INVESTOR-STATE DISPUTE SETTLEMENT

The Neglected Public Interest in Investor-State Dispute Settlement: Environmental and Human Rights Considerations

*Stanislava Nedeva**

With the rapid expansion of bilateral investment treaties (BITs), investor-state arbitration has paved its way to becoming the most preferred dispute settlement method by investors. However, the investment arbitration system has also attracted 'backlash'. One reason is the challenge to balance between protection of foreign investors and the recognition of host states' legitimate public interests. With the current pressures to reform the investor-state dispute settlement (ISDS) system, there is a pressing need to offer a better balance between investor protection and host states' sovereign right to regulate, as well as the wider public good such regulatory measures might have, especially in the context of environmental protection and human rights. This article argues for a better symmetry between foreign investor's treaty-based claims and host states' environmental and human rights (EHR) claims to acknowledge the public interests – social, economic, welfare, etc. In particular, it advocates for: the strengthened presence of independent experts and amicus curiae, a proportionality approach; and the overarching development of counterclaims as a consideration not only of the host state's capacity to regulate but also the wider repercussions of such regulations on the public as well as the conduct of foreign investors.

Keywords: public interest, investor-state, arbitration, human rights, environmental, counterclaims, reform, corporate responsibility.

I. The Investor-State Dispute Settlement (ISDS) System and some Underlying Challenges

Investment arbitration has been a very prominent fora for resolving investor-state disputes in the past decades as the number of bilateral and multilateral investment treaties (BITs and MITs) has grown exponentially. Unlike commercial arbitration which sits in the realm of private (international) law, or inter-state dispute resolution, which positions itself in public international law, investor-state dispute settlement (ISDS) sits in between those. The relationship is hybrid – semi-public (due to the presence of a sovereign state whose main objective is protecting the public interest) and semi-private (due to the presence of a foreign investor, i.e., a private company). This public-private dichotomy makes dispute settlement more complex due to the diverging (at least on the face of it) leading objectives and bargaining powers of each party.[1]

The ISDS system has developed to provide a means for resolving such complex disputes in a very particular manner – through reliance on BITs/MITs wherein Contracting State Parties make binding commitments to prospective foreign investors, nationals of the other, reciprocal Contracting State Party. These treaties create obligations which states have vis-à-vis prospective foreign investors; whilst foreign investors enjoy the benefit of these promises, without carrying themselves reciprocal obligations, as they are not direct parties to the treaties.[2] In this way, investment arbitration is characterized with that investors are always the claimants, those making allegations against and seeking monetary compensation from the host state for treaty violations, whilst states are commonly the respondent. Therefore, while investors may win or lose an investment arbitration, host states are deemed as being always on the losing side and the possibility for states to initiate counterclaims is limited.[3]

The problem or even the simple reality of investor-state agreements is that when host states enter relations with a private foreign investor, there is a realization that each party has different interests. While the state is interested in protecting its public interests by means of legislating and regulating, foreign investors are interested in a more predictable and stable regulatory framework which will not be amended for the duration of the investment project, thus ensuring predictability of costs, risks, and profits. This creates a clash of international norms – on the one hand, the public international principle of state sovereignty plays a part, on the other hand the private international concept of *pacta sunt servanda* is present, i.e., what has been agreed on must be kept. Each party stands by one of these principles – the host state is concerned about

* Dr, Lecturer in Law, Cardiff University, School of Law and Politics, Email: NedevaS@cardiff.ac.uk.

[1] *See* Stanislava Nedeva, *Predictability in Oil and Gas Investment Agreements Balancing Interests for a Stable Investment Environment* (Edward Elgar Publishing 2024), Ch. 2.

[2] Note: some new generation international investment agreements include provisions regarding investors' obligations to, e.g., maintain investments in line with the host state laws and regulations, e.g., Iran-Slovakia BIT 2016, Art. 10(3).

[3] Note: the author does not suggest that investment arbitration per se is pro-investor in terms of outcomes as statistics show that this may not always be the case –e.g., *see* UNCTAD Issue Note (2022) Facts on ISDS Arbitrations 2021: with a special focus on tax related ISDS cases, https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf (accessed 01 Jun. 2024).

INVESTOR-STATE DISPUTE SETTLEMENT

protecting its sovereignty and regulatory powers, whilst the investor is mostly concerned about the private aspects of the relationship.

Investment treaties often affirm the host states' right to legislate in the pursuit of legitimate public interests,[4] although such a right might be generally or vaguely defined, leaving it to arbitrators to interpret whether states have acted 'legitimately' or whether their actions were arbitrary, unjustified, and discriminatory. Oftentimes, examples include the difficulty in differentiating whether state measures or actions in pursuance of the public interest amount to legitimate regulatory measures or to expropriation.[5] Defined briefly, expropriation refers to the single act of compulsory host state taking of one or more properties of the alien and often under political motives.[6] Where the legal title of ownership is affected as a result of the state's unilateral actions, then one would usually be looking at direct expropriation.[7] In turn, indirect expropriation is not characterized with a single state action of regaining control and ownership over property, but may be comprised of a number of regulatory and legislative actions which make it more difficult for the investor to perform their obligations and/or which decrease the investor's profits.[8]

Treaties provide extensive investment protections, such as the guarantee of a fair and equitable treatment (FET), prohibition of discrimination, most favoured nation treatment. Therefore, once a state has acted in contravention of treaty provisions, there are opportunities which investors can pursue. The burden of proof on the investor is to establish that they have suffered damage or loss because of governmental measures; whilst host states need to establish that the measure was legitimate and justified in the public interest.[9] Whilst there are usually protections against expropriation and the guarantee of compensation, the precise dividing line between (lawful) expropriation and regulatory measures taken in the public interest remains unclear.[10] If the latter, the state measure would not in principle require compensation. For example, the tribunal in *Methanex v. USA* held that 'a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable', unless specific assurances to the contrary have been given.[11] However, one could argue that expropriatory measures are in principle an exercise of state sovereignty in the pursuance of its public, economic, political, etc. interests.

Until there is a framework to guide the parties and arbitrators as to the dividing line between regulatory and expropriatory measures, the public interest may remain exposed to the natural limitations of investment arbitration. A framework is needed so that it is inclusive of the public interest, even though the public (of the host state) is not a direct party to the contractual or investment-treaty relations. It is these regulatory and legislative actions through which a host state will seek to protect its public interests by, for example, introducing a new taxation regime once a project turns out to be more profitable than expected or protecting local communities through national legislation on the protection and monitoring of public health, for instance. This remains a significant topic in response to the oil and gas industry's excess profits as some countries have imposed new taxes following the sharp increase in energy prices after Russia's invasion in Ukraine.[12]

II. Public Interest in Investment Arbitrations

The public interest is a broad concept, and this article takes the perspective of it being a more general principle. It is thought to cover aspects which are of particular significance to a state's legislative, policy, social and economic functions.[13] Examples include environmental

[4] Example US Model BIT (2012), Art. 6; North American Free Trade Agreement, Preamble; Trans-Pacific Partnership Agreement, Preamble.

[5] Anne K. Hoffmann, *Indirect Expropriation* in *Standards of Investment Protection* (August Reinisch ed., Oxford 2008), Chs 8, 165.

[6] For a discussion of the standard of expropriation, *see* Nedeva, *supra* n. 1; also Mustafa Erkan, *International Energy Investment Law: Stability Through Contractual Clauses* (Wolters Kluwer 2010), Chs 3, 62–63; Sornarajah, *Nationalized Property* (n. 145) 171; Ernest Enobun, *Host Governments' Legislative Acts and Unilateral Review of State Contracts in Spite of Stabilization Clauses: A Sovereign Rights or Sovereign Wrong?,* (3) OGEL 11 (2009) www.ogel.org/article.asp?key=2913 (accessed 01 Jun. 2024).

[7] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (First ed., OUP 2008); Campbell McLachlan QC, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2007), Chs 8, 290.

[8] Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff Publishers 1995) Ch. Four, 100; Hoffmann, *supra* n. 5, at 156.

[9] Angelos Dimopoulos, *Climate Change and Investor-State Dispute Settlement: Identifying the Linkages*, in *Research Handbook on Climate Change and Trade Law* 430 (Panagiotis Delimatsis ed., Edward Elgar, Cheltenham 2016).

[10] Erkan, *supra* n. 6, at 87–88.

[11] *Methanex Corporation v. United States of America*, UNCITRAL/NAFTA, Final Award, 3 Aug. 2005, Part IV, Ch. D, para. 7 (*Methanex*).

[12] Reuters, *Windfall Tax Mechanisms on Energy Companies Across Europe* 8 Dec. 2022, https://www.reuters.com/business/energy/windfall-tax-mechanisms-energy-companies-across-europe-2022-12-08/ (accessed 1 Jan. 2024).

[13] Example Gabor Hajdu, *Investment Arbitration and the Public Interest*, Hungarian Y.B. Int'l L & Eur. L. 75, 81 (2020), doi: 10.5553/HYIEL/266627012020008001005, Alison Giest, *Interpreting Public Interest Provisions in International Investment Treaties*, 18 Chi J. Int'l L. 321–352 (2017).

INVESTOR-STATE DISPUTE SETTLEMENT

law, human rights, labour and employment law.[14] Regulations in the public interest might include the need to provide good working conditions, or to meet environmental standards.[15] In order to comply with national regulations, foreign investors might have to reduce their profits, by for example ensuring they limit their waste and environmental pollution. Such regulations could be particularly challenging in the hydrocarbons industry.

Some might question the need to consider the public interest if the public is not a party to the investor-state relationship. In other words, the public interest is not guarded by contract law principles, but it falls within the remit of public law. In investor-state relations, as noted above, the relationship is neither merely commercial, i.e., of private character, neither entirely within public international law. Importantly, the main parties are two: the foreign company and the host state, but the indirect yet very affected party is the public, who is the taxpayer, from whose money potential compensation will be paid; who will be exposed to the consequences of potential environmental and human rights (EHR) regulations and breaches; and thus, whose interests need to be addressed. One should be concerned with the public interest of the host state, because it is impacted by the investment treaties and investment projects to which the host state is a party – this could be by means of developing an economic sector and thus creating more jobs, bringing in expertise and technology, or through paying taxes; but also affecting human rights and environmental regulations by means of, for example, working conditions, waste management and environmental pollution. In other words, since the public entrusts power to the government and public bodies to implement certain policies, it is only logical that the public interest needs to be somehow considered during dispute resolution as arbitral decisions may have long-lasting repercussions upon it. How can the public be given a 'voice' and protected if they are not sitting on the formal 'table' of investor-state dispute resolution? This article argues that this can and should be achieved by means of a strengthened use of independent experts and amicus curiae, a proportionality evaluation of the facts and circumstances in investor-state disputes; a consideration of the host state's capacity to regulate and wider repercussions of such regulations on the general public – and consequently, the impact on governments to implement national policies to protect the public; as well as the conduct of foreign investors which might have a contributory role in their own losses; and in that sense and most importantly, the development of counterclaims on, but not exclusively, the basis of EHR regulations. It is argued that this approach will achieve better symmetry between foreign investor's treaty-based claims and host state's EHR concerns. Further, it is thought that this will bring greater fairness and promote the rule of law. This argument is in line with and supplements the ongoing ISDS reform, first initiated by the European Commission and the United Nations Commission on International Trade Law (UNCITRAL) Working Group III proposal, which considers and debates on the proper place of counterclaims and whether they are fit for purpose.

