

The Tribunal with a Toolbox: On *Perenco v Ecuador*, Black Gold and Shades of Green

Jason Rudall*

ABSTRACT

The Tribunal in *Perenco v Ecuador* utilized a variety of tools to craft solutions to the complex issues that arose in this milestone case. These ranged from provisional measures and counterclaims to independent experts and environmental compensation, as well as the adjustment of damages to avoid double recovery and contemplating an environmental remediation fund. This contribution zooms in on each of these aspects, placing them in their broader context and appraising how the Tribunal navigated the often-uncharted territory it was faced with, particularly from the perspective of the multifarious legitimacy concerns that are frequently levelled at investor-state dispute settlement. Views differ as to whether the Tribunal in this dispute was overly activist or prudently dealt with the unique matters at stake. In a case about black gold, *Perenco v Ecuador* suggests suggests arbitral tribunals may be willing and able to engage with shades of green.

1. INTRODUCTION

Perenco v Ecuador is a ground-breaking case in investor–state dispute settlement. It was long, complex and intertwined with another case known as *Burlington Resources v Ecuador*. Indeed, *Perenco* involved seven hearings, 55 witness statements and 53 expert reports over 11 years.¹ The case had many twists and turns, not least because the Parties failed to agree on so many procedural matters. However, it is also noteworthy for the wide variety of innovative tools utilized by the Parties and the Tribunal to navigate through the multifarious issues at stake.

First, the Tribunal ordered provisional measures to stop Ecuador from pursuing local proceedings against *Perenco*. Secondly, the Tribunal appointed its own independent expert, in addition to the Party-appointed experts, to assess damages associated with the environmental counterclaim submitted by Ecuador. Thirdly, *Perenco v Ecuador* is one of the very few cases in which environmental compensation has been awarded, and in this instance by virtue of a counterclaim. Fourthly, given the intertwined subject-matter of the case with that in *Burlington Resources v Ecuador*, the Tribunal in *Perenco* discounted the amount of compensation awarded in the former

* Assistant Professor of Public International Law, Leiden University

1 *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Final Award (27 September 2019), [51].

case to avoid double recovery. Fifthly, it considered whether it could order Ecuador to invest the compensation awarded from the counterclaim in an environmental remediation fund.

Following an overview of the background, proceedings and award, this article zooms in on these particularly innovative dimensions of the case. It does so while putting those aspects in their context and identifying several emerging trends in investor–state dispute settlement.

2. BACKGROUND

Perenco is an oil and gas company that was the majority shareholder and operator of two oil exploration blocks (Blocks 7 and 21) in Ecuador's Amazon rainforest. It had entered into production sharing contracts (PSCs) with Ecuador's national oil company, known as Petroecuador, and several other foreign investors, including its consortium partner Burlington Resources. Under the PSCs, Perenco was to receive a share in the revenue from the oil produced and, in the 2000s, international oil prices started to increase significantly.

Subsequently, Ecuador enacted a law and then a decree that had the effect of imposing a 99% windfall profit tax on certain oil revenues (Law No. 42 and Decree 662, respectively), which applied to Perenco. The PSCs had defined the tax regime applicable to Perenco but the new law and decree subsequently raised taxes on oil companies because of the 'unforeseen' rise in oil prices, in excess of the price level that was anticipated at the time of the conclusion of the PSCs.

Perenco initially paid the additional tax but later stopped paying it to the Government. As it did so, it sought to renegotiate its contractual relationship with state-owned Petroecuador. However, the President of Ecuador later announced that all PSCs would be terminated and new contracts would be agreed. Petroecuador eventually took over the operation of the blocks itself and the Government commenced local proceedings against Perenco to collect the tax allegedly owed.

Perenco filed for arbitration at the International Centre for the Settlement of Investment Disputes (ICSID) on 30 April 2008, claiming breaches of the fair and equitable treatment (FET) standard as well as unlawful expropriation under the 1994 France–Ecuador bilateral investment treaty (BIT). In December 2011, Ecuador filed an environmental counterclaim as well as an infrastructure counterclaim, alleging Perenco had polluted the local environment and caused damage to the oil exploration infrastructure.

3. THE PROCEEDINGS

The first of many dramatic plot twists in the story of this case came at the very beginning. The Tribunal was initially comprised of Lord Thomas Bingham, presiding, alongside Judge Charles Brower, appointed by Claimants, and Christopher Thomas QC, appointed by the Respondent. However, following an interview he gave in a professional journal, the Respondent challenged the independence and impartiality of Judge Brower and made a request for his disqualification. In a decision on 8 December 2009, the Secretary-General of the Permanent Court of Arbitration

sustained the challenge against Judge Brower and he resigned.² The Tribunal was subsequently reconstituted after the resignation of Judge Brower (as well as Lord Bingham) with Neil Kaplan QC, appointed by Claimants, and Christopher Thomas QC remaining the arbitrator appointed by the Respondent, while Judge Peter Tomka was designated to sit as President by the Chairman of the ICSID Administrative Council following the Parties' failure to agree upon this.³

In May 2009, the Tribunal recommended provisional measures to restrain the Respondent from pursuing certain action against the Claimant at the domestic level. The Tribunal issued its Decision on Jurisdiction in 2011, finding that Perenco was indirectly owned by French citizens albeit that Perenco was technically a Bahamian company,⁴ while on 12 September 2014 the Tribunal issued a Decision on Remaining Issues of Jurisdiction and on Liability. In the latter, the Tribunal was of the opinion that Ecuador was liable for breaches of the PSCs, as well as for acting in violation of the FET standard and illegally expropriating Perenco's investment by virtue of terminating its contract.⁵ Thus, the windfall tax amounted to a breach of FET but not to expropriation.

