Investment Arbitration and ESG Disputes: Evolution of International Investment Agreements, Counterclaims and the Asymmetry Problem

Liudas Tauperis
Junior associate at Ellex Valiunas

This article investigates how investment arbitration functions as a forum for disputes that engage environmental, social and governance (ESG) values, at a time when international investment agreements (IIAs) are being reshaped and long-standing concerns about the asymmetry of investor–State dispute settlement persist. Rather than treating arbitration as uniformly suited or unsuited to such disputes, the article maps the competing forces acting upon it and structures the analysis in three parts. The first part contrasts two opposing tendencies in treaty practice, analysing, first, the embedding of ESG provisions alongside arbitration agreements in new-generation IIAs and, second, the European Union's (EU) move away from arbitration towards a permanent investment court. The second part turns to the counterclaim, asking whether and how respondent States can use it to hold investors to their ESG obligations, and what conditions govern its success. The third part confronts the core tension of the field, namely the collision between a State's right to regulate in the ESG sphere and the protection owed to investors, drawing on the renewable-energy disputes brought against Spain. Building on this analysis, the article advances proposals for rebalancing regulatory freedom and investment protection and offers a way of understanding when investment arbitration is likely to remain a meaningful venue for ESG disputes.

INTRODUCTION

Investment arbitration is widely regarded as a significant means of resolving international disputes in which investors seek to vindicate rights, they consider having been infringed by a State. According to United Nations Trade and Development (UNCTAD), the cumulative number of known investor-State arbitrations reached 1401 by the end of 2024, with roughly three-quarters of those cases arising in the period 2010-2024. In 2024 alone at least 58 new treaty-based cases were initiated.[1] These figures suggest that investors seeking a neutral forum for disputes against States remain inclined to choose investment arbitration.

ESG is best understood as a broad, umbrella concept that gathers environmental, social and governance elements and feeds them into the decision-making of business actors at several levels. The rise of environmental, social and governance expectations has begun to reshape the substance of investment disputes. States face pressure from several directions at once. Inaction on climate change and in other ESG fields exposes them to litigation risk brought by non-governmental organisations and other stakeholders, while active

[1] UNCTAD, 'Recent Trends in Investor–State Arbitration Cases' (2025) <https://unctad.org/system/files/official-document/diaepcbinf2025d4_en.pdf>.

regulation of ESG matters increases the risk of being sued by foreign investors.[2] As a result, an increasing share of investment disputes touches upon ESG-protected values such as environmental protection, public health, sustainable energy and human rights.

This article examines investment arbitration in the context of ESG disputes. The first part analyses how differing attitudes towards investment arbitration affect its significance for ESG disputes – on the one hand the embedding of ESG provisions in new-generation IIAs together with arbitration agreements, and on the other the EU's critical stance. The second part examines the counterclaim in the context of ESG investment disputes. The third part analyses the asymmetry between the right to regulate and investment protection in ESG disputes and proposes ways of rebalancing it.

I. INVESTMENT ARBITRATION AND ESG DISPUTES IN THE LIGHT OF EVOLVING INTERNATIONAL INVESTMENT AGREEMENTS

The role of investment arbitration in the resolution of ESG disputes cannot be evaluated unequivocally. As section 1.1 explains, there is a discernible tendency to include ESG-related provisions in new-generation IIAs while at the same time providing for arbitration agreements that confer jurisdiction on arbitral tribunals. On the other hand, section 1.2 explains that there is also a negative EU attitude towards investment arbitration that may reduce the significance of this dispute resolution method in the context of ESG disputes.

1.1. ESG PROVISIONS AND ARBITRATION AGREEMENTS IN NEW-GENERATION INTERNATIONAL INVESTMENT AGREEMENTS

In the investment arbitration context, it is therefore essential to consider the IIAs from which investment ESG disputes may rise and which confer jurisdiction on arbitral tribunals to hear them. From the 1959 Germany–Pakistan IIA, regarded as the first of its kind, the principal aim of IIAs was the promotion and protection of investment. In other words, to attract foreign capital and to protect a State's own investors abroad.[3] Older-generation IIAs typically consisted of only a handful of articles and concentrated on core protections such as most-favoured-nation treatment, a general minimum standard of treatment, compensation for expropriation, and the right to transfer capital and returns.[4] They also provided a remedial mechanism only for investors, imposing almost no obligations upon them. As the doctrine notes, the international investment dispute settlement mechanism has attracted considerable criticism from climate activists, academics and States precisely because IIAs are asymmetric and traditionally provide remedies only to investors.[5] Older IIAs rarely contained provisions relating to ESG values such as public health, the environment, sustainable energy or human rights.[6]

However, at present, international instruments such as the Paris Agreement directly oblige States to refine their legal frameworks to attain the objectives set out in those instruments. Caught between the litigation risk of inaction and the litigation risk of regulation, States are reconsidering their approach to

[2] Helionor de Anzizu and Nikki Reisch, 'Investor-State Disputes, the Climate Emergency, and the Duty to Regulate Fossil Fuels: A Human Rights Perspective' in Annette Magnusson and Anja Ipp (eds), Investment Arbitration and Climate Change (Kluwer Law International 2023) 179, 191.

