a silver bullet that will relieve it of its treaty obligations to foreign investors. Similarly, taking property for an environmental purpose does not relieve a State of compensating the investor who suffered from such a taking.

⁷⁵ *Id.* ¶¶ 450-451.

⁷⁶ *Id.* ¶¶ 453-54.

⁷⁷ PCA Press Release, “Bilcon of Delaware et al v. Government of Canada,” The Hague, Feb. 6, 2017, available at <https://www.italaw.com/sites/default/files/case-documents/italaw9486.pdf>.

⁷⁸ *Bilcon of Delaware, Inc. et al. v. Gov’t of Canada*, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae ¶ 2 (Mar. 10, 2015).

⁷⁹ *Id.* ¶ 48.

⁸⁰ *Id.* ¶ 48.

The tribunal in *Santa Elena v. Costa Rica* reached this conclusion, confirming that an environmental purpose is just like any other purpose for which a State may expropriate—in such cases, the State may expropriate the property but must satisfy all of the requirements of a legal taking imposed by the BIT, including by providing just compensation:

While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking The international source of the obligation to protect the environment makes no difference”⁸¹

Thus, the application of an international treaty aimed at protecting the environment does not relieve a state of its obligation to pay full compensation for taking an investor’s property.

D. ENVIRONMENTAL ISSUES ARISING DURING THE ENFORCEMENT OF AN AWARD AGAINST A STATE

Companies that have won an arbitral award against a State resolving the State’s environmental claims may have to revisit those environmental issues in enforcement proceedings. This may arise under the New York Convention’s “public policy” exception to recognition and enforcement. But although protecting the environment comprises part of the public policy of most States—the mere allegation by a State of environmental harm is not enough to prevent the enforcement of an award on public policy grounds.

In *Crystallex v. Venezuela*, Venezuela fought the confirmation of an award against it in the U.S. District Court for the District of Columbia, arguing that “confirming the award would harm the public policy of the United States that States have the sovereign right to regulate the environmental impact of industrial activities because Venezuela’s conduct toward Crystallex was intended to protect Venezuela’s environment.”⁸²

The D.C. District Court rejected this argument, noting that the public policy exception to confirmation in the New York Convention is construed narrowly such that only violations of the forum State’s most basic notions of morality and justice would merit a refusal to confirm.⁸³ This argument was rejected because the public policy exception in the New York Convention is to be construed narrowly. The court found no violation of public policy under this narrow construction, reasoning that the tribunal “cast serious doubt on whether Venezuela’s assertions of environmental concerns motivated its actions” and that Venezuela failed to “demonstrat[e] that holding it to the terms of its own treaty would violated [the U.S.’s] basic notions of morality and justice.”⁸⁴

⁸¹ *Compañía del Desarrollo de Santa Elena, S.A. and Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award ¶ 71 (Feb. 17, 2000).

⁸² *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, Memorandum Opinion, Civil Action No. 16-0661, at 27 (D.D.C. Mar. 25, 2017) (internal quotation marks omitted).

⁸³ *Id.* at 28.

⁸⁴ *Id.*

The D.C. District Court’s interpretation of the New York Convention confirms that a mere allegation of environmental harm is typically insufficient to engage the public policy exception to confirmation and recognition of an arbitral award.

E. RECOMMENDATIONS TO COMPANIES AFFECTED BY STATE’S ACTS

While States have the right (and the obligation, as discussed further below) to take measures aimed at protecting the environment, companies affected by such measures should be aware of their rights as well. As a first step, before investing in another country, a company should identify any potentially applicable treaties that could provide some measure of protection. Knowing what treaties a host State has signed and the level of protection each treaty affords will also allow companies to structure their investment to obtain treaty protection.

Foreign investors must also be aware of their rights when facing environmental restrictions imposed by a State. These rights will depend on the applicable treaty. For example, investors will typically be protected against State action that is discriminatory—ie., action that favors local companies over foreign companies. If a State institutes environmental actions that disproportionately affect foreign investors over their local competitors, the State could be held liable for taking measures that harmed the investment. Being aware of these and other rights will help a company determine whether it has a claim against a State for overreaching when it takes environmental action that affects the company.