In 2015, the Tribunal issued an Interim Decision on the Environmental Counterclaim. Although it opined that Perenco would likely be liable for environmental damage in its final award, the Tribunal was at that time of the view that the parties should settle the counterclaim, urging them to embark upon 'a mediation process or some other consensual procedure to assist in arriving at a mutually acceptable figure'.⁶ However, the parties were not able to reach such a settlement and, as such, on 27 September 2019 the Tribunal issued its Final Award.⁷ In this Award, the Tribunal decided on the damages that were to be apportioned in the case, both in respect of the principal claim and the counterclaim.

4. THE AWARD

While the principal claim amounted to \$1.5 billion and the environmental counterclaim to \$2.5 billion, the Tribunal ultimately awarded \$449 million to Perenco for the principal claim and \$54 million to Ecuador for its counterclaim.⁸ As for the principal claim, the *Perenco* Tribunal noted that valuing damages was 'not an exact science'.⁹ It adopted a so-called 'layering analysis' and opined that it should first value the FET breach, which had occurred prior to and until the date of the expropriation,

2 In the Matter of a Challenge to be Decided by the Secretary-General of the Permanent Court of Arbitration Pursuant to an Agreement Concluded on October 2, 2008 in ICSID Case No. ARB/08/6 (*Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*), Decision on Challenge to Arbitrator, Case No IR-2009/1 (8 December 2009).

3 *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Jurisdiction (30 June 2011), [34].

4 *ibid.*

5 *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (12 September 2014).

6 *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015), [593].

7 *Perenco Ecuador Ltd* (n 1).

8 *ibid.*

9 *ibid.*, [69].

and then value the expropriation separately.¹⁰ As such, the Tribunal did not calculate the damages by having recourse to a single valuation date, but rather calculated the damages for the different breaches at different points in time. This meant the Claimant had to prove the damages caused at the time of each breach.

In arriving at its award on the principal claim, the *Perenco* Tribunal observed that the applicable law was inferred by the PSCs and, as such, it applied Ecuadorian law. However, the Tribunal was careful to delimit its analysis to the alleged breach of the PSCs arising from Law No. 42's impact on Perenco rather than appraising the constitutionality or legality of Law No. 42 *per se*.¹¹ As for the environmental counterclaim, the Tribunal also had recourse to Ecuadorian law. In this context, the 2008 Constitution of Ecuador, which provided for 'the protection of the environment as a fundamental constitutional imperative' as well as rights of nature, the principles of prevention and precaution, the human right to a healthy environment, a broad definition of environmental harm and strict liability for environmental damage,¹² was particularly significant. Other domestic environmental legislation as well as commitments made under the PSCs by Perenco were similarly considered by the Tribunal.¹³

Interestingly, in the principal claim Perenco had argued that it expected its participation contract to be extended but Ecuador denied this, contending that an extension of its contract had not been likely. The Tribunal agreed with Perenco given the subsequent practice on contract extensions in this context in Ecuador. That said, while the lost opportunity to agree an extension was compensable according to the Tribunal, it also said that estimating the value of this lost opportunity would be 'an exercise of discretion' and, as such, decided to award Perenco a nominal amount.¹⁴ This nominal amount was \$25 million.

In the context of the environmental counterclaim, Ecuador argued that the investor caused environmental damage by polluting parts of the Amazon rainforest. It submitted that it should be awarded compensation to repair the damage. Recognizing the difficulty in appraising the value of such damage and criticizing the testimony of the Parties' experts, the Tribunal appointed its own independent environmental expert to assist with the task.¹⁵ In its Final Award the Tribunal, drawing on the evidence of the Independent Expert, valued the amount of compensation due to Ecuador to repair the environmental damage. Adjusting the final amount awarded to avoid double recovery following the successful environmental counterclaim in the *Burlington Resources v Ecuador* case, the *Perenco* Tribunal subtracted the \$39 million that Ecuador had received in the *Burlington* award from the \$93 million that it found Perenco was liable to pay for remediation in this case to arrive at the figure of \$54 million.¹⁶ The Tribunal ordered Perenco to pay this to Ecuador for its environmental counterclaim.

10 *ibid*, [85].

11 *Perenco Ecuador Ltd* (n 5) [318]–[323].

12 *Perenco Ecuador Ltd* (n 6) [70].

13 See, in particular, *ibid*, [79]–[114].

14 *Perenco Ecuador Ltd* (n 1) [324]–[326].

15 *Perenco Ecuador Ltd* (n 6) [587].

16 *Perenco Ecuador Ltd* (n 1) [894]–[899].

As for the infrastructure counterclaim that Ecuador had also made against Perenco for damage caused to the oil exploration blocks, the Tribunal was of the view that this counterclaim had already been awarded in the *Burlington* case for an amount of \$2.5 million. As such, the Tribunal denied Perenco's counterclaim on this matter to avoid double recovery.

As is becoming evident, *Perenco* involved several innovative aspects. In the remaining sections of this article, we home in on these dimensions of the case and place them in their broader context. The first of these is the provisional measures recommended by the Tribunal, to which we turn next.