Moreover, as a fluid concept, the content of public interest, public purpose or public welfare has changed over the years. This is discernible from new generation investment agreements wherein environmental principles and human rights issues have started to feature as an emanation of the need to protect the public, thus signalling that they are of an increasing concern to contracting states. More conversations are raised by both practitioners and academics in the direction of investors' behaviour and the need to introduce measures that regulate investors' misconduct in the context of EHR damages. In this way, while earlier cases suggest that investors were able to sue host states for their environmental regulations, new investment agreements emphasize that the promotion of foreign investment should not compromise the protection of the environment or human rights.[16] Concerns about EHR protection can be seen in both treaties and international arbitration as both the number of investment protection provisions and arbitration claims are on the rise. These are often considered in the broader context of sustainability, as sustainable development relates to economic development, social development, and environmental protection.[17]

Have tribunals acknowledged and deliberated on the place of the public interest in investor-state relations in their decision-making? In some cases, yes, however, often such discussion was brief and/or did not ultimately appear to significantly affect the outcome of the dispute, respectively the final award. Oftentimes, tribunals have declined to do so based on a lack of jurisdiction and referred the matter to national courts.[18] Nevertheless, the significance of the public interest has not remained unnoticed. Oftentimes, the public interest or public purpose is discussed in the context of determining the lawfulness of expropriation. There are numerous BITs and MITs which explicitly

[14] Hajdu, *supra* n. 13, at 75, 81.

[15] Example *see* Stephan W. Schill & Vladislav Djanic, *Wherefore Art Thou? Towards a Public Interest-based Justification of International Investment Law*, 33(1) ICSID Rev. 29–55 (2018), doi: 10.1093/icsidreview/six025; Giest, *supra* n.13, at 321–352.

[16] UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, https://unctad.org/system/files/official-document/wir2015_en.pdf (accessed 01 Jun. 2024); Kezhen Su & Wei Shen, *Environmental Protection Provisions in International Investment Agreements: Global Trends and Chinese Practices*, 15 Sustainability (2023), doi: 10.3390/su15118525.

[17] United Nations General Assembly. A/RES/60/1. 2005 World Summit Outcome. 24 Oct. 2005, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf (accessed 01 Jun. 2024).

[18] Example, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 Dec. 2011; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 Aug. 2016; *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, 18 Jan. 2019.

INVESTOR-STATE DISPUTE SETTLEMENT

refer to the notion of public interest which has conventionally been given a broad interpretation, leaving a significant amount of discretion to host states to justify their actions or measures as having a public purpose. While tribunals have sometimes avoided providing a detailed explanation of the concept, earlier arbitrations have stated that an unlawful expropriation would seek to 'avoid contractual obligations of the State or of an entity controlled by it'[19] and/or where the state actions were motivated purely out of political reasons.[20] Therefore, tribunals have recognized the need to examine the purpose of state measures and have incorporated the notion more explicitly in some cases. For example, the tribunal in *LETCO v. Liberia* stated that in justifying an act of nationalization, the government will have to 'first point to some legislative enactment, embodying the act of nationalization'; then show that the action was 'taken for a *bona fide* public purpose; that it was non-discriminatory; and that it was accompanied by payment (or at least the offer of payment) of appropriate compensation'.[21]

Another example is *ADV v. Hungary*, where the Hungarian government maintained that its actions to amend the transport legislation and enact the Ministerial Decree were 'important elements of the harmonization of the Government's transport strategy, laws and regulations with EU law in preparation of Hungary's accession to the EU in May 2004' and the legislative changes were in 'the strategic interests of the State',[22] whilst the claimant alleged expropriation. The public interest was not relied on as a standalone justification, but it was discussed in conjunction with other elements to lawful expropriation, namely due process of law, the measures being non-discriminatory, and accompanied by payment of just compensation.[23] However, the tribunal found the respondent's justification to be unsubstantiated, stating that satisfying the public interest requirement needs 'some genuine interest of the public'. The mere reference to 'public interest' would not satisfy the requirement, or it would otherwise render the requirement 'meaningless since the tribunal can imagine no situation where this requirement would not have been met'.[24] This case demonstrates that the tribunal did not intend for the public interest requirement to be a self-explanatory one, satisfied *a priori.* The expectation was that the state had to show specifically and in the drafting of the legislation how the public interest was affected and protected by virtue of the legislation. However, it is unclear what is meant by 'genuine interest' of the public and how this requirement had to be spelled out and/or measured in domestic legislation. Would a more extensive and expert explanation of the legislation suffice, for example? Or would this still not satisfy the tribunal in the strive for equilibrium between state sovereignty and *pacta sunt servanda?* What evidence would be required to convince the tribunal of the genuine interest? What would the threshold be and for whom? These are some of the open questions. It might be that legislation supported by clear expert opinion as to, for example, the positive and feasible impact it would have on the public and/or the negative repercussions for its absence might suffice. In other words, the tribunal might anticipate express and well-developed links to be made between state action and purpose. For instance, *Chemtura v. Canada* demonstrates that the effects state measures may have on the environment or public health as well as supporting scientific evidence may influence the reasonableness of those measures and the extent of state liability. The claimant alleged that Canada was in violation of the North American Free Trade Agreement (NAFTA) Article 1103, Article 1105 and Article 1110 following a ban on the use of lindane-based products after a review which raised health concerns.[25] Discussing the standard of review, the tribunal noted that it must consider all circumstances, 'including the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations'.[26] The tribunal found the review was in pursuance of the agency's mandate and as a result of Canada's international obligations.[27] It was satisfied that the respondent had established that the use of lindane presented health and environmental risks by referring to a number of countries which had banned or restricted the use of lindane and international legal instruments.[28] In that sense, strong scientific evidence, especially one which has been verified internationally, might be a strong stepping stone for a state's justification.

Additionally, *Santa Elena v. Costa Rica* concerned the expropriation of the Santa Elena property by the Government of Costa Rica and whether the requirement to pay compensation should be valued according to its current fair market value with or without consideration of existing environmental legislation that would restrict the

[19] *Amoco International Finance Corp v. Iran,* 14 Jul. 1987, 15 Iran-US CTR 189, 233, para. 145.
[20] *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic,* 53 Int'l L. Reports 297, 329 (1979), doi: 10.1017/CBO9781316151808.036; 5 Y.B. Comm. Arb. 143, 150 (1980); *LIAMCO v. Libya* 20 ILM 1, 113–114 (Arbitrator Mahmassani) (1981), doi: 10.18261/ISSN1504-3061-1981-03-01; *Amoco International Finance Corp v. Iran*, 15 Iran-US CTR 189, 233 (1987), paras 145–146.
[21] *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 Mar. 1986; 26 ILM 647, 665.
[22] ICSID Case No. ARB/03/16, para. 392.
[23] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 Oct. 2006, para. 370.
[24] ICSID Case No. ARB/03/16, para. 432.
[25] North American Free Trade Agreement, Art. 1103 (most favoured nation treatment), Art. 1105 (minimum standard of treatment) and Art. 1110 (expropriation).
[26] *Chemtura Corporation v. Government of Canada*, UNCITRAL (formerly Crompton Corporation *v.* Government of Canada), Award, 2 Aug. 2010, para. 123.
[27] *Ibid.*, para. 138.
[28] *Ibid.*, para. 135.

INVESTOR-STATE DISPUTE SETTLEMENT

commercial development of the property.[29] The tribunal acknowledged that expropriation even for 'public purposes', such as environmental protection, does not affect the duty to pay adequate compensation.[30] In the end, the tribunal valued the compensation under the fair market value of the property, without consideration of the existing environmental legislation. Hence, even though the public good was recognized, this did not have a feasible impact on the outcome. This case illustrates the general approach by tribunals to focus on the breach of obligations and allocate damages accordingly. In other words, they tend to adopt a fault-based approach and one which looks at the commercial/contractual aspect of the relationship, rather than exploring in greater depth the overarching aims and effects of state measures. After all, arbitrators are appointed by the parties to consider and resolve the dispute at hand, rather than to safeguard the public interest – this is the primary responsibility of the state and so their duty to provide well-reasoned justifications for their measures.

Most recently, the tribunal decided in *Michael Anthony Lee-Chin v. The Dominican Republic* that the respondent state unlawfully expropriated the claimant's investments in a waste disposal operation, adopted measures in violation of the FET and breached the umbrella clause of the FTA between the Caribbean and the Dominican Republic.[31] The dispute concerned a concession agreement for the management and operation of the Duquesa Landfill. The respondent relied on a 'general exemption' under the agreement according to which the host state can take measures necessary for the protection of its own 'national security interests' without incurring liability under the agreement, if the claimant's actions amounted to threats to public health or the environment.[32] The respondent argued that the numerous breaches of the concession agreement and negligence in operating the landfill caused a risk of a national health and environmental crisis (as claimant failed to meet its sanitary and environmental obligations), if the respondent failed to take measures to control the situation.[33] The tribunal recognized that the protection of the environment is 'an essential priority in all human activities' and that measures may be necessary to ensure national security interests, but did not find sufficient evidence that the situation created a state of emergency which would pose a risk to national security in this particular situation.[34] Amongst others, the tribunal observed that the risks, which were due to accumulation of waste, presence of domestic animals, vectors, emission of unpleasant odours and the burning of waste, were within the Duquesa Landfill and were not affecting the entire population and thus, were not of national scope.[35] This is a useful ruling developing the discussions on the public interest, in the context of environmental protection and public health. It would have been interesting to see what the tribunal might have decided, had the objection been phrased differently, i.e., not in terms of 'national emergency' and 'national security', but rather in terms of the local threats and impacts the actions of the investor have caused, similarly to other cases discussed later in this article.

These examples demonstrate that in the balance between environmental protection and investment expropriation – i.e., between the protection of public interests and violation of private interests, the environmental expropriatory measures carry the same consequences as any other expropriatory measures and require that the state compensates the investor. Of course, one must remember that host states carry obligations towards investors to guarantee and maintain a stable and transparent investment environment, which often include not changing the applicable regulatory regime applicable in a manner which will harm and create adverse economic effects on the investor or the investment. This might lead to claims of expropriation, a breach of the FET standard, or of discrimination and less favourable treatment. One can infer that tribunals tend to focus on the substantial treaty clauses, such as whether the FET has been violated or whether there has been expropriation which requires compensation, as opposed to constructing the arbitration process in a manner which takes account of the potential effects on the public welfare, by for example looking at EHR repercussions.