IV. HUMAN RIGHTS CONSIDERATIONS IN INTERNATIONAL ENERGY INVESTMENTS

Claims of human rights impacts associated with international investments have become an increasingly important consideration in the past few years. That trend is continuing in investment treaty disputes, where it is raised by States as a defense to a treaty claim. In addition, based on a recent advisory opinion by the Inter-American Court of Human Rights, a State Party to the American Convention on Human Rights has an obligation to avoid transboundary environmental damage that may impact human rights of persons outside their territory. Finally, States and third parties are seeking support before human rights commissions and international courts to rule that fossil fuel investment and use is the major cause of climate change, which in turn affects a human right to a healthy environment.

A. HUMAN RIGHTS ISSUES IN INVESTMENT TREATY DISPUTES

In investment arbitration disputes, human rights claims are being raised by States as defenses to investment claims, i.e., the State has human rights obligations that supersedes its investment treaty obligation. Most tribunals that have considered these claims have implicitly rejected them because the claims have not involved true conflicts between human rights and investment obligations.⁸⁵ The ICSID award in *Urbaser v. Argentina* is the first to provide a detailed discussion of a host state’s human rights counterclaim and suggest that private actors,

⁸⁵ See *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award ¶ 230 (June 21, 2011) (recounting Argentina’s argument regarding human rights); *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award ¶¶ 331-32 (Sept. 28, 2007).

such as investors, might be bound by human rights obligations, even though the tribunal ultimately concluded it was not applicable to the claimants in this case.

In *Urbaser v. Argentina*, the Spanish claimants argued that Argentina breached the Spain-Argentina investment treaty by failing to accord the claimant fair and equitable treatment, taking unjustified and discriminatory measures against the claimant, and illegally expropriating the claimant's investment.⁸⁶ The claimants had invested in a concession to provide water and sewage services to the Province of Greater Buenos Aires.⁸⁷ It argued that the development of the project was obstructed by the Province's authorities in violation of the treaty.⁸⁸ The concession was ultimately terminated after the economic crisis in Argentina when the Argentine peso depreciated to such an extent that the project became uneconomical for the investors due to the decreased value of the tariffs due to the concession-holder. But the Argentine government failed to renegotiate a tariff rate based on the new value of the Argentine peso.⁸⁹

Argentina counterclaimed, alleging that claimants' failure to provide necessary investment in the water and sewage concession, which would have guaranteed the basic human right to water and sanitation.⁹⁰ Argentina argued that, by doing so, claimants "violated the principles of good faith and *pacta sunt servanda*" and that such failure affected "basic human rights, as well as the health and the environment of thousands of persons, most of which lived in extreme poverty."⁹¹ Argentina rested its counterclaim on the Universal Declaration of Human Rights of 1948, which it considered part of customary international law.⁹²

Notably, the tribunal recognized that private actors such as the claimants held an international law obligation not to engage in activity aimed at destroying human rights.⁹³ However, the tribunal rejected Argentina's counterclaim, noting that it is the State's obligation to enforce the human right to water and that obligation cannot be passed to private actors:

While it is thus correct to state that the State's obligation is based on its obligation to enforce the human right to water of all individuals under its jurisdiction, this is not the case for the investors who pursue . . . the same goal, but on the basis of the Concession and not under an obligation derived from the human right to water. Indeed, the enforcement of the human right to water represents an obligation to perform. Such obligation is imposed upon States.⁹⁴

⁸⁶ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award ¶ 35 (Dec. 8, 2016).

⁸⁷ *Id.* ¶ 34.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* ¶ 1156.

⁹¹ *Id.*

⁹² *Id.* ¶ 1158.

⁹³ *Id.* ¶ 1199.

⁹⁴ *Id.* ¶ 1210.

In addition, the tribunal considered that the claimants' investment in the concession did not cause them to undertake any human rights obligations deriving from international law: "[The concession-holder's] performance and its shareholders' investment were certainly designed as a substantial contribution to the enforcement of the population's right to water. Nevertheless, the mere relevance of this human right under international law does not imply that [the concession-holder] and its shareholders were holding corresponding obligations equally based on international law."⁹⁵ Thus, the tribunal rejected Argentina's human rights counterclaim.