5. PROVISIONAL MEASURES

Perenco requested provisional measures to preserve the contract it had entered into with Ecuador, as well as to prevent Ecuador from collecting on payments due under the windfall tax at the centre of the dispute. While the Tribunal cautioned against specific performance that might disproportionately interfere with state sovereignty,¹⁷ in its Decision on Provisional Measures the Tribunal went on to request that the Respondent pay Perenco any amounts that it was allegedly due under Law No. 42, restrain the Respondent from pursuing action against Perenco concerning the collection of money through its courts or otherwise, and ordered that Ecuador refrain from unilaterally amending, rescinding, terminating or repudiating the PSCs.¹⁸

Under various arbitral rules, a tribunal may recommend provisional measures in order to preserve either of the parties' rights during a proceeding.¹⁹ Similarly, a party may request provisional measures once proceedings have commenced.²⁰ In this context, the requesting party should usually specify which of its rights ought to be preserved, which provisional measures it requests and what circumstances it claims warrant such measures, as well as whether the tribunal has *prima facie* jurisdiction.²¹ It should also be noted that provisional measures can be extended, changed or revoked during the course of the proceedings.²² Those rights most typically preserved through provisional measures in ICSID arbitration include preserving the

17 See also *Occidental v Ecuador* in which the Tribunal stated that, '[t]o impose on a sovereign State reinstatement of a foreign investor in its concession, after a nationalization or termination of a concession license or contract by the State, would constitute a reparation disproportionate to its interference with the sovereignty of the State when compared to monetary compensation'. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (17 August 2007), [84].

18 *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009), [70]–[79].

19 See, eg Article 47 of the Convention on the settlement of investment disputes between States and nationals of other States 1965 (575 UNTS 159) (ICSID Convention), which provides that '[e]xcept as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party'. It is supplemented by Rule 39 of the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) 2006; see also G Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014), 2425.

20 See, eg ICSID Arbitration Rule 39(5).

21 See, eg ICSID Arbitration Rule 39(1).

22 See, eg ICSID Arbitration Rule 39(4).

status quo and the non-aggravation of the dispute, as well as ensuring the exclusivity and integrity of the proceedings.²³

The Tribunal in *Perenco v Ecuador* observed that provisional measures must be necessary and urgent.²⁴ This broadly resonates with the practice of international courts and tribunals. In general, in the event it receives such a request, a tribunal will consider if such provisional measures are necessary, urgent and required to circumvent irreparable damage.²⁵ First, necessity requires an appraisal of whether the provisional measures are proportionate to the harm or damage they seek to avert.²⁶ Indeed, as was noted in *Burimi v. Albania*, a tribunal must ‘weigh the interests of both parties and order the measure only if the harm spared [by] the petitioner “exceeds greatly the damage caused to the party affected” by it’.²⁷

Secondly, urgency is a criterion that is satisfied when an issue cannot wait until the final award of a tribunal, and is a standard which has been elaborated in the contexts of both investment law and public international law.²⁸ It should also be highlighted that, while they are intended to respond to urgent situations, in practice provisional measures are adjudicated between two and four months following the filing of a request for provisional measures.²⁹

Thirdly, the approach to irreparability was considered by the Tribunal in *Burlington Resources v Ecuador*, which opined that ‘harm not adequately reparable by an award of damages’ should be the test.³⁰ In *Burlington*, it was argued that the harm alleged to have been caused could be repaired by monetary compensation. The

23 A Sinclair and O Repousis, ‘An Overview of Provisional Measures in ICSID Proceedings’ [2017] 32(2) ICSID Review 431, 440.

24 *Perenco Ecuador Ltd* (n 18)[43].

25 See, eg *Millicom International Operations BV and Sentel GSM SA v Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on Provisional Measures (9 December 2009), [39]; *Tokios Tokelés v Ukraine*, ARB/02/18, Procedural Order No 3 (18 January 2005), [8]; *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Provisional Measures (15 October 2008), [34]; *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No 1 (29 June 2009), [51]; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2012), [113]; *Abacat and others (Case Formerly Known as Giovanna a Beccara and others) v Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No 11 (27 June 2012), [11].

26 *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Claimant’s Request for Provisional Measures (3 March 2010), [42].

27 *Burimi SRL and Eagle Games SHA v Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 (3 May 2012), [35].

28 See, eg *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No. 1 (31 March 2006), [76]; *Passage through the Great Belt (Finland v Denmark)*, Provisional Measures, Order (29 July 1991), [1991] ICJ Rep 41, [23]; *Certain Criminal Proceedings in France (Republic of the Congo v France)*, Provisional Measures, Order (17 June 2003), [2003] ICJ Rep 102, [22]; *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Preliminary Objections, Order (23 January 2007), [207] ICJ Rep 3, [32].

29 S Luttrell, ‘ICSID Provisional Measures “in the Round”’ [2015] 31 *Arbitration International* 393, 396; L Malintoppi, ‘Provisional Measures in Recent ICSID Proceedings: What Parties Request and What Tribunals Order’ in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 182–84.

30 *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No 1 (29 June 2009), [82]; see also *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order (6 September 2005), [46]. For a detailed exploration of this aspect, see C Frutos-Peterson and D

Burlington Tribunal ultimately found, however, that there was a risk of the ‘destruction of an ongoing investment and of its revenue-producing potential’ and of the Claimant having to cease its operations entirely.³¹ As such, that Tribunal recommended provisional measures, which involved both parties opening and paying into an escrow account, refraining from aggravating the dispute and requesting that the Respondent discontinue domestic proceedings against the Claimant.³²

Finally, tribunals have indicated that the power to recommend provisional measures is equivalent to that of ordering them. As the Tribunal in *Maffezini v Spain* explained, ‘the Tribunal’s authority to rule on provisional measures is no less binding than that of the final award’.³³ Confirming the nature of provisional measures and making a comparison between the ICSID Convention and the ICJ Statute on provisional measures, the *Perenco* Tribunal said ‘[t]he parallels between “recommend” in the ICSID Convention and “indicate” in the ICJ Statute are quite clear, suggesting that one cannot rightly assume that a “request” is comparatively weaker than a “recommendation”, or that neither is binding’.³⁴ While it has been argued by some scholars that this approach taken by tribunals represents a departure from what the parties to the ICSID Convention intended, most ICSID members have in fact accepted the evolution.³⁵ Despite this, several parties involved in various disputes have declined to recognize that they are bound by provisional measures.³⁶ This was the case in *Perenco v Ecuador* when, following the recommendation of provisional measures, Ecuador sought to auction barrels of oil that it had confiscated from *Perenco*.³⁷ Moreover, this was not the first time that Ecuador has defied provisional measures issued by an arbitral tribunal.³⁸

6. ENVIRONMENTAL COUNTERCLAIM

A counterclaim is a procedural mechanism that allows a respondent to bring a claim against the claimant. They have a relatively long history in the practice of

Ziyeva, ‘Provisional Measures in ICSID Arbitration: The Irreparable Harm Requirement’ in D Ziyeva (ed), *Interim Relief in International Arbitration* (Juris 2015) 220–21.

