Global Arbitration Review

The Guide to Mining Arbitrations

Editors
Jason Fry and Louis-Alexis Bret

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For further information please contact Natalie.Clarke@lbresearch.com

Publisher
David Samuels

Business Development Manager
Gemma Chalk

Editorial Coordinator
Hannah Higgins

Head of Production
Adam Myers

Production editor
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Copy-editor
Gina Mete

Proofreader
Rakesh Rajani

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Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to Mining Arbitrations*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service. But we also provide more in-depth content: books and reviews; conferences; and handy workflow tools, to name just a few. Visit us at www.globalarbitrationreview.com to find out more.

Being at the centre of the international arbitration community, we regularly become aware of fertile ground for new books. Recently mining – and the disputes it throws up – emerged as one such topic.

One could assume mining is little different from energy – which is already covered by a GAR guide (*The Guide to Energy Arbitrations*). But as Jason Fry and Louis-Alexis Bret explain in their excellent Introduction, miners face other risks. More than energy companies, their projects depend on the blessing of the local population because they are visible and on people's doorsteps in a way that oil and gas projects are not. And there are other differences. It is easier to value an early-stage oil and gas asset than a mine, which has implications for damages. And different substantive principles apply. The *lex mineralia* is less influenced by decisions out of Texas and more by rulings in Australia and Canada.

The era of hydrocarbons is waning, while that of minerals and metals is heading the other way. Copper, cobalt, lithium, silicon, zinc and other precious resources are required for batteries, circuitry and solar panels – they are powering the growth of technology and clean energy.

For all these reasons, it seemed right to add mining disputes to the topics covered by the GAR Guides series.

The Guide to Mining Arbitrations is the result. It is a practical know-how text in three parts. Part I identifies the most salient issues in mining arbitration, which are identified by reference to the key business risks facing the mining and metals sector. Part II introduces select substantive principles applicable to mining arbitrations, while Part III introduces some regional perspectives on mining arbitration. The Guide ends with a brief conclusion.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide to Mining Arbitrations*. If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A, and challenge and enforcement of awards in the same practical way. We also have books on advocacy in international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration*).

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

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The Rise of Environmental Counterclaims in Mining Arbitration

Yasmine Lahlou, Rainbow Willard and Meredith Craven[1]

Increased foreign direct investment by multinational mining companies has given rise to a growing number of international arbitration claims, both contract- and investment treaty-based.[2] Many of these have at least some connection to the environment.[3] Investors regularly invoke violations of the fair and equitable treatment standard or claim an indirect expropriation on the basis of a state's adoption or enforcement of environmental regulations.[4] Meanwhile, in a number of recent investment arbitrations – including in at least two mining disputes – states, too, have asserted counterclaims alleging environmental damage associated with an investment.[5] This seems to be indicative of a broader trend of states

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1 Yasmine Lahlou is a partner, and Rainbow Willard and Meredith Craven are associates at Chaffetz Lindsey LLP. The authors would like to thank Carlos Torres and Grace Brody for their indispensable assistance preparing this chapter.

2 See, e.g., *Glamis Gold Ltd v. United States of America*, UNCITRAL, Award, 8 June 2009 (concerning a gold mining investment in the United States); *Sergei Paushok et al v. The Government of Mongolia*, UNCITRAL, Award, 28 April 2011 (concerning a gold mining investment in Mongolia); *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (concerning a gold mining investment in Venezuela); *Bear Creek Mining Corporation v. Republic of Peru* ICSID Case No. ARB/14/21, Award, 30 November 2017 (concerning a silver mining investment in Peru); *South American Silver Limited v. The Plurinational State of Bolivia* PCA Case No. 2013-14, UNCITRAL, Award, 22 November 2018 (concerning a silver mining investment in Bolivia); *Pan African Burkina Limited et al v. Burkina Faso* (ICC) (discussed in Cosmo Sanderson, 'ICC panel dismisses claim against Burkina Faso', GAR, 13 March 2019) (concerning a manganese mining investment in Burkina Faso).