B. ADVISORY OPINION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS ON HUMAN RIGHTS AND THE PROTECTION OF THE ENVIRONMENT

In February of 2018, the Inter-American Court of Human Rights issued an advisory opinion in response to Colombia's request for clarification of a State's obligations for transboundary environmental impacts on the human rights of a person in another State. The Court advised that a State Party to the American Convention, upon being aware that a planned investment or project under their jurisdiction could cause a risk of significant transboundary damage, it must consult with the other States potentially impacted and consult and negotiate in good faith. Arguably, this opinion could lead to human rights claims arising from transboundary pollution of international on-shore or off-shore investments.⁹⁶

C. USE OF HUMAN RIGHTS CLAIMS AS A WAY TO ADDRESS CLIMATE CHANGE BY LIMITING FOSSIL FUEL PRODUCTION AND USE

Philippines: In 2015, a group of Filipino citizens and NGOs, including Greenpeace, filed a petition before the Philippine Commission on Human Rights ("CHR") in which they seek to hold 50 energy companies (so-called "Carbon Majors") responsible for climate change.⁹⁷ The petitioners seek a comprehensive investigation of climate change and ocean acidification and the resulting human rights implications.⁹⁸ They also ask the Commission to decide whether the Carbon Majors have breached their responsibilities towards the Filipino people.⁹⁹ The petitioners request that the Commission recommend appropriate legislative "accountability mechanisms" to the Philippine congress and recommend that other States, especially where the Carbon Majors are incorporated, take preventive or remediative steps to prevent human rights violations from climate change.¹⁰⁰ Similar to tort claims recently filed in the U.S. against fossil fuel companies, the petition relies on a report by Richard Heede of the Climate Accountability

⁹⁵ *Id.* ¶ 1212.

⁹⁶ Giovanni Vega-Barbosa and Lorraine Aboagye, *Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights*, EJIL: TALK! (Feb. 26, 2018), <https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/>.

⁹⁷ *Greenpeace Southeast Asia (Philippines) et al. v. Chevron et al.*, Case No.: CHR-NI-2016-0001, Petition requesting for investigation of the responsibility of the Carbon Majors for human rights violations or threats of violations resulting from the impacts of climate change (May 9, 2016), available at <http://www.greenpeace.org/seasia/ph/PageFiles/735291/Petitioners-and-Annexes/CC-HR-Petition.pdf> (petition originally filed Sept. 22, 2015).

⁹⁸ *Id.* at 59.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 45, 60.

Institute (“Heede Report”), which attributes responsibility to various fossil fuel companies for world-wide greenhouse gas emissions.¹⁰¹

The CHR is not an adjudicatory body. It cannot impose civil or criminal penalties. It is a fact-finding and policy recommending body centered on violations of civil and political rights. It can make recommendations to the Filipino authorities, but it cannot award damages and it has no enforcement authority.

In December 2017, the Commission agreed to investigate the petition and it has already held some hearings in the Philippines. It states that it plans to also hold hearings in the United States and England and to release its resolution in response to the petition by the first quarter of 2019.¹⁰² This appears to be one in a wave of disputes surrounding climate change, including the Netherlands, Ireland and Germany.

The Netherlands: In a landmark 2015 case, the Hague District Court ordered the Dutch government to take measures to reduce greenhouse gas emissions in the Netherlands by at least 25 percent compared with 1990 emissions levels. The nonprofit group, Urgenda, brought the action against the Dutch State on its own behalf and on behalf of 886 individuals, who claimed that the Netherlands’ policy was insufficient to meet its duty of care to reduce carbon dioxide emissions.¹⁰³ The court concluded that the Dutch State does have a duty of care to take mitigation measures to reduce greenhouse gas emissions.¹⁰⁴ It further found that the State’s current policy to reduce emissions was insufficient and ordered the State to reduce the nation’s emissions.¹⁰⁵ This case was the first in which a State was ordered to change its policy with respect to climate change.