It might be that tribunals prefer to defer the matter of defining what is in the national or public interest to the state.[36] In other words, the question can be perceived as a national and political matter, outside the scope of arbitration and thus not arbitrable. Even if a measure addressed the public interest, if it has not been carried out in accordance with the law, i.e., the relevant treaty, the tribunal might find a breach. In that sense, the motive of the state would not necessarily suffice to justify the lawfulness of its measures. This is so unless, as it has been observed in *Chemtura v. Canada*, there is strong scientific evidence and mutual agreement amongst states that certain actions are necessary to protect the public.

These cases also suggest that while the public interest criterion is essential for the determination of lawfulness of nationalization or expropriation, it is often considered in conjunction with the remaining three criteria. While in international law there is a distinction between *acta jure imperii and acta jure gestionis,* one could argue that in

[29] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 Feb. 2000, paras 35–37.
[30] ICSID Case No. ARB/96/1, paras 71–72.
[31] *Michael Anthony Lee-Chin v. Dominican Republic*, ICSID Case No. UNCT/18/3, Award, 6 Oct. 2023; the Agreement Establishing the Free Trade Area Between the Caribbean Community and the Dominican Republic.
[32] *Ibid.*, paras 218, 222.
[33] *Ibid.*, para. 225.
[34] *Ibid.*, paras 238, 264–265.
[35] *Ibid.*, paras 251–253.
[36] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 Sep. 2015, para. 245.

principle, every action or measure of the host state is taken with the aim of protecting the national interest. Therefore, it might prove challenging to demonstrate that certain actions have not got a public purpose or that such purpose is strong enough to justify revocation of state liability. Simultaneously, there is an ever-growing pressure to consider the public interest, especially in the context of investment projects which interfere with and raise environmental issues and human rights principles. This can be seen by the numerous actions taken recently by individuals, NGOs and climate change activists against governments and private enterprises, alleging that their actions have caused damage through violations of human rights and failed to ensure environmental protection.[37] Hence, the public interest is indeed undoubtedly a primary responsibility of the host state, and arbitrators might have little power (or desire) to influence it. Still, there has been an increasing need to acknowledge that the two-party investment relationship may have wider implications, making it necessary to consider not only how the public might be affected but also how to incorporate this third perspective, which the state primarily represents.

III. The Way Forward

This section analyses some further significant decisions with remarkable approaches to dispute resolution, which also contribute to the public interest discussion. This article argues that these cases are evidence of the various courses of action which might be employed to bring better symmetry between the parties and put forward the public interest.

3.1 Independent experts

One existing approach is the appointment of an *independent* expert to assist with determinations of EHR issues. The emphasis here is on *independent* – i.e., not only would tribunals benefit from the expert opinion of a third party, but such opinion must be entirely impartial and independent from the dispute/parties. For example, the tribunal in *Perenco Ecuador Ltd v. Republic of Ecuador* was assisted by an independent environmental expert in determining the extent of environmental damage, in addition to the party-appointed experts.[38] In particular, the tribunal noted that the party-appointed experts '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'.[39] This serves to illustrate the risks of relying solely on party-appointed experts as they may perceive their role as demonstrating the innocence of their client or the fault of the opponent, at the expense of providing a complete, well-rounded and most objective picture of the events and circumstances. Additionally, procedural safeguards were established in this case by means of, for example, having the independent expert interviewed by and chosen in consultation with the parties; drawing up a protocol and asserting that the expert is only answerable to the tribunal.[40] Transparency, fairness and perhaps even parties' trust were guaranteed by means of allowing the parties to be present at the expert investigations, receiving copies of their findings, and serving as evidence in addition to the evidence provided by the party-appointed experts.[41] Some authors correctly note that this might increase costs and delay proceedings, but the protection of the public interest especially when EHR concerns are involved should justify the appointment.[42] Some arbitration rules and soft rules provide for the right to appoint experts[43] and some treaties also refer to the same right for issues concerning environmental, human rights, health, or other matters,[44] thus strengthening the argument that tribunals should more confidently rely on experts.

3.2 Amicus curiae

Another beneficial tool, which has been relied on in some arbitrations, is the incorporation of amicus curiae. The attitude towards them appears generally positive, *amici* submissions have been recognized[45] and briefs are increasingly being submitted by, for example, UN Special Rapporteurs on EHR cases against governments.[46] An

[37] For a discussion, *see* Stanislava Nedeva, *Individuals and NGOs vs Corporations in the Pursuit of Climate Accountability. In the Spotlight: The Italian Oil Major ENI,* (OGEL, ISSN 1875–418X Sep. 2023), www.ogel.org (accessed 01 May 2024).

[38] *See* e.g., *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim (11 Aug. 2015) para. 611, where the Tribunal appointed an independent environmental expert to assist it in determining the extent of environmental damage; also, Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals*, 342 (CUP 2011), who welcomes appointment of independent experts.

[39] ICSID Case No ARB/08/6, para. 581.

[40] For a discussion, *see* Jason Rudall, *The Tribunal With a Toolbox: On Perenco v. Ecuador, Black Gold and Shades of Green*, 11 J. Int'l Disp. Settlement 485, 497 (2020), doi: 10.1093/jnlids/idaa015.

[41] *Ibid.*

[42] Xuan Shao, *Environmental and Human Rights Counterclaims in International Investment Arbitration: At the Crossroads of Domestic and International Law*, 24 J. Int'l Econ. L. 157, 177 (2021), doi: 10.1093/jiel/jgab001.

[43] UNCITRAL IBA Rules on the Taking of Evidence in International Arbitration (2020), Art. 6.

[44] Example, Argentina–UAE BIT (2018) Art. 31; Canada-Moldova BIT (2018), Art. 33; *see also* Shao, *supra* n. 42, at 157, 177.

[45] UNCITRAL, *Rules on Transparency in Treaty-based Investor-State Arbitration* (2014), Art. 4(1); ICSID Arbitration Rules 2022, Rule 67.

[46] Example Dr David R. Boyd, *The Right to a Healthy Environment in Brazil: Amicus Curiae Brief from the United Nations Special Rapporteur on Human Rights and the Environment*, https://www.ohchr.org/sites/default/files/Brazilian_climate_change_case.pdf (2020) (accessed 01 Jun. 2024); Amicus Curiae brief by the Special Rapporteur on human rights and the environment, Special Rapporteur on toxics and human rights

INVESTOR-STATE DISPUTE SETTLEMENT

interesting example from investment arbitration is *Suez v. Argentina* which concerned Argentina's privatization of water and sewage services to safeguard the human right to water and ensure supply to its population, thus violating treaty rights of the claimant.[47] The tribunal also received amicus curiae submissions from five NGOs, which contended that human rights law 'required that Argentina adopt measures to ensure access to water by the population, including physical and economic access, and that its actions in confronting the crisis fully conformed to human rights law'.[48] Ultimately, the tribunal dismissed the human rights arguments, stating that Argentina could have adopted other, 'more flexible' measures (which were suggested but Argentina rejected) to ensure the water and sewage services whilst respecting its treaty obligations.[49] Further, it was maintained that Argentina's human rights obligations towards its public do not 'trump' its treaty obligations and that Argentina could have respected both types of obligations.[50] This case demonstrates that amicus curiae submissions are sometimes admissible, but despite that they may not prove decisive. *Suez v. Argentina* resembles *Copper Mesa v. Ecuador* (discussed below) with the clear stance taken by the public which sought to justify the regulatory measures to protect the local environment, though in both cases the tribunals focused on the treaty breaches and how these could have been avoided.

This article argues that one useful strategy is amicus curiae submissions, especially in the context of alleged EHR violations, which can be reflective of the 'community interest'.[51] Support for the role of non-disputing parties is found in the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules.[52] Additionally, the tribunal in *Philip Morris v. Uruguay* agreed that amici participation could assist the tribunal in its decision-making and support the transparency of the proceedings and acceptability of its users.[53] The submission concerned the incomparable level of knowledge and experience the Petitioner had on public health in the region and therefore established the specific context in which Uruguay's regulatory approach on packaging and labelling of tobacco products was developed, and the reasonableness and effectiveness of this approach.[54] The tribunal further noted that the presence of the public interest in the subject matter justified the lifting of confidentiality, thus allowing its findings under the Procedural Order to be disclosed to third parties.[55]

Therefore, amici participation can have positive effects on the public awareness and understanding of investment arbitration and the relevant proceedings, in particular.[56] It is expected that by allowing individuals, NGOs, trade associations or other interested non-disputing parties to submit petitions and participate in the proceedings this will give 'voice' to the public and serve to address the imbalance in ISDS. In that sense, it can also strengthen transparency, legitimacy, and the rule of law in investment arbitration and supplement other already available tools aimed at increasing transparency, such as the UNCITRAL Rules on Transparency.[57] While the practice of amicus submissions might be seen as leading to procedural unfairness and politization of the process as submissions might often be in favour of the respondent state,[58] this article argues that such submissions do not oblige tribunals to make determinations which strictly and completely follow the content of the submissions. In fact, the tribunal in *Suez v. Argentina* was not convinced by the amicus curiae submissions. Nevertheless, even the mere consideration of these submissions would increase the presence of the affected communities, thus achieving a better balance.

and Independent Expert on the enjoyment of all human rights by older persons, *Verein KlimaSeniorinnen Schweiz et. al. v. Switzerland,* https://www.ohchr.org/sites/default/files/documents/issues/environment/srenvironment/amicus-curiae/verein-klima.pdf (2021) (accessed 01 Jun. 2024).

[47] *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 Jul. 2010, para. 252.

[48] ICSID Case No. ARB/03/19, para. 256.

[49] ICSID Case No. ARB/03/19, paras 260–262.

[50] ICSID Case No. ARB/03/19, paras 235 and 260: 'For example, if Argentina's concern was to avoid an increase in tariffs during a time of crisis, it might have relieved AASA, at least temporarily, of investment commitments that were placing a crippling burden on the Concession so long as tariffs did not increase. If Argentina's concern was to protect the poor from increased tariffs, it might have allowed tariff increases for other consumers while applying a social tariff or a subsidy to the poor, a solution clearly permitted by the regulatory framework. There is evidence that governmental agencies were among the consumers with the largest unpaid invoices owing to AASA. Argentina might have taken measures to assure that its own governmental organizations paid their legitimate debts to AASA'.

[51] Christoph Schreuer & Ursula Kriebaum, *From Individual to Community Interest in International Investment Law*, in *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* 147 (Ulrich Fastenrath et al., eds 2011). *Ibid.,* at 1096; Abdulkadir Gulcur, *The Necessity, Public Interest, and Proportionality in International Investment Law: A Comparative Analysis*, 6 U. Balt. J. Int'l L. 215, 245 (2018).

[52] ICSID Arbitration Rules (2022), Rules 67, 68; also, UNCITRAL, *Rules on Transparency in Treaty-Based Investor-State Arbitration*, Art. 5 (2021).

[53] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Procedural Order No. 4, 24 May 2015, para. 30.

[54] ICSID Case No. ARB/10/7, Procedural Order No. 4, para. 9.

[55] ICSID Case No. ARB/10/7, Procedural Order No. 4, para. 32.