[3] de Anzizu and Reisch (n 2) 191–92.

[4] Rimantas Daujotas, Tarptautinė investicijų teisė ir arbitražas (Eugrimas 2015) 40–41.

[5] Maxi Scherer and Clara Reichenbach, 'Climate-Related Counterclaims in International Investment Arbitration' in Annette Magnusson and Anja Ipp (eds), Investment Arbitration and Climate Change (Kluwer Law International 2023) 105, 105–06.

[6] Anjali Anchayil, 'ESG-focused Reform for International Investment Agreements: A Potential Solution' (Oxford Business Law Blog, 30 April 2024) <https://blogs.law.ox.ac.uk/oblb/blog-post/2024/04/esg-focussed-reform-international-investment-agreements-potential-solution> accessed 29 June 2026.

ESG both in domestic law and in their IIAs practice. Against that background it should be noted that there is a noticeable trend towards including ESG-related provisions in the IIAs.[7] In 2004, environmental provisions featured in 35 IIAs, by 2024 that number had grown to 273.[8] The statistics indicate a genuine shift in the formation of new IIAs towards the inclusion of ESG-related provisions. IIAs concluded after 2010 seek to reconcile investor rights with the State's right to regulate, while incorporating ESG requirements for both States and investors.[9] New-generation IIAs may be supplemented with provisions on environmental protection, climate change, human rights, anti-corruption and other related matters. The conduct of an environmental impact assessment is one typical environmental obligation imposed on investors.[10] Such IIAs may also require investors to ensure that an investment conforms with ESG standards and to carry out appropriate ESG due diligence.

There are already practical examples in which ESG provisions have been incorporated into IIAs or model IIAs. The first example is the 2016 Morocco–Nigeria bilateral investment treaty (the Morocco–Nigeria BIT), which includes ESG provisions.[11] Article 14(1) requires investors to conduct an environmental impact assessment and to comply with other applicable assessment procedures for their proposed investments prior to investing, as prescribed by the laws of the host State or the home State, whichever is the more rigorous for the particular investment. Article 14(2) requires a social impact assessment of the planned investment. Such requirements to carry out ESG-related assessments are characteristic of new-generation IIAs and reflect the growing weight of ESG factors in the investment environment. The Morocco–Nigeria BIT contains further ESG provisions. Article 18 requires investors, after establishment, to conduct themselves so that the investment complies with environmental requirements and standards, to respect human rights in the host State, and to observe core labour standards. The same article provides that investments may not be made in a manner that circumvents the international environmental, labour and human-rights obligations to which the States are committed. Article 27 contains an arbitration agreement conferring jurisdiction on the International Centre for Settlement of Investment Disputes (ICSID), an *ad hoc* tribunal or another arbitral institution. Taken together, these provisions suggest that the Morocco–Nigeria BIT may exert a significant influence on the role of investment arbitration in ESG disputes. Firstly, an arbitral tribunal assessing the quantum of damage might consider whether the investor itself complied with ESG requirements,[12] which could mean that a tribunal might consider reducing the damages awarded to an investor that failed to observe ESG requirements. Secondly, as new-generation IIAs increasingly impose ESG obligations on investors, the likelihood grows that host States will seek to make use of the counterclaim where an investor harms the environment or fails to comply with other ESG

[7] Nelson Goh, 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' (2022) 15(6) J World Energy L & Bus 485, 490.

[8] Olivier Hailes, 'Environmental Clauses in Investment Arbitration: Deep Roots, Green Shoots and Dead Wood' (2025) 40(2) ICSID Rev 399, 401.

[9] Anchayil (n 6).

[10] Scherer and Reichenbach (n 5) 124.

[11] Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016, not yet in force).

[12] ESG Subcommittee of the International Bar Association's Arbitration Committee, Report on the Use of ESG Contractual Obligations and Related Disputes (IBA 2023) 26 <https://www.ibanet.org/document?id=report-on-use-of-ESG-contractual-obligations> accessed 29 June 2026.

requirements.[13] The Morocco–Nigeria BIT thus shows a tendency to include ESG provisions in new-generation IIAs while retaining arbitration agreements – a combination liable to increase the number of ESG disputes heard in investment arbitration.