Ireland: In 2017, the High Court of Ireland for the first time recognized an independent constitutional right to a healthy environment, which could have implications for Ireland’s climate change goals.¹⁰⁶ The issue arose in the context of an application by Friends of the Irish Environment and others to prevent Fingal County from allowing the Dublin Airport Authority to build an additional runway because it would result in additional greenhouse gas emissions and hasten the pace of climate change.¹⁰⁷ Local residents filed suit against the county council, which was combined with a second, similar claim brought by the nonprofit, Friends of the Irish Environment, which seeks to protect the Irish environment.¹⁰⁸ The court ultimately did not grant

¹⁰¹ *Id.* at 4.

¹⁰² GMA News Online, “CHR sets 2019 target for results of landmark rights-based climate change probe, Dec. 12, 2017.

¹⁰³ *Urgenda Found. v. State of the Netherlands (Ministry of Infrastructure and the Env’t)*, Case No. C/09/456689/HA ZA 13-1396, Judgment, District Court of the Hague, June 24, 2015.

¹⁰⁴ *Id.* ¶ 4.83.

¹⁰⁵ *Id.* ¶¶ 4.84, 5.1.

¹⁰⁶ *Merriman et al. v. Fingal County Council; Friends of the Irish Env’t CLG v. Fingal County Council*, Judgment 2017 Nos. 201 344 JR (Nov. 21, 2017) (Ireland).

¹⁰⁷ *Id.* ¶ 1.

¹⁰⁸ *Id.* ¶¶ 2-3.

the petitioners the relief sought, but did recognize the constitutional right to a healthy environment:

A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1° of the Constitution. It is not so utopian a right that it can never be enforced. Once concretised into specific duties and obligations, its enforcement is entirely practicable. Even so, every dimension of the right to an environment that is consistent with the human dignity and well-being of citizens at large does not . . . require to be apprehended and to be described in detail before that right can be recognised to exist. Concrete duties and responsibilities will fall in time to be defined and demarcated. But to start down that path of definition and demarcation, one first has to recognise that there is a personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large and upon which those duties and responsibilities will be constructed. This court does.¹⁰⁹

This decision is significant because it will allow individuals to pursue actions against the State to force it to take action that will protect the environment or to refrain from taking actions that may harm the environment. Germany: In November 2015, a Peruvian farmer began a lawsuit in Germany against a private company for its alleged role in contributing to climate change. Saúl Luciano Lliuya argued that RWE (Germany's second largest electricity producer) was at least partially responsible for causing climate change and ultimately melting mountain glaciers near Huaraz.¹¹⁰ A 2013 climate study had determined that RWE bore 0.5 percent of the responsibility for all climate change since the beginning of industrialization.¹¹¹ Based on that study, Lliuya claimed damages of 0.5. percent of the cost he and Huaraz authorities had spent to establish flood protections, as well as declaratory and injunctive relief.¹¹² The district court dismissed the claim, but on November 30, 2017, the appeals court reversed the lower court

¹⁰⁹ *Id.* ¶ 264.

¹¹⁰ *Lliuya v. RWE* Summary, London School of Economics, Grantham Research Institute on Climate Change and the Environment, available at <http://www.lse.ac.uk/GranthamInstitute/litigation/liuya-v-rwe/>.

¹¹¹ *Peruvian farmer sues German energy giant for contributing to climate change*, THE GUARDIAN (Nov. 13, 2017), available at <https://www.theguardian.com/world/2017/nov/14/peruvian-farmer-sues-german-energy-giant-rwe-climate-change>; *Lliuya v. RWE* Summary, London School of Economics, Grantham Research Institute on Climate Change and the Environment, available at <http://www.lse.ac.uk/GranthamInstitute/litigation/liuya-v-rwe/>.

¹¹² *Lliuya v. RWE* Summary, London School of Economics, Grantham Research Institute on Climate Change and the Environment, available at <http://www.lse.ac.uk/GranthamInstitute/litigation/liuya-v-rwe/>.

decision, finding for the first time that a private company could potentially be held liable for its contributions to climate change.¹¹³

V. CONCLUSION

The development of international environmental and human rights law will continue to be an area to watch for any company with or contemplating international energy investments.

¹¹³ *Lliuya v. RWE* Summary, London School of Economics, Grantham Research Institute on Climate Change and the Environment, available at <http://www.lse.ac.uk/GranthamInstitute/litigation/liuya-v-rwe/>.