[56] Lukas Brunner (Wilmer Hale), *Can Amicus Curiae Lead Investor-State Arbitration out of its Legitimacy Crisis and Towards More Efficient Dispute Resolution?* 15 Jul. 2022, https://arbitrationblog.kluwerarbitration.com/2022/07/15/can-amicus-curiae-lead-investor-state-arbitration-out-of-its-legitimacy-crisis-and-towards-more-efficient-dispute-resolution/ (accessed 01 Jun. 2024).

[57] UNCITRAL, *Rules on Transparency in Treaty-Based Investor-State Arbitration* (2014), Arts 4 and 5.

[58] Brunner, *supra* n. 56.

Most importantly, there have been recognitions and support for the incorporation of amicus curiae as part of the UNCITRAL Working Group discussions on reform.[59] This signifies the growing understanding that a change in the direction of increased transparency and better recognition of the wider public welfare is necessary, and that such can be achieved through positive action. However, there is an existing jurisdictional concern that absent an express provision authorizing reference to *amicus* participation, either in the institutional rules or parties' contractual agreement, arbitrators should decline such participation.[60] Therefore, states are strongly encouraged to consider the explicit incorporation of third-party submissions in investment treaties, in addition to the discussions by the UNCITRAL Working Group. In turn, it is believed that the UNCITRAL reform should deliberate on and incorporate third parties' right to make submissions, even if this is in more limited and defined circumstances, such as cases which concern climate law and public health.

3.3 A proportionality approach in investor-state disputes

An approach based on proportionality evaluation of the facts and circumstances and a margin of appreciation is not unknown in investment arbitration. This approach was adopted in *Occidental Petroleum v. Ecuador*, where a dispute arose after the corporation sold off part of its production rights without the prior authorization of the Ecuadorian Government. This was required by Ecuador's hydrocarbons law with a view to protecting the Amazon environment and the law was incorporated into the contract. Ecuador terminated the licence, whilst Occidental Petroleum initiated arbitral proceedings alleging a breach of the FET principle.

Interestingly, the tribunal held that despite the finding that Occidental Petroleum has breached the contract, Ecuador's action to terminate the licence with immediate effect was not proportionate to the circumstances and not an exercise of its regulatory prerogatives.[61] Other less severe measures, such as a renegotiated settlement, were available to the parties. In balancing state's and individual's interests, the tribunal applied the proportionality principle which was not only part of Ecuadorian law, but also a general principle of international law.[62] The article suggests that more explicit consideration be given to the public interest, which the host state ultimately tries to protect, through the wider usage of proportionality, which is especially suitable in cases involving public health, human rights, and climate law. In this case, the tribunal did not engage in a lengthy discussion, though it recognized a state's right to exercise its prerogative for the 'public welfare'. Thus, the recognition of the public interest and that it was genuine could be implied. However, it was found that such an exercise is subject to limitations and that in the present case public welfare factors were not specified.[63] Perhaps, the tribunal engaged in a lengthy proportionality analysis, albeit with little reference to the public, because such was explicitly mentioned in the domestic law. Without explicit references, tribunals might be less inclined to engage in an extensive discussion. Despite that, the tribunal noted that proportionality is a general principle of international law, and this could reinforce the justification for tribunals to embark on a proportionality analysis. Nevertheless, it is maintained that to have a tribunal feel 'encouraged' to adopt this approach, the host state also has a role to play. As a legislator, it should ensure proportionality and public welfare are specifically considered in its law-making and regulatory processes, thus serving as stronger evidence before a prospective tribunal. Still, the question remains of how much is enough. Ultimately, the tribunal awarded damages to the investor, but also made a deduction of 25% due to the investor's breach of contract which contributed to the prejudice they had suffered.[64]

Similar was the approach in *Copper Mesa v. Ecuador*[65] in which local communities resisted the mining activities out of concerns over environmental harm. This resulted in Ecuador's termination of the licence through new legislation, which allowed the expropriation of mining licences without compensation. Copper Mesa initiated arbitration, whilst Ecuador tried to argue that the investor's illegal actions precluded the tribunal from hearing the claim. However, the tribunal disagreed, stating that Ecuador acted arbitrarily and neglectful of due process. This case is interesting as it raises the important doctrine of 'unclean hands' and disregards the legitimacy of the public interest, despite the local communities' concerns of the harmful effects the mining activities would have on the local environment.[66] In fact, this article examined two arbitrations where the host state was still ordered to pay

[59] UNCITRAL, Report of Working Group II, 2010, A/CN.9/712, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V10/572/07/PDF/V1057207.pdf?OpenElement (2010) (accessed 01 May 2024); UNCITRAL Working Group III, *Third Party Rights in Investor-State Dispute Settlement: Options for Reform* (2019), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_reformoptions_0.pdf (2019) (accessed 01 May 2024); UNCITRAL, Possible reform of investor-state dispute settlement (ISDS), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/standing_multilateral_mechanism_-_selection_and_appointment_of_isds_tribunal_members_and_related_matters__0.pdf (2021) (accessed 01 May 2024).

[60] Gary Born & Stephanie Forrest, *Amicus Curiae Participation in Investment Arbitration*, 34(3) ICSID Rev. 626–665 (2019), doi: 10.1093/icsidreview/siz020.

[61] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 Oct. 2012, para. 856.

[62] ICSID Case No. ARB/06/11, para. 427.

[63] ICSID Case No. ARB/06/11, paras 391–392, 470, 528–529.

[64] ICSID Case No. ARB/06/11, paras 873, 876.

[65] *Copper Mesa Mining Corp. v. Republic of Ecuador,* PCA No. 2012-2, Award, 15 Mar. 2016.

[66] *Ibid.*, at 5.36–5.42; for a discussion of the case, *see* Hajdu, *supra* n. 13, at 75, 84–85.

INVESTOR-STATE DISPUTE SETTLEMENT

compensation to the investor for its environmental or human rights regulations, despite the investor's own breach of contract as well. In turn, the tribunal tried to balance this by adopting a proportionality consideration and by decreasing the amount of compensation awarded to the investor. While these cases still leave open the important question as to how and why an investor could benefit from the 'unclean hands' doctrine, the two arbitrations are also beneficial in demonstrating that there is scope for a proportionality analysis and for such to include the non-economic interests of the public.

A more lenient approach was taken in *Philip Morris v. Uruguay*, where the tribunal considered the margin of appreciation that should be accorded to regulatory authorities when making public policy determinations. The margin of appreciation is conventionally considered in the context of the European Convention of Human Rights. For instance, in *Hutten-Czapska v. Poland,* the Grand Chamber noted that the notion of '"public" or "general" is necessarily extensive'. Thus, when the welfare and economic policies of the state are concerned, the Court will allow a wide margin of appreciation to the legislature unless the judgment is manifestly without reasonable foundation.[67]

Even though the margin of appreciation is better known in the human rights context, the tribunal in *Philip Morris v. Uruguay* deemed it to be applicable to claims arising under the relevant BIT. This was despite the lack of a specific provision thereto, at least in the context of public health. The dispute concerned governmental measures regulating the tobacco industry with a view to protecting public health.[68] These measures were challenged by the claimant because of an alleged breach of the FET, whilst the respondent invoked the 'margin of appreciation' in its defence to make public policy determinations. The tribunal agreed that the margin of appreciation is applicable to claims arising under BITs when public health measures are concerned. As such, the tribunal recognized that responsibility rests with the government and national authorities. It considered that tribunals should *'pay great deference to governmental judgments of national needs in matters such as the protection of public health'.*[69] Relying on previous decision, the tribunal asserted that '*respect is due to the "discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith ... involving many complex factors"*[70]*; and that "[t]he sole inquiry for the Tribunal ... is whether or not there was a manifest lack of reasons for the legislation"'.*[71] The tribunal was convinced by the *'strong scientific consensus as to the lethal effects of tobacco'* and the *'widely accepted articulations of international concern for the harmful effect of tobacco'* that the imposition of more stringent regulation of the sale and use of tobacco products has a rational basis and was justified.[72] Therefore, tribunals can and have identified that in certain circumstances national legislators and authorities are better placed to decide on the manner and form in which the public is protected. This decision is very logical and reasonable given the public health context, but of course it does not deprive the tribunal of their role in monitoring whether state actions were discriminatory or arbitrary.

Overall, a proportionality evaluation would include arbitrators balancing not only foreign investors' interests against states' interests, but also the interests of the public – non-economic interests, which are not tied into the profitability of the project.[73] Tribunals should engage in a clear proportionality analysis to evaluate properly whether state measures were legitimate regulatory measures. This approach can help bring better symmetry between investor-state relations, thus aligning with the current criticism and debate for reform of the ISDS. Moreover, it will give indirectly 'voice' to the public as the third party which is not bound by a contract or treaty but is affected by the investment project.

In its proportionality analysis, a tribunal can pay considerations to the fact that national governments are better equipped to understand and protect the needs of the public, thus contributing to the provision of justification for state actions. While tribunals should evaluate the legality of state measures in the context of discrimination and arbitrariness, tribunals should leave it to national governments as to how they achieve balance between investor treatment and public interests' protection, especially in the context of public health.[74] Moreover, there should be a consideration not only of the host state's capacity to regulate (and any possible deference) but also the wider repercussions of such regulations on the general public. In this way, tribunals will show respect for state's sovereignty in terms of recognizing that national courts and regulators are best placed to regulate domestically.

3.4 The role of counterclaims

3.4.1 Development of counterclaims

The proposal to develop host states' right to submit counterclaims is likely the solution which will target the current asymmetry most directly, but it has also attracted

[67] *Hutten-Czapska v. Poland* Application No 35014/97 ECtHR (Grand Chamber) 2006, (2007) 45 EHRR 4, 166; discussed in Ben McFarlane, Nicholas Hopkins, & Sarah Nield, *Land Law: Text, Cases and Materials* (5th ed.), Ch. 4.

[68] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*), Award, 8 Jul. 2016, para. 9.

[69] ICSID Case No. ARB/10/7, paras 398–399.

[70] ICSID Case No. ARB/10/7, para. 399, citing *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicability and Liability, 30 Nov. 2012, (RLA-200), at 8.35.

[71] ICSID Case No. ARB/10/7, para. 399, citing *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 Jun. 2008, ('Glamis') (RLA-183), at 805.

[72] ICSID Case No. ARB/10/7, paras 418, 429–430.

[73] Schill & Djanic, *supra* n. 15, at 29–55.

[74] *Ibid.*

INVESTOR-STATE DISPUTE SETTLEMENT

divergent opinions. The International Court of Justice 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'.[75] Case-law exists to demonstrate that tribunals recognize that counterclaims can be within their jurisdiction and be admissible. However, such cases are still rare to date and some of them have been rejected on the merits. Therefore, one might ponder what the actual effect a state's counterclaim might be on the outcome and respectively, on the amount of compensation.