The 2015 Norwegian model bilateral investment treaty (the Norway Model BIT) likewise contains ESG-related provisions.[14] Its preamble expresses the States' wish to strengthen economic and investment relations in accordance with the objective of sustainable development in its economic, social and environmental dimensions, and to promote investment in a manner that secures a high level of environmental, health and labour protection in accordance with internationally recognised standards. Thus, Norway makes it an objective of any new IIA that investments conform to ESG requirements. Articles 11 and 12 reinforce that objective. Article 11 provides that investment should not be encouraged at the expense of domestic health, human-rights, safety, environmental or labour standards, while Article 12 provides for the States' right to regulate so that investment activity is carried out with regard to health, safety, human rights, labour rights, resource management and environmental protection. Article 14(3) contains an arbitration agreement submitting disputes to ICSID. Where Norway concludes an IIA on the basis of this Norway Model BIT and the host State then regulates ESG matters more actively, disputes may arise as to whether the right to regulate has been used proportionately and without infringing investor rights – disputes that, given the arbitration agreement, should reach investment arbitration.

In sum, although older-generation IIAs were asymmetric and contained no ESG provisions, the opposite tendency has lately become apparent. New-generation IIAs seek not only to balance the interests of investors and States but also to integrate ESG provisions. In most cases these IIAs also contain arbitration agreements conferring jurisdiction on arbitral tribunals, so it is likely that the resolution of ESG disputes in investment arbitration will grow. Yet the negative attitude of the EU and of some EU Member States towards investment arbitration means that its relevance in the ESG context cannot be assessed unequivocally.

1.2. THE EUROPEAN UNION'S CRITICAL STANCE TOWARDS INVESTMENT ARBITRATION

Investment arbitration is viewed negatively within the EU. That position rests on the much-discussed Achmea judgment of the Court of Justice of the European Union, which is considered to have, in substance, prohibited investment arbitration for EU investors investing in EU Member States.[15]

The EU's criticism of investment arbitration rests on the following arguments. Firstly, investment arbitration is overly closed off.[16] Secondly, it lacks democratic accountability and responds inadequately to the problem of corruption.[17] Thirdly, investment arbitration lacks guarantees of equal rights, meaning that there is a noticeable predominance of male arbitrators and a

[13] Steven Finizio and Matteo Angelini, 'Climate-Related Disputes and International Arbitration' in The Guide to Climate Change and Related Disputes (Global Arbitration Review, 2024) <https://globalarbitrationreview.com/guide/the-guide-climate-change-and-related-disputes/first-edition/article/climate-related-disputes-and-international-arbitration> accessed 29 June 2026.

[14] Norway Model Bilateral Investment Treaty (2015).

[15] Case C-284/16 Achmea EU:C:2018:158; Rimantas Daujotas, 'Achmea byla – ESTT uždraudė investicinį arbitražą ES investuotojams' (rdaujotas.com, 2018) <https://rdaujotas.com/wp-content/uploads/2022/02/R.Daujotas.-ESTT-sprendimas-Achmea-byloje.pdf> accessed 29 June 2026; Greg Lourie, 'End of the Road: German Constitutional Court Closes Achmea Chapter' (Kluwer Arbitration Blog, 12 November 2024) <https://legalblogs.wolterskluwer.com/arbitration-blog/end-of-the-road-german-constitutional-court-closes-achmea-chapter/> accessed 29 June 2026.

[16] Alan Uzelac, 'Why Europe Should Reconsider Its Anti-Arbitration Policy in Investment Disputes' (2019) 1(2) Access to Just in E Eur 6, 18.

[17] Uzelac (n 16) 18.

shortage of female arbitrators.[18] Fourthly, it fails adequately to reconcile States' regulatory policy with the interests of private investors.[19] Fifthly, it is thought to be biased in favour of investors.[20] Sixthly, it lacks transparency, has no appellate mechanism, and produces no consistent body of practice.[21] Seventhly, the process exhibits asymmetry.[22] For these reasons the EU is seeking a different means of resolving investment disputes. The alternative the EU proposes and has chosen is an international investment court.[23] The choice of a different forum for investment disputes may reduce the use of investment arbitration as a dispute resolution method. According to UNCTAD data, as of 31 July 2018 disputes in which an investor from one EU Member State proceeded against another EU Member State amounted to roughly 20 per cent of all investor–State arbitrations registered worldwide.[24] That 20 per cent may be expected to translate into an overall decline in the number of disputes heard in investment arbitration, and thus into fewer ESG disputes resolved there.