31 *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No 1 (29 June 2009), [83].

32 *ibid* 28–29.

33 *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No 2 (28 October 1999), [9]. See also, *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures (25 September 2001), [2], [18]–[19], [20]–[26]; *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/08/15, Decision on Claimant’s Request for Provisional Measures (3 March 2010), [39]–[40].

34 *Perenco Ecuador Ltd* (n 18)[69].

35 T Gazzini and R Kolb, ‘Provisional Measures in ICSID Arbitration from “Wonderland’s Jurisprudence” to Informal Modification of Treaties’ [2017] 16 *The Law and Practice of International Courts and Tribunals* 159, 183.

36 See, eg *Československá Obchodní Banka, A.S. v The Slovak Republic*, ICSID Case No ARB/97/4, Procedural Order No. 4 (11 January 1999); Procedural Order No. 5 (1 March 2000); *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order (6 September 2005), [43].

37 D Vis-Dunbar, ‘Ecuador Defies Provisional Measures in Dispute with French Oil Company’ (*Investment Treaty News*, 5 June 2009) <<https://www.iisd.org/itn/2009/06/05/ecuador-defies-provisional-measures-in-dispute-with-french-oil-company/>> accessed 7 August 2020.

38 See, eg *City Oriente Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21.

international courts and tribunals.³⁹ The ICJ has defined a counterclaim as ‘independent of the principal claim in so far as it constitutes a separate “claim”, that is to say an autonomous legal act the object of which is to submit a new claim to the Court, and, . . . at the same time, it is linked to the principal claim, in so far as, formulated as a “counter” claim, it reacts to it’.⁴⁰ Counterclaims have arisen in a number of investor–state dispute settlement cases as well.⁴¹ That said, most of these have been rejected, usually for jurisdictional or admissibility reasons.⁴²

In *Perenco v Ecuador*, Ecuador argued through a counterclaim that the Claimant had caused environmental damage in polluting parts of the Amazon rainforest.⁴³ The counterclaim was based on a violation of Ecuadorian domestic law that concerned environmental protection. The Tribunal found that it had jurisdiction over the counterclaim and that it was admissible.⁴⁴ During the proceedings, the Tribunal received two requests from Perenco that the counterclaim be dismissed. One of these concerned Perenco’s argument that, given an award on the environmental counterclaim had been rendered in *Burlington Resources v Ecuador*, the dispute at issue in the present counterclaim was *res judicata*, which the Tribunal ultimately dismissed because it appraised there was a possibility the *Burlington* Award could be annulled and, in any event, the *Perenco* Tribunal could eliminate the risk of double recovery.⁴⁵

In its consideration of the counterclaim, the Tribunal reviewed all of the evidence put forward by the parties and the Tribunal-appointed expert, and was of the view that Perenco would likely be liable for causing environmental damage in its Final Award, at which point it would also indicate its findings as to the value of the damage.⁴⁶ We will assess the valuation methodology and amount of environmental compensation actually awarded below.

Counterclaims for environmental damage caused by foreign investors have arisen in several recent cases. One of the first examples in fact arose in *Burlington Resources v Ecuador*. In this case, the Tribunal awarded compensation for environmental

39 See, eg *Factory at Chorzów (Germany/Poland)*, Judgment, [1928] PCIJ Rep Series A, No 17, 34–39, 63–64; Judgment [1937] PCIJ Rep Series A/B, No 70, 28–32; *Colombian-Peruvian Asylum Case*, Judgment [1950] ICJ Rep 266, 278.

40 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Counter-claims, Order of 17 December 1997, [1997] ICJ Rep 243, [27].

41 See, eg *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award (7 December 2011), [859]; *Antoine Goetz & others and SA Affinage des métaux v Republic of Burundi*, ICSID Case No. ARB/01/2, Award (21 June 2012), [267]; *Hesham Talaat M Al-Warraq v Republic of Indonesia*, UNCITRAL (15 December 2014), [659]; *Vestey Group Limited v Venezuela*, ICSID Case No. ARB/06/4, Award (15 April 2016), [333]; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016); *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims (7 February 2017).

42 AK Hoffmann, ‘Counterclaims’ in M Kinnear and others (eds), *Building International Investment Law: The First 50 Years of ICSID* (Wolters Kluwer 2016) 505.

43 *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015).

44 *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Perenco’s Application for Dismissal of Ecuador’s Counterclaims (18 August 2017), [43], [44] and [51].

45 *ibid.*, [50] and [52].

46 *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015).

damage caused by the Claimant, following a counterclaim submitted by Ecuador.⁴⁷ As in *Perenco*, the Tribunal in *Burlington Resources* made its finding on the basis of Ecuadorian domestic environmental law.