Crucially, there are tribunals which have adopted a positive approach towards counterclaims. One perspective could be seen in *Urbaser v. Argentina* which concerned a concession for water and sewage services to be provided in the Province of Greater Buenos Aires. With the economic crisis, Argentina's emergency measures and the so-called 'pesoification', the claimant company sought unsuccessfully the renegotiation of the concession, which eventually became insolvent. The claimant commenced arbitral proceedings, whilst the respondent submitted a counterclaim under Article 46 of the ICSID Convention alleging that the claimant failed to provide the necessary investment into the concession, thus violating its obligations under international law based on the human right to water.[76]

The tribunal considered that the dispute resolution clause within the Argentina-Spain BIT is neutral as to the parties to an investment dispute, thus not indicating that a state could not sue an investor in relation to a dispute concerning the investment.[77] Following a detailed discussion and a finding of a manifest link between the claimant's claim and the respondent's counterclaim, the tribunal concluded that the respondent can, under the BIT, raise a counterclaim in the case and that the tribunal has jurisdiction to hear it.[78] The tribunal stated that companies operating internationally are not immune from becoming subjects of international law, although there needs to be an assessment of a corporation's specific human rights activities to determine whether they would carry international law obligations. In its discussion, the tribunal referred to a number of international human rights instruments, such as the Universal Declaration of Human Rights 1948, the International Covenant on Economic, Social and Cultural Rights 1966, and others, which lay down duties on both institutions and individuals, not on states exclusively.[79] Despite this, the tribunal found that the enforcement of the human right to water is an obligation imposed on states, not on companies,[80] unless there is 'a contract or similar legal relationship of civil and commercial law'.[81] The tribunal therefore maintained that the source of the obligation would be domestic law, not general international law. Hence, unless there is a domestic provision for such international obligations, *Urbaser v. Argentina* suggests it may be difficult to subject private entities to these in ISDS.[82] Curiously, the tribunal noted that the 'situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties'.[83] Overall, the tribunal acknowledged for the first time that investors could have human rights obligations under international law but refused to impose an obligation on the company to perform otherwise contractual obligations. The tribunal found that Argentina bore the obligation to ensure that the concessionaire ensures water supply; but the investor's obligation to perform human rights has its source in domestic law. While the claim was unsuccessful, it shows an opportunity to broaden the scope of counterclaims based on human rights violations, even though full effect to human rights vis-à-vis investor's obligations was not given.

A different and yet equally intriguing perspective can be seen in *Burlington v. Ecuador* and *Perenco v. Ecuador*, which both concerned environmental counterclaims that were based on breaches of domestic law. These two arbitrations arose from the same actions by the Government and therefore, they are closely interconnected. Closer attention will be paid to *Perenco v. Ecuador* as it was decided second, and the Burlington tribunal had already issued an award in favour of the Claimant. The dispute occurred after Ecuador passed legislation with which it raised the windfall profit taxes in response to an unexpected increase in oil prices. After failure to renegotiate, Perenco commenced arbitral proceedings alleging a violation of the FET and unlawful expropriation. In turn, Ecuador submitted a counterclaim maintaining that Perenco polluted parts of the Amazon rainforest and caused damage to the oil exploration infrastructure, and that Perenco's compensation should be reduced based on contributory fault. The tribunal rejected the claim and then considered Ecuador's counterclaim for environmental damage.

Significantly, the tribunal in *Perenco v. Ecuador* awarded compensation to the state for environmental

[75] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Order of 17 Dec. 1997, [1997] ICJ Rep 243, [27].
[76] *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 Dec. 2016, para. 36.
[77] ICSID Case No. ARB/07/26, para. 1143; Argentina-Spain BIT (1991), Art. IX (2): '2. If the dispute cannot be resolved in this way [diplomatic means] within six months of the start of the negotiations, it shall be submitted, at the request of either party, to an Arbitration Tribunal'.
[78] ICSID Case No. ARB/07/26, para. 1151.
[79] ICSID Case No. ARB/07/26, paras 1195 et seq.
[80] ICSID Case No. ARB/07/26, para. 1210.
[81] ICSID Case No. ARB/07/26, para. 1210.
[82] Rudall, *supra* n. 40, at 485, 494.
[83] ICSID Case No. ARB/07/26, para. 1210.

INVESTOR-STATE DISPUTE SETTLEMENT

damage. Importantly, it acted flexibly in preventing 'double recovery' by reducing the payable compensation to Ecuador as such was already awarded in *Burlington v. Ecuador* and because Perenco had entered the production sharing contract together with its consortium partner Burlington. Therefore, the environmental harm was seen as caused by the Consortium. The tribunal's decision to treat the amount paid by Burlington to Ecuador as a down payment on the environmental and infrastructure claims was later one of the grounds for annulment submitted by Ecuador on the basis that the tribunal manifestly exceeded its powers or failed to state reasons. However, this was rejected by the ad-hoc committee deciding on the annulment.[84] The ad-hoc committee noted that the tribunal arrived to its decision after appointing an independent expert who, in the words of the tribunal, quantified environmental damages more accurately than the Burlington tribunal; the tribunal further considered that Perenco and Burlington were jointly and severally liable for the environmental damage caused; and given that Burlington had already paid over USD 39 million for the contamination caused by the Consortium, the tribunal deducted this amount and treated it as a down payment in the *Perenco* arbitration.[85]

Where *Perenco* differed from *Burlington* was notably the tribunal's analysis whether to apply a strict-liability or fault-based liability regime for the environmental harm.[86] Remarkably, these cases are distinguishing because the claimants, i.e., the foreign investors, had consented to jurisdiction over the host state's counterclaims for investor breaches of domestic law.[87] Despite this, we are far from having the confidence in tribunals that counterclaims are a natural part of investment arbitrations. To make this step forward, tribunals need regulatory support which allows for the evolution of the ISDS system. Therefore, the future of ISDS and the public interest lies in, amongst others, the discussions to reform to explicitly incorporate a right to counterclaims as well as in the states' own initiative to include counterclaim provisions in future treaties.

There have been criticisms that allowing states to submit counterclaims raises procedural obstacles.[88] Truthfully, some tribunals did not establish jurisdiction to hear counterclaims as they arose not out of the underlying contract but the relevant domestic law, thus deferring the question to domestic courts.[89] Certainly, one must differentiate between contract-based and treaty-based arbitrations – the source of jurisdiction is different in each. One probable solution regarding contract-based arbitration is the explicit incorporation of counterclaims into investor-state contracts. This will address the question of parties' consent but may still leave unresolved the tribunal's jurisdiction to hear such claims when the arbitration is investment-treaty. Alternatively, or in addition to the above, investment treaties could be drafted and agreed to by the contracting states with counterclaims in mind. In investment arbitration, jurisdiction to hear counterclaims could be satisfied with the drafting of broad arbitration clauses to cover any disputes relating to an investment, which either party may bring to arbitration. For instance, the tribunal in *Saluka v. Czech Republic* established its jurisdiction and found consent to hear the counterclaim in the Czech Republic – Netherlands BIT. The provision stated that 'all disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter' were subject to arbitration.[90] The tribunal was satisfied that the broad wording of the provision contained no implication that only investors can initiate claims.[91]

Another milder option is reference to public good, in general and human rights and environmental protection in the treaty preambles. This will signal the significance of the public good, without imposing legally binding obligations on the parties. This solution will be deemed favourable by those who trust that the ISDS system functions well as it currently stands and might benefit from only minor changes. Absent explicit treaty language, the parties may agree in a separate agreement that they either accept or do not contest the tribunal's jurisdiction over counterclaims.[92]

An expansive approach to counterclaims could be seen in the ICSID Convention where Article 25(1) defines a

[84] ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, paras 722–723, 739.
[85] ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, paras 698–699.
[86] *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 Aug. 2015, paras 317 et seq.*; Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5 (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)),* Decision on Counterclaims, 7 Feb. 2017, paras 248 et seq.*; see also* Rudall, *supra* n. 40, at 485, 494.
[87] Example *see* Tomoko Ishikawa, *Counterclaims and the Rule of Law in Investment Arbitration*, Published online by Cambridge University Press: 7 Jan. 2019, https://www.cambridge.org/core/journals/american-journal-of-international-law/article/counterclaims-and-the-rule-of-law-in-investment-arbitration/1864471C7ABB41A54C72A373F19B6AFC#fn5 (accessed 01 May 2024).
[88] Example *see* Shao, *supra* n. 42, at 157, 177.
[89] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, para. 79; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 Apr. 2011, paras 694–695.
[90] Czech Republic – Netherlands BIT (1991), Art. 8.
[91] *Saluka Investments BV v. Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, paras 39–40; for a discussion, please *see* Maxi Scherer, Stuart Bruce & Juliane Reschke, *Environmental Counterclaims in Investment Treaty Arbitration*, 36(2) ICSID Review 413–440 (2021).
[92] Scherer, Bruce & Reschke, *supra* n. 91, at 413, 418.

INVESTOR-STATE DISPUTE SETTLEMENT

legal dispute as 'any dispute arising directly out of an investment'. Furthermore, Article 46 ICSID Convention accepts the submission of respondent counterclaims arising out of the subject-matter of the dispute and within the parties' consent, thus presuming reference to human rights and environmental claims. Therefore, ICSID arbitrations would find support for the submission of counterclaims, but their jurisdiction would still be dependent on the parties' consent in the relevant treaty and otherwise needs to be within the jurisdiction of the ICSID. Authority for the right to counterclaims can be further found in, amongst others, Rule 48(1) of the ICSID Arbitration Rules as well as Articles 4 and 21(3) of the 2021 UNCITRAL Arbitration Rules.[93]

The incorporation of counterclaims in the context of environmental principles and human rights issues is also in line with the emerging investment treaties and model agreements. Recently, there has been an increased interest in reforming investment treaties to move towards sustainability and regulate in the field of climate change. OECD members have discussed the link between investment treaties, the Paris Agreement and the need to limit global warming to 1.5°C, and the overall need to protect the environment.[94] There is a growing discussion that future investment treaties could include governments' commitments to accede to and enforce international treaties and basic standards on the environment, human rights, health or labour.[95] This change of approach continues in the direction of imposing due diligence conduct or reporting obligations on businesses with regards to environmental principles and human rights issues as well as companies' contribution to their own fault, which has led governments to pursue a heightened scrutiny of companies actions, through their Model BITs and provisions on counterclaims. Some new generation agreements have included explicit references to the states' right to submit counterclaims. For instance, the Morocco Model BIT (2019) provides for this right when an investor has failed to comply with domestic laws or has engaged in corruption, money laundering or terrorist financing.[96] An express obligation on investors and investments to uphold human rights is found in the Morocco – Nigeria BIT 2016.[97] Furthermore, the Netherlands Model Investment Agreement of 2019 addresses EHR principles by granting arbitral tribunal powers to take account of the investor's behaviour when it has not complied with its commitments under the UN Guiding Principles on Business Human Rights and the OECD Guidelines for Multinational Enterprises.[98] The states' right to regulate to protect the environment as well as the investors' obligations to comply with responsible business practices are also recognized in new FTAs.[99]

Further, the Common Market for Eastern and Southern Africa (COMESA) Investment Agreement grants the right to submit counterclaims if the COMESA investor has not fulfilled their obligations under the agreement, including the obligations to comply with domestic laws or has not taken all reasonable steps to mitigate possible damages.[100] A similar provision is found in the Draft Pan-African Investment Code (2016) which provides that the tribunal hearing the dispute has to consider whether the alleged breach is materially relevant to the issues and what mitigating or off-setting effects this might have on the merits of the claim or the damages.[101] The Economic Community of West African States (ECOWAS) Supplementary Act on Investment also contains a right to initiate a counterclaim.[102] Moreover, while there is not yet an international instrument agreed on by states on investors' conduct, the UN Human Rights Council has been working on the drafting of an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights.[103] This draft could be an invaluable addition to the 2021 Resolution adopted by the UN Human Rights Council, which stipulates that having a clean, healthy and sustainable environment is a human right, which states have to respect and protect.[104] The draft currently provides that individuals and communities who have suffered human rights abuses in the context of business activities shall enjoy all internationally recognized human rights and fundamental freedoms.[105] Therefore,

[93] *See also* the LCIA Arbitration Rules 2020, Arts 2 and 15; ICC Arbitration Rules 2021, Art. 5.