In new-generation IIAs or model IIAs approved by the EU and some of its Member States, the idea of an international investment court is increasingly enshrined alongside ESG provisions, suggesting that investment arbitration may gradually be abandoned also in disputes with non-EU investors. Canada, the EU and its Member States concluded the Comprehensive Economic and Trade Agreement (CETA), signed on 30 October 2016, with full entry into force awaiting ratification by all EU Member States.[25] Article 8.9(1) of CETA affirms the States' right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection, the promotion and protection of cultural diversity. Thus, certain ESG-related investment disputes may therefore arise under CETA. The example of CETA also illustrates a shift away from traditional *ad hoc* investment arbitration. It should be noted that CETA's investment dispute settlement provisions are based on a new system of international investment court.[26] Article 8.23 governs the submission of an investor's claim to a specially constituted tribunal. Furthermore, Article 8.27(2) provides that the tribunal is composed of fifteen members – five nationals of EU Member States, five nationals of Canada and five nationals of third countries. CETA also establishes an appellate mechanism and an appellate tribunal. This differs from traditional *ad hoc* investment arbitration. Firstly, the new method is of permanent nature rather than *ad hoc*. Secondly, it provides a right to appeal. Thirdly, the parties cannot choose their own arbitrators. Although ICSID is frequently mentioned in CETA, however it is engaged only for logistical and organisational matters. CETA thus indicates that the EU seeks to move from investment arbitration to an investment court model. Since CETA contains ESG aspects, that transition could reduce the number of ESG disputes heard in investment arbitration.

EU Member States, too, may opt for an alternative to investment arbitration. The 2019 Netherlands model investment agreement (the

[18] Uzelac (n 16) 18.
[19] Uzelac (n 16) 18.
[20] Uzelac (n 16) 18.
[21] Uzelac (n 16) 18.
[22] Uzelac (n 16) 18.
[23] Hannes Lenk, 'An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada' (2016) 1(2) European Papers 665, 666.
[24] UNCTAD, 'Fact Sheet on Intra-European Union Investor–State Arbitration Cases' (2018) <https://unctad.org/system/files/official-document/diaepcb2018d7_en.pdf>.
[25] Comprehensive Economic and Trade Agreement (Canada–European Union) (signed 30 October 2016, provisionally applied 21 September 2017) [2017] OJ L11.
[26] Uzelac (n 16) 10.

Netherlands Model BIT) is a significant example in two aspects.[27] First, it contains ESG-related provisions. Article 7(1) requires investors to comply with the host State's domestic laws and regulations, including those on human rights, environmental protection and labour. Article 7(3) provides that the States affirm the importance of investors carrying out a due-diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of their investments. Article 12(8) provides that, except where the impact of a measure, in light of its objective, is so significant as to appear manifestly disproportionate, non-discriminatory measures adopted by a State, which are designed and applied in good faith to protect legitimate public interests, such as public health, safety, the protection of the environment or public morals, social or consumer protection, or the promotion and protection of cultural diversity, shall not be considered indirect expropriation. Secondly, the Netherlands Model BIT also expresses serious intentions regarding an international investment court. Article 15(1) provides that once an international agreement, providing for the establishment of an international investment court enters into force, the relevant provisions of the IIA relating to the settlement of investment disputes in investment arbitration shall cease to have effect. The doctrine considers this provision to be of mandatory character, leaving the States no choice as to whether to join the investment court.[28] It follows that, once an international investment court is created, the Netherlands and the States with which it has concluded IIAs will abandon investment arbitration, since the arbitration agreement will ultimately lose effect. Where the Netherlands Model BIT combines ESG provisions with a potential transition to an investment court, the relevance of investment arbitration in the ESG disputes context may diminish.

Notwithstanding the negative EU attitude towards investment arbitration, there are EU Member States that have included ESG provisions and opted for the resolution of investment disputes by arbitration in their newly concluded IIAs. The 2018 Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments (the Lithuania–Turkey BIT) was ratified by Lithuania on 3 December 2020, though it has not yet entered into force.[29] It contains ESG-related provisions. Article 3(1) provides that the States affirm their right to undertake regulatory activity to attain legitimate policy objectives such as the protection of public health, social services, public education, safety, the protection of the environment or public morals, social or consumer protection, and privacy and data protection. By that provision both Lithuania and Turkey affirm their right to regulate, which extends to the adoption of new ESG-related regulation. Article 17(2) goes further, recognising the States' right to set their own levels of environmental protection and their own sustainable-development policies and priorities, and to adopt or amend their environmental laws, the States undertake to ensure that their laws provide for the requisite level of environmental protection and to strive to improve those laws. Furthermore, article 8(2) provides that, except in rare cases where the measures are, by their very nature, so severe that they cannot reasonably be regarded as having been adopted and applied in good faith, non-discriminatory measures adopted and applied by a State to protect legitimate public welfare objectives, such as health, safety, and the environment, shall not be regarded as measures having an effect equivalent to expropriation.

[27] Netherlands Model Investment Agreement (2019).

[28] Eric De Brabandere, 'The 2019 Dutch Model Bilateral Investment Treaty: Navigating the Turbulent Ocean of Investment Treaty Reform' (2021) 36(2) ICSID Rev 319, 332.

[29] Agreement Between the Government of the Republic of Lithuania and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments (signed 28 August 2018, not yet in force); Law of the Republic of Lithuania Ratifying the Lithuania–Turkey Agreement on the Reciprocal Promotion and Protection of Investments (3 December 2020) No XIV-40, TAR 2020-27348.