3 See K. Gordon and J. Pohl Environmental Concerns in International Investment Agreements: A Survey OECD Working Papers on International Investment, 2011, p. 6.

4 See, e.g., *Glamis Gold v. United States*, Award (concerning claims that denial of gold mining permits for environmental and cultural reasons breached the NAFTA standards of treatment).

5 See, e.g., *Paushok v. Mongolia*, Award (counterclaiming that Claimants violated their environmental obligations under gold-mining licences); *Rusoro v. Venezuela*, Award (raising environmental protections in the gold-mining sector as both a defence on the merits and a counterclaim). See also *Burlington Resources Inc v. Republic of*

asserting counterclaims more frequently in investment arbitration and negotiating new treaties that may be more amenable to both counterclaims and environmental interests.

This chapter addresses state-asserted counterclaims in the investment treaty context. In particular, we examine the potential for environmental counterclaims in mining arbitrations asserted under an investment treaty. We do not address counterclaims asserted in the commercial context or pursuant to investment agreements.[6] Nor do we address claims initiated by states pursuant to investment treaties.[7]

While states often allege environmental violations as a defence in the mining context, very few have used these same environmental violations as a basis for a counterclaim. Nonetheless, in recent years, state-asserted counterclaims have been asserted with increased frequency in investment treaty arbitrations overall.[8] Very few of these counterclaims have succeeded. More often than not, they are rejected on jurisdictional or admissibility grounds.[9] Tribunals have struggled to find consent to arbitrate counterclaims in investment treaty language, particularly in the case of counterclaims that are not directly related to the investor's claims.[10] The very few counterclaims that proceed on the merits usually are rejected because the particular treaty does not create a substantive cause of action for a state.[11]

As treaties are often silent regarding the assertion of counterclaims, the customary practice of investment arbitration tribunals has provided the parameters for state-asserted counterclaims. There are three preliminary requirements for a counterclaim to be entertained on the merits.[12] First, the investment instrument – whether an investment treaty or an investment agreement negotiated directly between the investor and the state – must provide consent to arbitrate counterclaims. Second, the investment instrument must provide a

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Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017 (awarding damages to Respondent on the basis of its environmental counterclaim); *David Aven et al v. The Republic of Costa Rica,* UNCITRAL Case No. UNCT/15/3, Final Award, 18 September 2018 (finding that an environmental counterclaim was available but inadequately pled under the DR-CAFTA).

6 For example, some of the earliest instances of state-asserted counterclaims arose in the context of contracts and investment agreements negotiated directly between the state and investor. See, e.g., *Klockner Company v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision, 21 October 1982; *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID, Decision, 6 January 1988; *Atlantic Triton v. Government of Guinea,* ICSID, Award, 21 April 1986.

7 For a discussion of investment arbitrations where the host state acted as claimant, see Gustavo Laborde, 'The Case for Host State Claims in Investment Arbitration', 1, *J. Int'l Disp. Settlement* 97-122 (2010).

8 *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bishkaia, Bilbao Bishkaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016; *Anglo-American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019; *Burlington v. Ecuador*, Decision on Counterclaims; *Aven v. Costa Rica*, Final Award.

9 *Burlington v. Ecuador* is the only case we know of arising under an investment treaty, where a state succeeded on its counterclaim on the merits and won damages against the investor.

10 See Zachary Douglas, *The International Law of Investment Claims* (Oxford University Press 2009), para. 496 et seq. (discussing the requirement imposed by both ICSID and UNCITRAL tribunals that the counterclaim share a nexus with the investment).

11 See, e.g., *Rusoro v. Venezuela*, Award at para. 628; *Anglo-American v. Venezuela*, Award at paras. 529–530.

12 These requirements are based on an analysis of publicly available arbitral decisions where tribunals have examined counterclaims.

cause of action for the relevant counterclaim. Third, the claim must meet other procedural and substantive requirements, often arising from the governing arbitration rules.