[94] *See OECD, The Future of Investment Treaties,* https://www.oecd.org/investment/investment-policy/investment-treaties.htm (accessed 01 May 2024).

[95] OECD Working Papers on International Investment, *The Future of Investment Treaties – possible Directions* (2021), https://www.oecd-ilibrary.org/docserver/946c3970-en.pdf?expires=1704299937&id=id&accname=guest&checksum=F3FC9ED334C1CF6824E3DE63DF174B56 (accessed 01 May 2024).

[96] Morocco Model BIT (2019), Art. 28(4).

[97] Morocco-Nigeria BIT (2016), Art. 18(2), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download (accessed 01 May 2024).

[98] Netherlands Model Investment Agreement, Mar. 2019, Art. 23.

[99] Chapter 17: Investment – Text of the 2023 Canada – Ukraine Free Trade Agreement, Arts 17.4 and 17.15; also, the 2023 Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organization of the African, Caribbean and Pacific States, of the other part; the 2023 Sustainable Investment Facilitation Agreement between the European Union and the Republic of Angola.

[100] COMESA Investment Agreement (2007), Art. 28(9).

[101] Draft Pan-African Investment Code (2016), Art. 43.

[102] ECOWAS Supplementary Act on Investments (2008), Art. 18(5).

[103] 7 UN General Assembly, Human Rights Council, 'Text of the third revised draft legally binding instrument with textual proposals submitted by States during the seventh and the eighth sessions', A/HRC/52/41/Add.1, Jan. 2023, Art. 4, https://documents-ddsny.un.org/doc/UNDOC/GEN/G23/008/93/PDF/G2300893.pdf?OpenElement (accessed 10 May 2023).

[104] UN GA, Human Rights Council, Forty-Eight Session, A/HRC/48/L.23/Rev.1, Oct. 2021, https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/270/15/PDF/G2127015.pdf?OpenElement (accessed 10 May 2023) UN GA, *supra* n. 104.

[105] UN General Assembly, Updated draft legally binding instrument (clean version) to regulate, in international human rights

INVESTOR-STATE DISPUTE SETTLEMENT

safeguarding the environment and associated human rights has arguably become an essential factor to investments and is transforming into an obligation on both states and companies, even though from different perspectives.

Therefore, there is a solid foundation to further advance the right to counterclaims. Developing and relying on it is not only a tool which allows host states to defend their regulatory powers, but also an instrument to direct the attention to foreign investors' wrongdoing and the fact that they may have caused damage or losses during the lifetime of the investment. Consequently, counterclaims can be a valuable technique that sheds light onto the damage or loss caused to the public welfare. As seen by the cases above, counterclaims can be particularly suitable in the context of EHR claims because of their wider political, economic, and societal impact. The examples show that states are increasingly more concerned not only about their right to regulate in the public interest overall but are also motivated to address EHR concerns, directly affecting their nationals. This move is slowly going towards the creation of a corporate duty to respect those rights, in addition to the existing rules in international law according to which states have an obligation to protect environmental law and human rights. This new direction of reform could ultimately have a positive effect on ISDS and the public.

3.4.2 Prospect for reform: The EU's workings on corporate responsibility and reforming ISDS

The European Union has been heavily involved in a number of legislative initiatives to re-structure ISDS and pay greater attention to the adverse activities of corporations as well as to stimulate more direct actions to protect the local communities and the public interest at large. Some examples include the surge to modernize the Energy Charter Treaty to align it with international climate goals, to introduce more stringent EU regulatory frameworks to coordinate with the international energy commitments and the Paris Agreement, in particular, as well as the discussions for ISDS reform at international scale first initiated by the EU and continued by UNCITRAL. The EU's pro-active legislative approach demonstrates its overall ambition to respond to the global demands and overarching climate-related pressures. Such pressures are increasingly more vocalized not only by national governments, but also by NGOs and individuals. Consequently, one can also notice an influx of climate-related claims against governments and corporations, which now more commonly interpret environmental protection and the need to respond to climate change as integrated into fundamental human rights.[106] This interpretation might go hand in hand with the UN Resolution that the right to a clean, health and sustainable environment is a human right, which states have an obligation to respect and protect,[107] but also goes beyond this to put investors' potentially harmful activities under the spotlight.

3.4.2.1 Secondary EU legislation

Most recently, in July 2024, the Corporate Sustainability Due Diligence Directive (CSDDD) entered into force, following rounds of consultations and negotiations. The Directive sets out obligations on EU and non-EU businesses and parent companies (specifically their upstream and downstream partners) to mitigate their negative impact on the environment and human rights.[108] The Directive is a continuation of the aspirations entrenched in the European Green Deal and part of a series of EU directives and regulations which address human rights and environmental protection through reporting and due diligence obligations. These include the Corporate Sustainability Reporting Directive and the Sustainable Finance Disclosure Regulation, which impose mandatory reporting obligations and require businesses to publish detailed information on how their activities affect society and the economy and report on environmental matters, human rights, anti-corruption measures, diversity issues[109]; as well as the ongoing plans to review the Energy Taxation Directive with the ambition to revise taxation, with the most polluting fuels (coal, oil, gas) to be taxed the highest, and aviation and maritime fuels to see a gradual increase

law, the activities of transnational corporations and other business enterprises, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf (accessed 8 Jan. 2024).

[106] Example *see* Greenpeace International, *Italian citizens and organisations sue fossil fuel company ENI for Human Rights Violations and Climate Change Impacts* (9 May 2023), https://www.greenpeace.org/international/pressrelease/59686/italian-citizens-and-organisations-sue-fossil-fuel-company-eni-for-human-rights-violations-andclimate-change-impacts/; for a discussion, *see* Stanislava Nedeva, *Individuals and NGOs vs Corporations in the Pursuit of Climate Accountability. In the Spotlight: The Italian Oil Major ENI*, OGEL 1 (2024), in Climate Change, www.ogel.org/article.asp?key=4117 (accessed 10 May 2024).

[107] UN GA, *supra* n. 104.

[108] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 Jun. 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859; *see also*, European Parliament, *Corporate Due Diligence Rules Agreed to Safeguard Human Rights and Environment* (Dec. 2023), https://www.europarl.europa.eu/news/en/press-room/20231205IPR15689/corporate-due-diligence-rules-agreed-to-safeguard-human-rights-and-environment#:~:text=The%20new%20directive%20on%20corporate,pollution%2C%20deforestation%2C%20excessive%20water%20consumption (accessed 01 Jan. 2024); Council of the EU, Press Release, Dec. 2023, https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/corporate-sustainability-due-diligence-council-and-parliament-strike-deal-to-protect-environment-and-human-rights/#:~:text=The%20due%20diligence%20directive%20will,out%20by%20their%20business%20partners (accessed 1 Jan. 2024).

[109] Other examples include the Regulation (EU) 2023/1115 on Deforestation-free Products; the Conflicts Minerals Regulation (EU) 2017/821, the Batteries Regulation (EU) 2023/1542 and the Forced Labour Ban Regulation which impose due diligence requirements on companies in certain sectors or circumstances.

INVESTOR-STATE DISPUTE SETTLEMENT

in taxation as well. Additionally, the CSDDD will be consonant with relevant international standards, such as the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and OECD Due Diligence Guidance for Responsible Business Conduct.[110]

The Directive is significant as it obliges companies to mitigate the adverse effects of their activities on human rights and the environment, including slavery, child labour, labour exploitation, biodiversity loss, pollution and destruction of natural heritage; and will require them to prepare a transition plan limiting global warming to 1.5°C aligning with the obligation under the Paris Agreement, with those who fail, facing fines for non-compliance and claims for damages made by individuals or organizations.[111] In order to comply, companies have to identify, prevent, mitigate, minimize, bring to an end, or remedy actual or potential adverse human rights and environmental impacts, understood as breaches of rights contained in listed international instruments and ratified by EU Member States.

The directive sets out an expectation that companies will adopt a complaints mechanism to address 'legitimate concerns' of individuals and communities adversely impacted by their activities,[112] as well as an opportunity to take legal action to obtain compensation.[113] Thus, it can be an instrument to hold companies legally accountable for human rights and environmental impacts and costs that they have caused through their business activities throughout their global supply chains. In scope, the directive covers companies with over 1000 employees and with a turnover of more than 450 million Euro (and eighty million euro to franchises, if 22.5 million was generated by royalties). Whilst initially the intention was that the Directive would apply to companies in high-risks sectors, this approach was abandoned, and the scope of companies reduced with the possibility to review whether a sector-specific approach would be more effective in high-risks sectors. The exclusion of the high-risk sector approach might be problematic as these can often be the businesses which are the biggest carbon offenders. The Directive is further significant for the coal, crude oil, and natural gas markets and it sets out a requirement that companies establish transition plans to limit the 'exposure of the company to coal-, oil- and gas-related activities'. Furthermore, national supervisory authorities will be responsible for monitoring and enforcing penalties on non-compliant companies, and those will interact and cooperate through a European Network of Supervisory Authorities.[114]

The new legislation has been applauded by many EHR organizations, although they have noted their disappointment with big businesses remaining outside of its remit, thus questioning its effectiveness to tackle climate change and uphold human rights.[115] As the chosen format is a directive, not a regulation, it will be legally binding on companies but cannot be applied directly against them – national legislation will first need to be implemented to give effect to the Directive domestically, thus evading full maximum harmonization across Member States. Of course, the Directive should deliver greater legal certainty regarding companies' obligations and a level playing field across Member States and companies operating within the EU, but this remains dependent on the proper implementation of the directive.