Even so, ESG disputes could still arise, as investors might question the justification for, and the limits of expropriation. Article 12(4)(b)–(d) permits investment disputes to be submitted to arbitration, meaning that ESG disputes arising under the treaty would be heard there. Although investment arbitration is criticised at EU level, Lithuania has chosen to retain it as a means of resolving investment disputes, which suggests that other new-generation IIAs concluded by Lithuania may, alongside ESG provisions, contain arbitration agreements. The Lithuania–Turkey BIT example thus suggests that investment arbitration may remain relevant in the new-generation IIAs of at least some EU Member States. The 2019 Côte d'Ivoire–Portugal bilateral investment treaty likewise contains ESG-related provisions and permits investment disputes to be heard in investment arbitration.[30]

In sum, the EU views investment arbitration critically. It criticises the lack of transparency, accountability, consistency and equal rights, as well as its asymmetry and pro-investor bias, and favours an international investment court instead. This shift is reflected in instruments such as CETA and the Netherlands Model BIT, which combine ESG provisions with a transition to an international investment court and may thus reduce the number of ESG disputes resolved through investment arbitration. Nevertheless, some EU Member States still pair ESG provisions with arbitration agreements Lithuania–Turkey BIT is one such example, which suggests that investment arbitration may remain relevant in the new-generation IIAs of at least some EU Member States.

II. THE COUNTERCLAIM IN THE CONTEXT OF ESG INVESTMENT DISPUTES

New-generation IIAs are concluded with a view to rebalancing the asymmetry, providing both an express right to regulate the ESG field and other ESG provisions. But asymmetry is also discernible within the arbitral process itself.[31] Ordinarily, only the investor may bring claims in investment arbitration, which gives rise to a practical problem – whether a respondent State could bring a counterclaim against an investor where, for example, it considered that the investor had itself breached its obligations – in the context of this article, obligations relating to ESG requirements.

An effective opportunity for States to bring counterclaims in investment arbitration would contribute significantly to the assurance of equality of arms and could prevent the rendering of incompatible decisions.[32] There would, of course, be a negative aspect as time and costs would increase.[33] While it may be accepted that counterclaims could make the process more expensive and protracted, in ESG disputes it is vital that States possess proper tools with which to defend themselves, since in such disputes they also seek to protect fundamental values such as the environment, health and human rights. Given the tendency to supplement IIAs with ESG provisions, States could bring a counterclaim where an investor has harmed the environment or failed to comply with other prescribed ESG requirements.[34] From a practical perspective, for a State to bring a counterclaim successfully the following conditions must be met. Firstly, there should be consent to

[30] Agreement Between the Portuguese Republic and the Republic of Cote d'Ivoire for the Reciprocal Promotion and Protection of Investments (signed 13 June 2019, not yet in force).

[31] Scherer and Reichenbach (n 5) 105–06.

[32] Kiran Nasir Gore, 'Opportunities for ESG-Related Counterclaims in International Investment Arbitrations: A Trip Down the Rabbit Hole' (Kluwer Arbitration Blog, 17 April 2024) <https://legalblogs.wolterskluwer.com/arbitration-blog/opportunities-for-esg-related-counterclaims-in-international-investment-arbitrations-a-trip-down-the-rabbit-hole/> accessed 29 June 2026.

[33] Dao Kim Anh and Nohyoung Park, 'Balancing Investor-State Arbitration: Evolving Treaty Approaches to Counterclaims' (2026) 21(1) Asian J WTO & Intl Health L & Pol'y 1, 7–8.

[34] Finizio and Angelini (n 13).

the counterclaim's jurisdiction.[35] Secondly, the counterclaim must be connected to the claims advanced in the investor's claim.[36] Thirdly, the counterclaim must specify the basis, i.e., which specific obligation under domestic law or the IIA the investor breached.[37] Arbitral practice already furnishes examples in which a State raised a counterclaim in an ESG dispute.

The first successful examples are Burlington Resources Inc v Republic of Ecuador and Perenco Ecuador Ltd v Republic of Ecuador, which are connected. In Burlington Resources Inc v Republic of Ecuador, the oil-and-gas company Burlington Resources Inc applied to ICSID with a claim against Ecuador under the Ecuador–United States BIT.[38] Burlington Resources Inc, together with Perenco Ecuador Ltd, carried out hydrocarbon exploration and extraction in two blocks of the Amazon region. Following changes to the regulatory framework and to circumstances in Ecuador, Burlington Resources Inc alleged that Ecuador had breached the fair-and-equitable-treatment standard and had unlawfully expropriated its investment.[39] Ecuador, for its part, brought a counterclaim alleging that under Ecuadorian law Burlington Resources Inc was liable for environmental damage in the Amazon blocks it operated, the damage consisting in significant contamination of the soil and groundwater.[40] An interesting situation resulted from the tribunal's award – damages were awarded to the investor Burlington Resources Inc, while the counterclaim was partly upheld, with Burlington Resources Inc being ordered to pay Ecuador roughly USD 41 million in compensation for environmental damage.[41]