State negotiators are actively engaged in drafting free trade agreements, bilateral investment treaties (BITs), and other investment instruments that may change these tribunal-constructed parameters and make environmental counterclaims a strategic reality for states. Some new treaties squarely address counterclaims. And many of them acknowledge states' right to regulate in the public interest, as well as the potential for environmental and social impact arising from foreign direct investment.[13] Many of these treaties have yet to enter into force so no case law interpreting them exists as yet. As a result, it is impossible to predict whether these new treaties will give rise to a higher number of environmental counterclaims in the mining context and whether states rich with mining resources will seek to renegotiate existing treaties to include these provisions.[14] It also remains to be seen whether these new treaty provisions will permit state-asserted counterclaims to meet jurisdictional and admissibility requirements, whether more environmental counterclaims will proceed on the merits, and whether any could lead to a state recovering damages on its counterclaim.

A changing panorama: from implied to express consent

In most investment disputes, the scope of the parties' consent for purposes of jurisdiction – including whether the parties have consented to arbitrate counterclaims – is determined by the host state's offer to arbitrate (usually contained in a treaty).[15] While some tribunals have interpreted an investor's submission of a dispute to ICSID or under the UNCITRAL Rules as sufficient to determine consent to state-asserted counterclaims,[16] in this section we focus solely on how tribunals have analysed consent that arises from the investment

13 See Alessandra Arcuri and Francesco Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties', *Boston College Law Review*, 2018, p. 2806; Alison Giest, 'Interpreting Public Interest Provisions in International Investment Treaties', *Chicago Journal of International Law*, 2017, p. 324.

14 Some (but not all) of these new treaties have been signed by states with developed mining industries. Even in the case where the signatories do not have mining industries, these new provisions are important as they may be adopted by states that have rich mining resources. And even where these provisions are not in play, they may impact how tribunals address environmental counterclaims in the mining context.

15 See Andrea M. Steingruber, *Consent in International Arbitration* Section 14.16-14.17 (Oxford Int'l Arb. Series eds., 1st ed. 2012) (interpreting Article 46 of the ICSID Convention to encompass exactly the same scope of counterclaims as agreed upon in the investment treaty or investment agreement) ('the provision expresses the fact that "the parties may vary or exclude the tribunal's power to deal with ancillary claims in their consent agreement or subsequently",' and 'the tribunal . . . has no discretion to refuse considering ancillary claims') (quoting G. Petrochilos, S. Noury & D. Kalderimis, 'Convention of the Settlement of Investment Disputes between States and Nationals of Other States', in *Concise International Arbitration* 2010, at para. 2 at Article 46 (The Hague: Kluwer Law International); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, para. 866 (indicating that whether the parties have consented to arbitrate counterclaims 'must be determined in the first place by reference to the dispute resolution clause contained in the BIT'.).

16 See, e.g., *Antoine Goetz & Consorts et SA Affinage des Metaux v. Republic du Burundi*, ICSID Case No. ARB/01/02, Award, 21 June 2012, paras. 278–79 (adopting the Separate Opinion of Prof Reisman in *Roussalis v. Romania* to find that election of a remedy under ICSID – including Article 46 of the ICSID Convention providing for counterclaims – 'ipso facto' constitutes consent to arbitrate counterclaims). C.f. *Karkey Karadeniz Elektrik Uretim AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, para. 1015 (rejecting the reasoning in *Goetz v. Burundi*).

treaty and how treaty negotiators are addressing consent to arbitrate counterclaims in a new breed of treaties.

When an investor files an investment dispute against a host state, the investor accepts the state's standing offer to arbitrate on the same terms contained in the offer.[17] As a result, states unilaterally control the scope of consent. If the state offers its consent to arbitrate disputes including counterclaims, then the investor through its acceptance also consents to arbitrate counterclaims.[18]

Despite state control of the scope of consent, it has historically been the most significant barrier to counterclaim jurisdiction in investment arbitration. This is because investment treaties have historically focused on giving investors the right to seek a remedy in an international forum, so consent to counterclaims was not expressly contemplated. Under these treaties, consent to arbitrate counterclaims exists implicitly or not at all.[19] Some newly negotiated treaties now include express consent to counterclaims. This express consent is, however, often limited in scope. We will discuss treaty language from which tribunals have interpreted implied consent in the past, and then new investment treaties and free trade agreements that expressly include consent to arbitrate state-asserted counterclaims.