As it addresses due diligence obligations to cover violations of the rights and prohibitions under international conventions and human rights, the Directive promotes human rights and environmental principles and upholds the general public good/interest perspective, which is at the centre of this article as it allows individuals to raise 'red flags' through the civil liability route. It is a step in the right direction as it provides for instances of human rights prohibitions and obligations for companies to identify and prevent. It is therefore likely that the directive will influence and be reflected in future international investment agreements concluded by the EU. This supplements EU's more recent investment agreements which explicitly refer to the host state's obligations to implement environment-related measures,[116] clauses to promote sustainable development of foreign investments[117] and guidelines relating to corporate social responsibility.[118] In

[110] Kimberley Botwright & Spencer Feingold, *EU Governments Back Human Rights and Environmental Due Diligence Law for Supply Chains* (Mar. 2024) https://www.weforum.org/agenda/2024/03/eu-human-rights-environment-due-diligence-supply-chains/ (accessed 01 May 2024).

[111] European Parliament legislative resolution of 24 Apr. 2024 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, https://www.europarl.europa.eu/doceo/document/TA-9-2024-0329_EN.html (accessed 01 May 2024); European Parliament, Press Release, *First Green Light to New Bill on Firms' Impact on Human Rights and Environment* (19 Mar. 2024), https://www.europarl.europa.eu/news/en/press-room/20240318IPR19415/first-green-light-to-new-bill-on-firms-impact-on-human-rights-and-environment (accessed 01 May 2024).

[112] *Ibid.,* Art. 14.

[113] *Ibid.,* Art. 29.

[114] *Ibid.,* Art. 28.

[115] Example World Wide Fund for Nature, Apr. 2024, https://www.wwf.eu/?13548416/Corporate-due-diligence-law-greenlit-by-European-Parliament#:~:text=%E2%80%9CThe%20resounding%20backing%20from%20Parliamentarians,the%20WWF%20European%20Policy%20Office (accessed 01 May 2024); and here, https://www.wwf.eu/?13140866/EU-Member-States-sreduce-corporate-due-diligence-rules-to-a-shadow-of-their-former-self (accessed 01 May 2024); Oxfam International and Economic Justice lead Marc-Olivier Herman, Mar. 2024, https://www.oxfam.org/en/press-releases/eus-heavyweights-slash-supply-chain-rules-appease-big-business (accessed 01 May 2024); also K Armstrong (BBC News), *EU Backs Law Against Forced Labour in Supply Chains* (Mar. 2024), https://www.bbc.co.uk/news/world-europe-68583189 (accessed 01 May 2024).

[116] Example EU-Vietnam FTA, Annex 2-B, Art. 1.3(e).

[117] Example EU-Singapore FTA 2019.

[118] Example EU-Canada Comprehensive Economic and Trade Agreement (CETA), even though *see* limitations on counterclaims in Arts 8(40) and 8(18).

INVESTOR-STATE DISPUTE SETTLEMENT

future international investments arbitrations, the obligations on environmental protection and the public interest and any associated human rights emanating therefrom will have to be weighed against the private interests of foreign investors. To align with the EU's climate neutrality provisions as entrenched in the Paris Agreement, investment agreements are supposed to promote 'climate-friendly investment'[119] and to integrate not only investment protection provisions but also environmental protection rules. Therefore, foreign investors commencing foreign direct investment projects in an EU Member State would be subject to the provisions of the Directive and exposed to enhanced scrutiny of their activities. Particularly exposed might be companies from high-polluting industries, such as oil and gas.

3.4.2.2 EU Charter of fundamental rights

Apart from secondary EU legislation, environment and human rights-related dimensions that would be subject to consideration under investment law can be found in the EU Charter of Fundamental Rights and the jurisprudence of the Court of Justice of the European Union (CJEU).[120]

Article 17 'right to property' stands out as it establishes conditions under which deprivation of property may be permitted. The right to property is considered a general principle of EU law,[121] developed under the constitutional traditions of EU countries as well as on the basis of Article 1 of Protocol 1 of the European Convention of Human Rights. On an international level, the right to property is guaranteed by Article 17 of the Universal Declaration of Human Rights. Article 17 of the EU Charter identifies two categories of interferences: deprivations of property and regulations concerning the use of property, which require a fair balance to be struck between the protection of the public interest and the proportionality of the interference. From an investment law perspective, a violation of Article 17 might materialize as expropriation (direct or indirect) and therefore, this article juxtaposes state's regulatory actions to safeguard the public interest by virtue of EHR-related regulatory measures and the private interests and investment objectives of the foreign investor.

For instance, a case regarding the host state's exercise of regulatory power in order to comply with their EU and international climate law obligations is *RWE and Uniper v. the Netherlands (Ministry of Climate and Energy)*.[122] This case juxtaposed the right to property as protected under Article 1 Protocol 1 of the ECHR, and enshrined in Article 17(1) of the EU Charter, that the national legislation on the mandatory phasing-out of coal-fired power generation by 2030 was a form of expropriation. Whilst the court agreed that there was an interference, such was not unlawful, it met the 'fair balance' test and served the general public interest by promoting the reduction of CO_2 emissions. Thus, this climate change-related national measure implied that investments in a targeted sector must permanently cease operation, thus affecting future investors' projects. The case fundamentally demonstrates the equilibrium that needs to be maintained between legitimate, proportionate, necessary, and foreseeable legislation in the public interest, so as to address EHR concerns emanating from high-risk polluting industries, whilst ensuring adequate investor protection and payment of relevant compensation. Therefore, in the context of human rights and environmental principles, the environmental justification of a measure may serve to reject (or reduce the amount of) a claim of compensation.[123]

Similar example is *Križan*, which concerned an allegation by the operator of a landfill site that Article 17 was breached following the annulment by a court of a permit for infringing the Integrated Pollution and Prevention and Control Directive (2008/1/EC).[124] The Grand Chamber of the CJEU held that the annulment did not constitute an unjustified interference with the right to property and relied on environmental protection as a legitimate interest. Furthermore, in *Standley,* UK farmers challenged the EU Nitrates Directive (91/676/EEC), but the Court held that the right to property of private corporations must not take precedence over the general interest in environmental protection.[125] Therefore, Article 17 can be used by companies/investors as a 'shield' against government measures taken to protect the environment.[126] The generally broader wording of the provision signals that future EU international investment agreements have to be drafted to avoid potential conflicts with the Charter and the interpretation of expropriation provisions by investment tribunals.[127] Drafting expropriation provisions would

[119] Johannes Tropper & Kilian Wagner, *The European Union Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?*, 23 J. World Invest. Trade 813–848 (2022), doi: 10.1163/22119000-12340271; Su & Shen, *supra* n. 16, at 7–8.

[120] Example Arts 2, 7, 17 and 37 of the Charter of Fundamental Rights of the European Union (2000/C 364/01).

[121] Example *see* Case 44/79 Hauer (13 Dec. 1979) in which the CJEU initially recognized the right to property as forming an integral part of the general principles of EU law, the observance of which is ensured by the Court.

[122] *RWE and Uniper v. the Netherlands (Ministry of Climate and Energy),* The District Court of the Hague, 2022, ECLI:NL:RBDHA:2022:12635.

[123] Other examples are: *Turgut v. Turkey*, ECtHR Application No. 1411/03, Judgment – Merits (8 Jul. 2008) (Turgut–Merits), para. 90; *Theodoraki v. Greece*, ECtHR Application No. 9368/06, Judgment (2 Dec. 2010); *see also* the India Model BIT, Arts 5(6) and 5(7).

[124] Case C-416/10, *Križan*, ECLI:EU:C:2013:8; C. Hilson, *Substantive Environmental Rights in the EU: Doomed to Disappoint?,* in *Environmental Rights in Europe and Beyond* (Sanja Bogojevic & Rosemary Rayfuse eds, Bloomsbury Publishing 2018).

[125] Case C-293/97, *Standley*, ECLI:EU:C:1999:215, para. 54.

[126] Jasper Krommendijk & Dirk Sanderink, *The Role of Fundamental Rights in the Environmental Case Law of the CJEU,* 2 Eur. L. Open 616–635 (2023), doi: 10.1017/elo.2023.30.

[127] Angelos Dimopoulos, *EU Foreign Investment Law* 3.2.7.3 (OUP 2011) .

require a consideration of national regulatory powers, as emphasized by the European Parliament,[128] and thus a general provision to regulate in the pursuance of legitimate public policy objectives, such as the protection of public health, national security, the environment, and workers' and consumers' rights, might not amount to indirect expropriation, as long as it is proportionate, sufficiently protects the right to regulate, and is coherent with the Charter.[129] Whilst counterclaims are beyond the remit of the Charter, the threshold of the 'fair balance' test for property deprivation, which bears some similarities but also feasible differences with the international definition of lawful expropriation, delivers some guarantees of the indirect protection of the public and the safeguarding of legislative measures aimed at EHR preservation:

3.4.2.3 Modernization of the Energy Charter Treaty

As part of the overarching reform of the ISDS mechanism, the EU has also sought to modernize the Energy Charter Treaty to align it with the Paris Agreement, in order to reflect climate change and the EU's own roadmap towards clean energy transition.[130] The Energy Charter Treaty (ECT) has been considered problematic and in need of reform because it has been commonly used by fossil fuel companies to initiate arbitral proceedings against governments for compensation over their national climate and energy-related policies which affect their investments.

The draft proposal excludes new investments relating to fossil fuels energy from its production, introduces a transition period for existing ones until 2040, promotes investments in renewable sources of energy, and includes a new article on the states' right to regulate to achieve their legitimate policy objectives, such as the protection of the environment, climate change mitigation and adaptation, protection of the public health, safety and morals.[131] The modernization can be described as a surge to balance between foreign investment interests and state sovereignty. Article 19 of the draft proposal contains a provision on sustainable development, outlining parties' obligation to comply with their human rights obligations and commitments under the UN Framework Convention on Climate Change and the Paris Agreement. It is worth noting that the sustainable development provisions therein are still directed at states, not investors and no investor obligations are envisaged in the agreement in principle. This contrasts with some of the other model BITs examined earlier.[132] Therefore, the draft proposal has not taken note of the increased discussions that states should be able to initiate counterclaims against investors, at least in the context of safeguarding the public interest by virtue of introducing regulatory measures on EHR-related dimensions. Criticism has been expressed that the EU proposal has not only ignored investors as duty bearers, but that the sustainable development provisions do not offer any additional basis for the creation of legitimate expectations that host states will comply with any commitments undertaken in this chapter as these provisions cannot be characterized as specific representations towards investors.[133]

The voting on the agreement in principle was initially set for April 2023 but then postponed indefinitely, as states appear to have been dissatisfied with the proposed reforms, particularly with the treaty's continued protection of fossil fuels, and a number of them, such as Slovenia, Spain and the United Kingdom, have formally notified the ECT Secretary of their intended withdrawal. Following a proposal for a coordinated withdrawal by the Commission and the approval by Parliament, in late May 2024, the Council of the EU has endorsed the decision to withdraw, which will come into effect a year after the ECT depositary receives the EU's and Euratom's notification of withdrawal.[134] The Council's decision was welcomed by climate justice campaigners and described as an opportunity for the EU to abandon 'this sinking ship'.[135] Whilst a withdrawal would reduce investor protection in the energy sector, the existing sunset clause will continue to provide protection for all existing investments, including those in fossil fuels and renewables for another twenty years after formal withdrawal.[136] This brings legal uncertainty and stands in the way of speedy phasing out of fossil fuel investments, thus affecting the pace at which host states may effectively protect their public interests.