In *David Aven et al v Costa Rica*, a tribunal found that the Claimants had breached environmental law in Costa Rica and that Costa Rica was justified in interfering with a tourism project investment on the grounds of environmental protection.⁴⁸ Costa Rica also submitted a counterclaim against the Claimants for breaching provisions on environmental protection under the relevant international investment agreement in the course of the proceedings. In this context, Costa Rica asked the Tribunal to order that Claimants pay compensation to Costa Rica for repairing the environmental damage caused by Claimants' activities.⁴⁹ While it was apparently sympathetic to the environmental concerns in this case, the Tribunal rejected the counterclaim for procedural reasons.⁵⁰ In particular, Costa Rica had not properly presented its claim for environmental damage in a timely manner.⁵¹

Counterclaims have also been made in connection with issues other than environmental damage, such as in relation to human rights. *Urbaser v Argentina*⁵² was the first investment tribunal to accept jurisdiction over a counterclaim on human rights. It is also interesting as it does not involve a counterclaim based in domestic law, as was the case in *Perenco* and *Burlington Resources*, but rather on international law. The latter scenario is more complicated in the context of investor–state dispute settlement, not least because private actors like investors have not classically been subject to international legal obligations in the same way that they can be subject to domestic legal obligations.⁵³

Urbaser v Argentina concerned a concession for water distribution and sewage in Buenos Aires. Argentina counterclaimed that Urbaser had breached its obligations under the concession contract as it did not adequately invest in the water distribution infrastructure and it was not possible to guarantee the right to water to the population in the areas concerned. The Tribunal in *Urbaser* rejected the argument that it could not accept jurisdiction for a human rights claim,⁵⁴ and was of the view that the BIT at issue did not constitute a 'closed system',⁵⁵ which meant the state was entitled to invoke legal obligations beyond the treaty. The Tribunal also rejected the argument that the Claimant, being a non-state entity, could not be bound by human rights obligations. Indeed, it emphasized that human rights and labour standards

47 *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims (7 February 2017).

48 *David Aven et al v Costa Rica*, DR-CAFTA Case No. UNCT/15/3, Award (18 September 2018).

49 *ibid.*, [715].

50 *ibid.*, [742].

51 *ibid.*, [745].

52 *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016).

53 A de Nanteuil, 'Counterclaims in Investment Arbitration: Old Questions, New Answers' [2018] 17(2) *The Law and Practice of International Courts and Tribunals* 374.

54 *Urbaser SA* (n 52)[1154].

55 *ibid.*, [1191].

were applicable to public and private actors.⁵⁶ That said, the Tribunal went on to distinguish that the human rights at issue in this case entailed ‘an obligation of compliance on the part of the state, but [not] an obligation for performance on the part of any company providing a contractually required service’.⁵⁷ Therefore, unless there is domestic provision for such international obligations, *Urbaser* suggests it may be difficult to subject private entities to these in investor-state dispute settlement.

7. ENVIRONMENTAL COMPENSATION

In the context of the counterclaim in *Perenco v Ecuador*, Ecuador argued that the investor caused environmental damage by polluting parts of the Amazon rainforest and submitted that it should be paid around \$2.5 billion in compensation to repair the damage. In its Final Award, the Tribunal indicated the damages awarded to both Parties, including that monetary compensation should be paid to Ecuador for the environmental damage caused by the Claimants.⁵⁸

In its reasoning on the environmental counterclaim, the Tribunal noted that ‘[p]roper environmental stewardship has assumed great importance in today’s world’ and that, if the relevant BIT permits it, the state may make a counterclaim for environmental damage caused by the investor and, if a tribunal is satisfied that the counterclaim is substantiated, the state should be awarded full reparation.⁵⁹ The Tribunal was of the view that ‘a State has wide latitude under international law to prescribe and adjust its environmental laws, standards and policies in response to changing views and a deeper understanding of the risks posed by various activities, including those of extractive industries such as oilfields’.⁶⁰ Moreover, the Tribunal explained that the Rio Declaration on Environment and Development of 1992 had been an important source in drafting the relevant Ecuadorian law on the protection of the environment that *Perenco* had allegedly breached.⁶¹

In its Interim Decision, the Tribunal engaged in an analysis of Ecuadorian environmental law and, in particular, whether a strict or fault-based liability applied. This is an analysis that the Tribunal in *Burlington Resources v Ecuador* had also conducted.⁶² Interestingly, the *Perenco* and *Burlington* tribunals diverged on their interpretation of whether the applicable Ecuadorian environmental law at certain times of the investor’s activity provided for a fault-based or strict liability regime for environmental harm. The *Burlington* Tribunal said:

56 *ibid.*, [1198], [1200]–[1203]. For an insightful analysis of the Tribunal’s reasoning on this point, see E de Brabandere, ‘Human Rights and Foreign Direct Investment’ in M Krajewski and R Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar 2018).

57 *Urbaser SA* (n 52)[1208].

58 *Perenco Ecuador Ltd* (n 1).

59 *Perenco Ecuador Ltd* (n 6)[34].

60 *ibid.*, [34]–[35].

61 *ibid.*, [331].

62 *Burlington Resources Inc* (n 47). Interestingly, the Tribunal applied Ecuadorian environmental law because it was the law of the host state under art 42(2) of the ICSID Convention, and not because it had been chosen by the Parties under art 42(1) of the ICSID Convention. As it has been pointed out, the application of art 42(2) is significant because it allows the tribunal freedom to apply either domestic or international law. See Stefanie Schacherer, *International Investment Law and Sustainable Development: Key Cases from the 2010s* (IISD 2018) 23.

it has difficulty following the *Perenco* Tribunal's view that decisions of the Ecuadorian courts have merely "strengthened the presumptions in favour of a finding of liability in the case of damage caused through hazardous activities" [and] finds indeed that these courts have established a strict liability regime for hazardous activities, in particular oilfield operations.⁶³