A very similar situation arose in Perenco Ecuador Ltd v Republic of Ecuador. The oil-and-gas company Perenco Ecuador Ltd applied to ICSID and brought a claim against Ecuador under the France–Ecuador BIT,[42] alleging that Ecuador had breached the fair-and-equitable-treatment standard and had unlawfully expropriated its investment.[43] Ecuador brought a counterclaim for environmental damage, relying on experts' findings of an environmental catastrophe in the Amazon blocks operated by Perenco Ecuador Ltd.[44] As in Burlington Resources Inc v Republic of Ecuador, the tribunal awarded damages both to the investor Perenco Ecuador Ltd and, partly upholding the counterclaim, ordered Perenco Ecuador Ltd to pay Ecuador roughly USD 54 million in compensation for environmental damage.[45] These examples suggest that the counterclaim may be effectively used in ESG disputes in investment arbitration. The doctrine considers that arbitral tribunals' readiness to address environmental questions should encourage States to bring counterclaims relating to the protection of ESG values.[46] It must be noted, however, that these cases involved a rare phenomenon – the investors themselves consented to the tribunals' jurisdiction to hear Ecuador's counterclaims.

[35] Anh and Park (n 33) 19–20.
[36] Anh and Park (n 33) 22–25.
[37] Anh and Park (n 33) 26.
[38] Burlington Resources Inc v Republic of Ecuador (Decision on Counterclaims) ICSID Case No ARB/08/5 (7 February 2017).
[39] Burlington (n 38).
[40] Burlington (n 38).
[41] Burlington (n 38).
[42] Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (Interim Decision on the Environmental Counterclaim) (Award) ICSID Case No ARB/08/6 (11 August 2015 and 27 September 2019).
[43] Perenco (n 42).
[44] Perenco (n 42).
[45] Perenco (n 42).
[46] Scherer and Reichenbach (n 5) 107–08.

It is unlikely that such consent will be given in other cases.

A further example, in which the tribunal also addressed the question of an ESG-related counterclaim, is Urbaser v The Argentine Republic. This case is described as the first one in which a tribunal heard a counterclaim grounded in the proposition that an investor must respect human rights.[47] The dispute concerned a concession for water-supply and sewerage services. The investors brought a claim alleging that they had encountered numerous obstacles from Argentine institutions that made effective and profitable performance of the concession exceedingly difficult.[48] Argentina brought a counterclaim alleging that the investors had failed to fulfil their obligation to invest in the concession and had thereby breached obligations under international law arising from the human right to water.[49] The ICSID tribunal confirmed its jurisdiction to hear Argentina's counterclaim,[50] reaching that conclusion by interpreting the arbitration agreement in Article X of the Argentina–Spain bilateral investment treaty as permitting a State to bring a counterclaim.[51] As additional grounds the tribunal cited the need to avoid duplication of proceedings and to prevent the rendering of contradictory decisions.[52] On the merits, Argentina's counterclaim was dismissed, because Argentina failed to establish how and why Urbaser was bound to ensure the human right to water and on what basis it should compensate for harm to that right.[53] Unlike the earlier cases, in this case the ESG counterclaim was unsuccessful. Nonetheless, the doctrine views Urbaser positively, noting that it opens the way to recognising human-rights considerations as a basis for States to bring counterclaims.[54] The case also shows that tribunals are inclined to uphold their jurisdiction over ESG-related counterclaims, while illustrating how difficult it can be to substantiate such a counterclaim.

In sum, an effective right for States to bring counterclaims could help rebalance the asymmetry of investment arbitration, particularly in ESG disputes concerning values as important as the environment and human rights. Practice shows that tribunals tend to uphold their jurisdiction over such counterclaims, but success depends heavily on the State formulating the counterclaim properly, which is a genuinely difficult task. Because tribunals may assess jurisdiction differently from case to case, express counterclaim-related IIA provisions may ultimately be required, something that, at least for now, is not common in practice.

III. THE ASYMMETRY PROBLEM: THE RIGHT TO REGULATE VERSUS INVESTMENT PROTECTION IN ESG DISPUTES

Investment arbitration practice furnishes examples that reveal the tension between the State's right to regulate the ESG field and investment protection. Arbitral tribunals have heard ESG-related disputes in which States, seeking to transition to renewable energy, used various incentives to attract foreign investment, but ultimately decided to change course. The governments of EU Member States implemented policies whose essence was to grant subsidies and other incentives to attract investment in renewable-energy generation, in order to meet

[47] ESG Subcommittee (n 12) 27.
[48] Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic (Award) ICSID Case No ARB/07/26 (8 December 2016).
[49] Urbaser (n 48).
[50] Urbaser (n 48).
[51] Urbaser (n 48).
[52] Urbaser (n 48).
[53] Urbaser (n 48).
[54] Kristen Boon, 'Theorizing Responsibility in Investor State Dispute Resolution System' (2021) 95(2) St John's L Rev 253, 282.