The ECT is one of the most frequently invoked investment treaties in recent years and one recent and interesting example of an ECT arbitration where the public interest was concerned is the arbitral award which ordered Italy to pay Rockhopper, an oil and gas company, 190 million Euros as compensation for breach of its obligations under the Energy Charter Treaty, which Italy had withdrawn from but is still covered under the 'sunset clause'.[137] The basis for the dispute arose after Italy

[128] European Parliament Investment Resolution, paras 23–26, as cited in Dimopoulos, at 3.2.7.3.

[129] Dimopoulos, *supra* n. 127 and 128, at 3.2.7.3.

[130] Energy Charter Secretariat, *Decision of the Energy Charter Conference* 6 Oct. 2019, https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf (accessed 01 Mar. 2024).

[131] Agreement in Principle on the Modernization of the Energy Charter Treaty, Jun. 2022, https://www.bilaterals.org/IMG/pdf/reformed_ect_text.pdf (accessed 01 Mar. 2024).

[132] Example the Morrocco Model BIT; Morocco-Nigeria BIT, Arts 14, 18 and 20; Netherlands Model BIT, Arts 7(1) and 7(4).

[133] Tropper & Wagner, *supra* n. 119, at 843.

[134] Council of the EU, Press Release, 30 May 2024, https://www.consilium.europa.eu/en/press/press-releases/2024/05/30/energy-charter-treaty-council-gives-final-green-light-to-eu-s-withdrawal/ (accessed 1 Jun. 2024).

[135] Climate Action Network (CAN) Europe, *Historic Victory: Council Gives Green Light for EU Withdrawal from Climate-Wrecking Energy Charter Treaty* (30 May 2024), https://caneurope.org/historic-victory-council-gives-green-light-for-eu-withdrawal-from-climate-wrecking-energy-charter-treaty/ (accessed 1 Jun. 2024).

[136] Article 47(3) of the ECT.

[137] *Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic* (ICSID Case No. ARB/17/14).

passed legislation banning oil productions within tweleve nautical miles from the coastline, after the public and pressure groups had raised environmental concerns. Despite that, and in accordance with case-law discussed earlier, the motivation behind the Italian legislation, i.e., to respond to the public desire to safeguard the local environment and human rights, did not outweigh the need to pay compensation to the investor – not because ISDS should be perceived as interfering with state sovereignty to regulate, but because it affords investor protection. Hence, there is some inconsistency between investment treaty protections and the need for states to respect and act in accordance with international goals and obligations under treaties, such as the Paris Agreement. There also appears to be some discrepancy and a parallel to be made between the approaches of the CJEU and approaches under Article 17 of the EU Charter and arbitral tribunals deciding disputes under the ECT. As seen above, while the former examples tended to uphold the public interest perspective, the latter one reaffirms the general arbitral approach to focusing on identifying treaty breaches and allocation of compensation, therefore reaffirming the need to consider a reform which will reinforce the importance of safeguarding the general public interest and finding a compromise between investor protection and EHR considerations:

3.4.2.3 Multilateral investment court

Since 2015, the EU has been promoting a reformed approach to ISDS, namely the pursuit to establish a Multilateral Investment Court through intergovernmental discussions at UNCITRAL.[138] Amongst others, the development of counterclaims has been discussed. Arguably, the strongest impact can be achieved by including provisions relating to states' powers to raise counterclaims into the draft proposal by the UNCITRAL Working Group III. There have been encouraging discussions to broaden the scope of tribunals' jurisdiction to include counterclaims, although reforms have not been undertaken yet.[139] Some scholars contend that host states' counterclaims should be solely a matter of domestic law.[140] However, by broadening tribunals' jurisdiction to hear EHR claims, the need to enhance symmetry will be better addressed, due to the very well-known characteristics of arbitration in providing for finality of awards and confidence in their enforcement under the New York Convention or the ICSID Convention. This approach will also go a step further than the incorporation of treaty provisions because it can provide for a direct cause of action in the event of breaches of EHR obligations.[141]

Additionally, some scholars doubt the competence and expertise of investment arbitrators to adjudicate EHR issues.[142] Therefore, if host states choose to enable counterclaims, they should include arbitrators with the requisite expertise when making appointments. From the perspective of the UNCITRAL Reform and the proposal to create a Multilateral Investment Court, where arbitrators will be state-appointed, rather than party-appointed,[143] the draft proposal should consider the establishment of an expert body, whether permanent or ad-hoc, to provide advice on EHR matters specifically and the public interest, generally.

Even if counterclaims are explicitly included in the draft proposal, thus addressing the jurisdictional concerns, there would be questions on substantive matters, such as the requisite threshold. How would counterclaims for breaches of environmental and human law rights be assessed? This matter is incredibly thought-provoking and challenging, though also beyond this article's scope. Considered briefly, one possibility is by means of adopting the already familiar proportionality test and looking at the severity of state interference in the investment against the objectives pursued. As to the burden of proof – it could be on the host state to demonstrate that environmental or human rights harm has been caused by the investor – i.e., positive action by the state can be required. Alternatively, the burden can be on the investor to prove that their actions have not caused any harm. In that sense, one could consider whether there is scope to include proof that bad faith in the state's regulatory actions and regulations has or has not been present. It would be sensible that the party making the claim and, respectively, the one making the counterclaim is the party upon which the burden of proof rests. Therefore, this article favours an approach requiring the state to demonstrate that EHR harm has been caused by the investor. Once again, these are questions which the UNCITRAL Working Group has the chance to deliberate on in its plenary sessions.

Currently, it is thought that the ISDS system grants asymmetric, disproportionate access to international dispute resolution – where investors can bring claims directly against governments, whereas those (negatively) impacted by projects – i.e., the public and/or individuals or certain groups, conventionally seek redress domestically. For some, this is a justified approach as such claims are within the scope of national law, not international law. However, if we are really to reform the ISDS system with the motive to bring greater symmetry between the parties,

[138] European Commission, Reform of the ISDS Mechanism, https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/investment-disputes/reform-isds-mechanism_en (accessed 1 May 2024).

[139] Possible reform of investor-state dispute settlement (ISDS), Multiple proceedings and counterclaims, A/CN.9/WG.III/WP.193, Jan. 2020, para. 41; Possible reform of Investor-State dispute settlement (ISDS), Submission from the Government of South Africa, A/CN.9/WG.III/WP.176, Jul. 2019, para. 64.

[140] Shao, *supra* n. 42, at 157, 177.

[141] For a discussion, please *see* Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 Va. J. Int'l L. 57 (2011).

[142] Shao, *supra* n. 42, at 157, 177.

[143] UN General Assembly, *Possible Reform of Investor-State Dispute Settlement (ISDS) Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters* A/CN.9/WG.III/WP.213 (8 Dec. 2021).

to enhance fairness, transparency, and consistency, then the next reasonable step is to establish provisions on the investment obligations of investors.

This article does not suggest that investors should be imposed human rights obligations under general international law. Rather, it argues that ISDS could undergo changes to accommodate the protection of the public by means of including EHR protections. This could take the form of introducing provisions in future BITs – either in preambles as a first, albeit not legally binding, step for those states who are less convinced by the idea, or in the treaties' substantive provisions. Arguably, the most suitable and yet most challenging way in which the public interests could be given a proper 'seat' at the investment table is through the comprehensive development of counterclaims. Moreover, the development of EU law, both secondary legislation and case-law decided under Article 17 of the EU Charter, supports the stance of a strengthened consideration and relevance of EHR principles in investor-state relations and seems to be becoming an increasing element of the obligations of private companies, in particular. This article argues that the future of ISDS in enhancing public interests' protection lies in the further advancement of counterclaims. This is a challenging endeavour because of both procedural and substantive issues.

IV. Conclusions

This article examined the nature of the public interest through case-law and academic commentary and argued that even though the public is not a direct party to investor-state relations and thus, often not the focus of arbitral determinations, it should be acknowledged and considered further; and that arbitrators should have a more active role therein as opposed to deferring to national courts, although not going beyond the subject matter of the dispute. That is because the public is impacted by the investment projects which their state commits to. The public interest is a broad and fluid concept and has grown to encompass considerations of protecting the environment and human rights. As ISDS currently stands, the system is primarily fault-based oriented and focuses on identifying treaty breaches and allocating compensation. While some believe that ISDS has so far functioned well and requires no change, this article proposes that greater balance can be achieved by recognizing and hearing the public interest more commonly. Arbitrators need to balance between deciding the subject matter of the dispute and ensuring they act within their jurisdiction, whilst maintaining flexibility and adaptability by means of looking at the wider repercussions of investor-state relations and actions in the context of EHR issues. This can prove challenging as arbitrators have to ensure that they do not become advocates of the public interest at large, as this remains the primary responsibility of the state and because this might affect the perception of their impartiality and objectivity.

As stated, the public interest could be better integrated through some milder changes – e.g., the more regular reference to amicus curiae or experts, with a view to gaining a better understanding of the dispute's nature and overall consequences. It could take the form of more radical changes, such as the express recognition of states' right to submit counterclaims and investors' obligations stipulated in the draft proposal itself, thus encouraging prospective contracting states to follow a similar approach in negotiating BITs/MITs. It is believed that an approach which takes account not only of the economic and commercial interests of the investor, but also the competing public interest will positively influence the criticism that ISDS is pro-investor. While the primary duty to regulate and safeguard public welfare rests with the state, ISDS may advance in a manner empowering tribunals to scrutinize more closely investors' compliance with relevant EHR standards. This could be achieved through new generation investment agreements. International law, the draft proposals examined, and increased considerations of scrutinizing investors' conduct, particularly under EU law, such as under the new EU CDDD, but also under Article 17 of the EU Charter and the likely justifications for the failed modernization of the ECT, further demonstrate that soon states may not be the sole bearers of this responsibility.

In addition, this article seeks to encourage the UNCITRAL Working Group to debate, consider and implement counterclaims in their proposed reforms. There is already a strong foundation for a reform. This change would be a natural continuation of the narrative to achieve greater symmetry in ISDS and will align with provisions on counterclaims in new generation investment agreements. This article recognizes that the proposal to incorporate counterclaims has not remained unopposed to, but it is believed that the search for equilibrium will be enhanced by expressly including the perspective of the public of the relevant host state and that counterclaims can be a suitable instrument. The Working Group is in a unique position to offer ground-breaking reforms and giving a 'voice' and 'seat' to the public is a crucial element of promoting greater fairness. The discussion has demonstrated that states place greater emphasis on foreign investors' wrongful conduct and any impact this might have on EHR principles. Therefore, it is anticipated that the future of ISDS would consist not only of states invoking investors' wrongdoings as a 'shield' in the face of investors' claims for damages, but also as a 'sword' depicting states' right to issue counterclaims as a tool to safeguard their regulatory powers and national interests.

While it is not yet entirely clear the direction in which investment arbitration will head next, it is certain that change is on its way.