Conceived as a strict liability regime, Ecuadorian environmental law merely required proof that an economic activity entailing a serious risk to the environment took place in the concerned area as well as an actual negative impact on the environment.⁶⁴ However, as a fault-based liability regime, there was a rebuttable presumption that operators engaging in risky activities would be responsible for damage that resulted from this.⁶⁵ The *Perenco* Tribunal added that where negligence or regulatory exceedance had taken place, the operator should be deemed to have caused the environmental tort,⁶⁶ unless it could prove—on a preponderance of evidence—*force majeure*, that it in fact discharged the relevant duty of care or the harm was caused by another actor.⁶⁷

As for the environmental compensation awarded in the *Burlington* case, that Tribunal ordered the payment of \$41 million.⁶⁸ In its valuation of the environmental damage, the *Burlington* Tribunal assessed the harm caused and reparation cost at each of the 40 sites in the oilfield exploited by the Claimant and even made site visits to assess soil contamination and land use in the area,⁶⁹ which was not something that the *Perenco* Tribunal did. At each of the sites, the Parties' counsel in the *Burlington* case were permitted to make oral presentations as well as to answer any questions that the Tribunal had.

It is interesting to note the evolution in the reasoning of investment tribunals over recent years concerning environmental matters. Indeed, environmental considerations have become much more integrated in the reasoning of tribunals as they arrive at their decisions, rather than as an additional element mentioned in *obiter dicta*.⁷⁰ *Perenco v Ecuador* follows this mainstreaming of environmental considerations in the jurisprudence of investment tribunals, a trend that is evident, for example, in *Unglaube v Costa Rica*,⁷¹ *Gold Reserve v Venezuela*⁷² and *Clayton and Bilcon v Canada*.⁷³ Similarly, *Perenco v Ecuador* reflects cases like *Al Tamimi v Oman*⁷⁴ and

63 *ibid.*, [248].

64 *ibid.*, [82] and [225ff].

65 *Perenco Ecuador Ltd* (n 6) [371].

66 *ibid.*, [374].

67 *ibid.*, [379].

68 *Burlington Resources Inc* (n 47).

69 *ibid.*, [18ff].

70 JE Vinales, 'Foreign Investment and the Environment in International Law: Current Trends' in K Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar 2019) 35.

71 *Marion Unglaube v Republic of Costa Rica*, ICSID Case No ARB/08/1, Award (16 May 2012).

72 *Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award (22 September 2014).

73 *Bilcon of Delaware et al v Government of Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015).

74 *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33, Award (3 November 2015).

Aaron C Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments) v Costa Rica,⁷⁵ which have afforded policy space to countries so that they can take measures intended to protect the environment.

Outside the investor–state dispute settlement context, it is important to mention the decision of the ICJ on environmental compensation in the *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Compensation)* case of 2018.⁷⁶ The Court made a significant point of principle: namely, that ‘damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law’. In the case, Costa-Rica estimated that environmental damages amounted to approximately \$6 million. It used a so-called ‘ecosystem services approach’ to arrive at this valuation. Such ecosystem services may include provisioning services provided by the environment (like food, wood, fuel, or medicines), regulating services (like biological diversity, climate regulation, human disease control, flood and storm protection, and waste treatment), as well as cultural services. Nicaragua, on the other hand, arrived at an amount of about \$190,000 using what it termed a ‘replacement costs approach’. Under this approach, the cost of preserving an equivalent area while the affected area recovers, as well as certain remediation costs, comprise the elements used to calculate the compensation owed.

The ICJ ultimately awarded an amount of approximately \$380,000. It decided to value the environmental damage based on what it called an ‘overall valuation approach’. Using this approach, compensation for environmental damage is calculated based on an overall evaluation of the impairment or loss of environmental goods and services, rather than by calculating the value of specific categories of environmental goods and services as well as the time it may take each to recover. Moreover, the Court distinguished the valuation for pure environmental damage from the expenses incurred by a state as a result of such damage, which can also be compensable and include such costs as monitoring the affecting area, for example.

These cases bring into sharp focus that environmental concerns can be taken into account by international courts and tribunals, and may even become critical to determining the outcome of a dispute. That said, the recent jurisprudence also highlights that there are many ways of calculating monetary compensation for environmental damage and their outcomes vary significantly.⁷⁷ Tribunals in the future will have to navigate through the thicket of approaches that have been developed in recent practice, and the best practice indicates that experts may play a critical role in assisting tribunals.

8. TRIBUNAL-APPOINTED INDEPENDENT EXPERT

In *Perenco v Ecuador*, the Tribunal acknowledged the difficulty in evaluating environmental damage and compensation on the basis of expert reports provided by the

75 Aaron C Berkowitz, Brett E Berkowitz and Trevor B Berkowitz (formerly Spence International Investments et al.) v Republic of Costa Rica, ICSID Case No UNCT/13/2, Interim Award of the Tribunal on Jurisdiction (25 October 2016).

76 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Compensation, Judgment [2018] ICJ Rep 15.

77 For a detailed exploration of environmental compensation in international law, see J Rudall, *Compensation for Environmental Damage Under International Law* (Routledge 2020).

parties. The Tribunal in fact complained that the parties were ‘effectively shooting at different targets’ in their assessments and this made the Tribunal’s task very difficult.⁷⁸ It even observed that the Party-appointed experts had ‘crossed the boundary between professional objective analysis and party representation’ and were ‘each attempting to achieve the best result for the party by whom they were instructed’.⁷⁹ As a result, the Tribunal needed additional expert evidence to appraise the environmental damage and went on to appoint its own independent environmental expert.⁸⁰ In its Interim Decision, although the Tribunal suggested that Perenco would likely be held liable for environmental damage, it declined to decide the specific aspects of the counterclaim and indicated that the Tribunal’s expert would assist in valuing the damage prior to the Final Award being published. While the appearance of both party- and tribunal-appointed experts is not alien to international arbitration, the existence of accompanying procedural safeguards has been lacking.⁸¹ *Perenco* goes some way to remedying this.