EU-level climate objectives.[55] When those States decided to reduce the scope of the incentives, investors sought to vindicate their rights and initiated investment arbitrations. Because of such measures, more than 50 investment arbitrations were brought against Spain alone, most of them under the Energy Charter Treaty (ECT).[56]

The doctrine describes the Spanish case as illustrating the prevailing tension between investment protection and the State's right to regulate.[57] It shows how two interests collided – the State's right to regulate the ESG-related field of renewable energy and investment protection. In 2007 Spain began to regulate the renewable-energy field more actively and adopted Spanish Royal Decree No 661/2007 (Decree No 661/2007), the essence of which was to contribute to Spain's efforts to promote electricity generation from renewable sources.[58] The decree fixed tariffs applicable throughout the operating life of a given installation and provided that any subsequent tariff changes would not apply to existing installations. This attracted the attention of numerous investors, and investment in renewable energy in Spain grew. Spain actively emphasised this aspect of its special regime to foreign investors, assuring them that the decree sought to preserve the legal certainty of all investments made and that it constituted a statutory guarantee.[59] The incentives and Spain's stance created investors a legitimate expectation that their investments would be adequately protected. However, between 2010 and 2014, the situation changed. In 2010 Spain imposed a transmission charge, abolished the favourable tariff regime and limited the number of annual operating hours eligible for the feed-in tariff.[60] Between 2012 and 2014 stricter measures were taken, including a 7 per cent levy on the entire value of energy supplied by electricity generators to the national grid and the abolition of the favourable tariff and premium regime.[61] These measures led investors to initiate investment arbitrations, most under the ECT.

A pertinent example is NextEra v Spain. The investors applied to an ICSID tribunal, arguing that the change in Spain's legal framework and economic regime for renewable-energy projects had infringed their rights and adversely affected their investments, and sought compensation.[62] Their principal argument was that Spain had breached the obligation under Article 10(1) of the ECT to observe the fair-and-equitable-treatment standard, protecting investors' legitimate expectations.[63] Having assessed the parties' positions, the tribunal concluded that the various assurances given by Spanish authorities had created investors a legitimate expectation that the regime established by Decree No 661/2007 would not be altered so as to harm the security of their invest-

[55] Matteo Fermeglia and others, 'Investor-State Dispute Settlement as a New Avenue for Climate Change Litigation' (Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, 2 June 2021) <https://www.lse.ac.uk/granthaminstitute/news/investor-state-dispute-settlement-as-a-new-avenue-for-climate-change-litigation/> accessed 29 June 2026.

[56] Samantha J Rowe, 'The Energy Charter Treaty and Its Role in the Energy Transition' in James Menz and Urs Weber-Stecher (eds), ESG and Disputes: Flash in the Pan or Game Changer? (ASA Special Series No 50, Kluwer Law International 2024) 67, 76.

[57] Lucy Greenwood, 'The Canary is Dead: Arbitration and Climate Change' (2021) 38(3) J Intl Arb 309, 318.

[58] Spanish Royal Decree on the Feed-in Tariffs for Electricity from Renewable Energy Sources (26 May 2007) No 661/2007.

[59] Rowe (n 56) 76.

[60] Beata Gessel-Kalinowska vel Kalisz, Maja Frontczak and Piotr Paprota, 'Types of State Action Leading to Climate-Related Investor Claims' in Annette Magnusson and Anja Ipp (eds), Investment Arbitration and Climate Change (Kluwer Law International 2023) 7, 15.

[61] Gessel-Kalinowska vel Kalisz, Frontczak and Paprota (n 60) 15.

[62] NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v Kingdom of Spain (Award) ICSID Case No ARB/14/11 (31 May 2019).

[63] NextEra (n 62).

ments.[64] The tribunal further added that Spain's entire regulatory framework had been radically changed and that the claimants had lost legal certainty and security.[65] Finding Spain liable, the tribunal awarded the investors EUR 290.6 million in damages.[66] As noted, there were more than 50 similar cases against Spain, and it is estimated that, as a result of this regulatory change, Spain lost more than EUR 800 million.[67]

The Spanish case genuinely reveals the strained relationship between investment protection and States' right to regulate ESG-related matters. In the author's view, one of the essential and desirable objectives in investment arbitration should be a balance between them. The Spanish case may be viewed from two perspectives. On the one hand, in transitioning to renewable energy, Spain took active measures and adopted a favourable legal framework, thereby creating legitimate expectations for investors. When Spain later changed that framework, it had to pay compensation to investors. On the other hand, the outcome may be seen as constraining the State's right to regulate. The difficulty is that both readings are partly true. Protecting investors' legitimate expectations is a core function of the fair-and-equitable-treatment standard, but so is the State's ability to recalibrate its incentive schemes.