The expert was chosen after consultation with the Parties. In fact, each of the Parties were given an opportunity to interview the Independent Expert. Both recommended that the Tribunal appoint Mr Scott MacDonald as its Independent Expert, and he was duly appointed by the Tribunal.⁸² A protocol was drawn up for the expert by the Tribunal and the Tribunal made it clear that the expert was only answerable to the Tribunal. That said, safeguards were constructed at various points in the proceedings to ensure transparency, fairness and Party participation as the Independent Expert went about his work. Importantly, the Tribunal allowed the Parties to attend the investigations of the Independent Expert’s team, receive a copy of the Independent Expert’s findings and to comment on the Independent Expert’s final report.⁸³ It should also be noted that his investigation was limited to the sites where one or both Parties had identified soil, groundwater or mud pit contamination.⁸⁴ Moreover, the mandate of the Independent Expert was circumscribed to supplementing the evidence obtained by the party-appointed experts.⁸⁵

The Independent Expert’s report was issued on 19 December 2018.⁸⁶ The Independent Expert, in reviewing the Parties’ expert findings, was of the view that the ‘technical choices made by the Parties, intended or not, embedded biases within their findings’,⁸⁷ confirming the earlier concerns of the Tribunal about the reliability of the Parties’ expert evidence.

Both Parties commented on the Independent Expert’s findings. Among their comments, Perenco claimed that the Independent Expert had exceeded his mandate

78 *Perenco Ecuador Ltd* (n 6) [581].

79 *ibid.*

80 *ibid.*, [587].

81 M Hodgson and M Stewart, ‘Experts in Investor-State Arbitration: The Tribunal as Gatekeeper’ [2018] 9(3) *Journal of International Dispute Settlement* 453, 457.

82 *Perenco Ecuador Ltd* (n 1) [425].

83 *Perenco Ecuador Ltd* (n 6) [588].

84 *Perenco Ecuador Ltd* (n 1) [519].

85 *ibid.*

86 *ibid.*, 514.

87 *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, Mr Scott MacDonald’s Independent Expert Report (19 December 2019), 32–33.

by undertaking sampling at sites that had not been sampled by the Parties' experts, while Ecuador claimed that the Independent Expert had exceeded his mandate by not conducting sampling at certain sites that had been sampled by the Parties' experts.⁸⁸ Perenco's claim was dismissed by the Tribunal while Ecuador's was accepted.⁸⁹ Consequently, the Tribunal adjusted upwards the damages estimated by Mr MacDonald in the amount of \$7.7 million.⁹⁰ Other than this significant adjustment, the Tribunal largely adopted the remedial estimates provided by the Independent Expert, which were based on remediation costs in Ecuador.

It is interesting to highlight that further safeguards were implemented for the Parties as the Independent Expert introduced his evidence at the hearings. Indeed, the Parties were permitted to make two sets of written pleadings, oral pleadings as well as submit questions to the Tribunal-appointed expert during the hearings. Further still, throughout the hearings the Party-appointed experts and counsel were permitted to hold witness conferences with the Tribunal-appointed expert.⁹¹ The Tribunal-appointed Independent Expert evaluated the total amount of contamination at the affected sites and indicated the cost of remediation, which amounted to \$160 million in his estimation. Taking into account that the affected sites had also been exploited by other operators who had caused damage, the Tribunal found that Perenco was liable for \$93 million in environmental damage. However, it should be noted that the evidence for this damage by past operators was limited and, as explored below, the Tribunal once again was required to be creative with methodological tools it had at its disposal to apportion liability.

The kinds of safeguards adopted in *Perenco* help to ensure that legitimacy issues around the use of experts are addressed.⁹² However, the appointment of tribunal-appointed experts in international arbitration has only occurred in eight publicly available investor–state cases since 2005,⁹³ and the practice in other international courts and tribunals has likewise been mixed. Indeed, the ICJ in the abovementioned *Costa Rica v Nicaragua (Compensation)* case did not avail of a Court-appointed expert despite that it is the first case of its kind - an award of environmental compensation - before that jurisdiction.⁹⁴ On the other hand, in the 2010 *Pulp Mills on the River Uruguay* case the ICJ emphasised that scientific or technical evidence should be submitted via experts rather than counsel, which would allow such evidence to be

88 *Perenco Ecuador Ltd* (n 1) [818]–[834].

89 *ibid.*, [827] and [830].

90 *ibid.*, [830].

91 *ibid.*, [627]–[630].

92 M Mbengue, 'The Role of Experts Before the International Court of Justice: The Whaling in the Antarctic Case. Questions of International Law' [2015] 2 *Zoom-in* 3; L Boisson de Chazournes and others, 'One Size Does Not Fit All – Uses of Experts before International Courts and Tribunals: An Insight into the Practice' [2018] 9(3) *Journal of International Dispute Settlement* 477.

93 These were cases in which damages were awarded and the tribunal-appointed experts were additional to party-appointed experts. N Choudhury, 'Tribunal-appointed damages experts: Procedural improvements can serve as a better alternative in arbitration' (*Thompson Reuters*, 30 April 2018), <[https://uk.practical.law.thomsonreuters.com/w-014-5066?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practical.law.thomsonreuters.com/w-014-5066?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)>.

94 See J Rudall, 'Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica v. Nicaragua*)' [2018] 112(2) *American Journal of International Law* 288, 293.

subject to cross-examination.⁹⁵ Scientific experts have since appeared in several other ICJ cases.⁹⁶ Beyond the ICJ, in the *South China Sea Arbitration Between the Republic of the Philippines and the People's Republic of China*, the Tribunal appointed its own *ex curia* experts to facilitate the Tribunal's assessment of the environmental impact of the activities conducted by China in the South China Sea.⁹⁷

9. ADJUSTING DAMAGES

As alluded to above, Perenco had invested in a consortium with US company Burlington Resources. In 2012, the Tribunal in *Burlington Resources v Ecuador* ultimately found that Ecuador had breached the US–Ecuador BIT for unlawfully expropriating Burlington's investment because it had seized the production facilities being used by Burlington Resources, but not because of the windfall tax.⁹⁸ In 2017, however, it also ordered the payment of \$39 million in compensation for environmental damage caused by the Claimant.⁹⁹ Adjusting the amount awarded for environmental compensation to avoid double recovery following the successful environmental counterclaim in the *Burlington* case, the *Perenco* Tribunal subtracted the \$39 million that Ecuador had received in the *Burlington* Award from the \$93 million that it found Perenco was liable to pay for remediation in this case to arrive at the figure of \$54 million.¹⁰⁰

In its Final Award, it is also notable that the Tribunal was careful to delineate between contamination that was attributable to Perenco's predecessors or its successors only, contamination that was attributable to Perenco only, and contamination that was attributable to Perenco and either its predecessors or its successors as well.¹⁰¹ Indeed, the Tribunal did find that some of the harm had been caused by other operators, although it recognized the difficulty in attempting to 'unscramble the contamination egg' and that the exercise was 'not one of scientific certainty.'¹⁰² As such, where it was necessary to do so, the Tribunal used a time-weighted sharing technique to allocate liability between successive operators for soil contamination and groundwater impairment.¹⁰³ In doing so, the Tribunal adjusted the damages awarded in the case to reflect only those that Perenco itself was liable for.

For the infrastructure counterclaim, the Tribunal observed that a higher amount of \$2.5 million had already been granted in the related *Burlington* case for infrastructure damages and, as a result, awarding monetary compensation for Ecuador's

95 *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ Reports 2010, p 14, para 167.

96 See, eg *Whaling in the Antarctic (Australia v Japan)*, ICJ Reports 2014, p 226, paras 74–75; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Judgment, 16 December 2015, paras 45, 175–176, 204; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua) / Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua)*, General List Nos 157 and 165, 2 February 2018, paras 14, 71, 73, and 86.

97 *South China Sea Arbitration Between the Republic of the Philippines and the People's Republic of China*, Award, paras. 84, 136 and 821.

98 *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Liability (14 December 2012), [545].

99 *Burlington Resources Inc* (n 47)[1099]. The Tribunal also ordered the payment of 2,577,119.77 for Ecuador's infrastructure counterclaims, [1074].

100 *Perenco Ecuador Ltd* (n 1) [894]–[899].

101 *ibid*, [882].

102 *ibid*, [810].

103 *ibid*, [811] and [887].

infrastructure counterclaim in the *Perenco* case would amount to double recovery.¹⁰⁴ As such, no compensation was awarded for damage caused to the infrastructure associated with Blocks 7 and 21.

10. AN ENVIRONMENTAL REMEDIATION FUND?

Interestingly, *Perenco* had argued that Ecuador should pay any compensation awarded for the environmental counterclaim into an environmental remediation fund.¹⁰⁵ Ecuador agreed to this.¹⁰⁶ However, the Tribunal declined to make such an order.¹⁰⁷ It considered that this ‘would require continued monitoring of Ecuador’s remediation activities’ by the Tribunal and such monitoring ‘would be inconsistent with the Tribunal’s role’, not least because, following the issuance of the Final Award, ‘the Tribunal is *functus officio*’.¹⁰⁸ That said, the Tribunal went on to declare its ‘firm expectation . . . that the proceeds of the damages award made in favour of Ecuador in the environmental counterclaim will be devoted to remediation’.¹⁰⁹

11. CONCLUSION

The Tribunal in *Perenco v Ecuador* utilized a variety of tools in its toolbox to craft solutions to the complex issues that arose in this case. These ranged from provisional measures and counterclaims to independent experts and environmental compensation, as well as the adjustment of damages to avoid double recovery. Some have characterized the tools used in these proceedings as an example of ‘tribunal activism’,¹¹⁰ while others observe they represent a ‘vehicle to facilitate sustainable and eco-friendly development’.¹¹¹ The tools certainly allowed shades of green to be painted into a case about black gold, amongst other positive and negative outcomes. Given that an application for the annulment of the Award was registered by ICSID at the end of 2019, and a stay on its enforcement was confirmed on 21 April 2020 by the *ad hoc* annulment committee, it is likely that there is yet more mileage in this milestone case.

104 *ibid*, [996].

105 *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, *Perenco’s Comments to the Independent Expert Report* (22 February 2019), [75].

106 *Perenco Ecuador Ltd* (n 1)[900]–[901].

107 *ibid*, [902].

108 *ibid*.

109 *ibid*, [904].

110 D Páez-Salgado and N Zuleta, ‘*Perenco v Ecuador: An Example of a “Lengthy, Complex, Multi-faceted, Hard Fought and Very Expensive” Investment Arbitration?*’ (Kluwer Arbitration Blog, 14 November 2019) <<http://arbitrationblog.kluwerarbitration.com/2019/11/14/perenco-v-ecuador-an-example-of-a-lengthy-complex-multi-faceted-hard-fought-and-very-expensive-investment-arbitration/>>.

111 S Jain, ‘*Bridging the Gap Between Investment Arbitrations and Environmental Concerns: Can Inclusion of Counterclaims Help?*’ (The American Review of International Arbitration, 26 March 2019) <<http://aria.law.columbia.edu/bridging-the-gap-between-investment-arbitrations-and-environmental-concerns-can-inclusion-of-counterclaims-help/?cn-reloaded=1>> accessed 7 August 2020.