Such situations are likely to recur, since the transition from fossil fuels to renewable energy is an inseparable part of global efforts to combat climate change.[68] Conflicts over the balance between States' right to regulate ESG matters and investment protection may therefore continue to arise. For example, on 8 August 2025 Woodhouse Investment and West Cumbria Mining v United Kingdom case was registered at ICSID.[69] This is the first ever ICSID investment arbitration case against the United Kingdom (UK), in which Singaporean investors brought a claim concerning a planned coal mine in UK territory.[70] The principal question is whether the UK's actions in quashing the planning approval for the proposed coal mine breach the fair-and-equitable-treatment standard and the protection against expropriation under the 1975 UK–Singapore bilateral investment treaty (the UK–Singapore BIT).[71] Here too a problematic aspect arises as to the balance between the State's right to regulate and to act in the ESG field and the protection of investors' rights. The UK–Singapore BIT, like the ECT, may be regarded as an older-generation IIA containing no provisions that clearly enshrine a right to regulate or an investor obligation to comply with ESG requirements[72]. Although the case has not yet been decided, it raises the problematic question of the extent to which a State's position, regulation and conduct may change once it decides to pursue ESG objectives more, or less, strictly. The imbalance between the right to regulate and investment protection may therefore remain a salient problematic aspect of investment arbitration, particularly in the ESG context.

In the author's view, a balance between States' right to regulate and investment protection could be found in two ways. Firstly, the already-mentioned inclusion of ESG provisions and of an express right to regulate in new-generation IIAs could contribute. This would generate realistic expectations among investors as

[64] NextEra (n 62).
[65] NextEra (n 62).
[66] NextEra (n 62).
[67] Greenwood (n 57) 318.
[68] Rowe (n 56) 69.
[69] Woodhouse Investment Pte Ltd and West Cumbria Mining (Holdings) Limited v United Kingdom (Request for arbitration registered) ICSID Case No ARB/25/37 (8 August 2025).
[70] Woodhouse (n 69).
[71] Woodhouse (n 69).
[72] Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Singapore for the Promotion and Protection of Investments (signed and entered into force 22 July 1975).

to States' positions on ESG matters and could give States additional arguments in formulating their positions and defending against investor claims. It would by no means abolish investors' right to seek compensation for State action, but the mere fact of State action would not suffice – justification would be required as to why the State's ESG-related action infringes the investor's rights. The essential difficulty is that concluding and renegotiating IIAs takes a relatively long time, so this method may lack efficiency in temporal terms. Secondly, an effective opportunity for States to bring counterclaims in investment arbitration could also help to even out the asymmetry. The counterclaim is a rather rare phenomenon, but, with effective opportunities to use this tool, States could bring counterclaims against investors that have harmed ESG-protected values – an effective means of evening out the asymmetry, since States could seek to defend the ESG regulation they have adopted where the investor itself causes harm. This need not unduly prejudice investors' interests, since investment arbitration guarantees investors an opportunity to defend against such counterclaims.

In sum, the Spanish case reveals the tension between the protection of investors' rights and the State's right to change ESG-related regulation. In the author's assessment, this problem will remain relevant, and further examples may arise in future where a State seeks to tighten or relax ESG regulation, giving rise to new investment disputes. To even out the potential imbalance between investors and States in the ESG context, the author proposes both the continued embedding of ESG provisions in IIAs and the creation of an effective opportunity for States to make use of the counterclaim in investment arbitration.

CONCLUSIONS

Investment arbitration remains the principal forum for investor–State disputes, and a growing share of those disputes now engages ESG values such as environmental protection, public health, sustainable energy and human rights. This article has shown that its role in ESG disputes cannot be assessed unequivocally. New-generation IIAs increasingly pair substantive ESG provisions with arbitration agreements, which is likely to bring more ESG disputes before arbitral tribunals. Yet the EU's critical stance, expressed in Achmea and in its preference for a permanent international investment court, pulls in the opposite direction and may reduce the number of ESG disputes heard in arbitration. Investment arbitration practice confirm that tribunals tend to uphold jurisdiction over ESG-based counterclaims, although success turns on the State framing the counterclaim correctly and, ideally, on express IIA provisions that remain uncommon in practice. Finally, the Spanish renewable-energy case together with other cases expose the enduring tension between the right to regulate and investment protection. To even out this asymmetry, the author proposes two complementary paths – the continued embedding of ESG provisions together with an express right to regulate in new-generation IIAs, and an effective opportunity for States to make use of the counterclaim in investment arbitration.