Implied consent to arbitrate counterclaims

Investment tribunals historically have interpreted implied consent to arbitrate counterclaims on the basis of vague language or broad dispute resolution clauses in investment treaties. These tribunals have noted that a number of linguistic formulations provide implicit consent to arbitrate counterclaims, either because they exclude counterclaims under particular, defined circumstances, or because they broadly consent to arbitration of 'any' or 'all' disputes.

Implied consent to arbitrate some counterclaims by excluding others

Many treaties, while not expressly permitting the assertion of counterclaims, do appear to envision them generally by excluding counterclaims in specific circumstances. A common provision in investment treaties and free trade agreements prohibits counterclaims in one very limited situation: where a state attempts to invoke an investor's ability to receive indemnification or compensation for a claim under an insurance policy or guarantee

17 See Douglas *supra* note 10, at para. 491 ('The consent is perfected by the investor's filing of a request for arbitration, which cannot expand or limit the host state's standing offer to arbitrate in the investment treaty.'); Hege Elisabeth Kjos, 'Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law' 112 (Vaughan Lowe QC et al. eds,. *Oxford Monographs in Int'l Law*, 1st ed. 2013).

18 See, e.g., *Urbaser v. Argentina*, Award at para. 1147 (noting that any attempt by Urbaser to accept an offer that was different than the one made by Argentina in the BIT would have resulted in no agreement to arbitrate at all).

19 One notable exception to this rule was the recent Decision on Counterclaims in *Burlington v. Ecuador*, where the investor signed an agreement consenting to arbitrate Ecuador's environmental counterclaims midway through the arbitration, essentially executing a post-dispute arbitration agreement in favour of the counterclaims. *Burlington v. Ecuador*, Decision on Counterclaims at paras. 60–61.

contract. Based on basic canons of treaty construction, the exclusion of this single type of counterclaim would appear to allow for all other types of counterclaims.[20]

This was the case in *Aven v. Costa Rica*, where 'the only provision [of the DR-CAFTA] referring to "counterclaims"' provided:

> *A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract*.[21]

The *Aven* tribunal found that this language meant that counterclaims were in principle contemplated by the DR-CAFTA and were therefore within the scope of the parties' consent:

> *It follows that, except for a counterclaim by a respondent State alleging that 'claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract,' Respondent's right to counterclaim under the Treaty is contemplated and falls within the scope of jurisdiction of a tribunal constituted under the Treaty.*[22]

Such provisions prohibiting state defences or counterclaims based upon insurance or guarantee contracts have been around since at least the early 1990s. For example, similar language appears in NAFTA,[23] and was included in treaties concluded throughout the 1990s.[24]

Perhaps using past treaties as models, treaty negotiators continue to insert similar or identical provisions in current investment treaties. For example, the Argentina–Japan BIT, signed in 2018, includes nearly identical language to the DR-CAFTA.[25] Interestingly, the

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20 M. Waibel, 'The Origins of Interpretive Canons in Domestic Legal Systems', in *Between the Lines of the Vienna Convention?: Canons and Other Principles of Interpretation in Public International Law*, Eds. J. Klingler, Y. Parkhomenko, C. Salonidis, (Wolters Kluwer, 2018) (discussing the application of the principle of *exclusio unis* in public international law).

21 *Aven*, Final Award at para. 693.

22 id. at para. 694.

23 See North American Free Trade Agreement, entered into force 1 January 1994, Article 1137.3 ('In an arbitration under this Section, a Party shall not assert, as a defense, counterclaim, right of setoff or otherwise, that the disputing investor has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.')

24 See, e.g., Agreement Between the Government of Australia and the Government of the Republic of Lithuania on the Promotion and Protection of Investments, adopted 24 November 1998, entered into force 10 May 2002, Article 13.8. ('In any proceeding involving a dispute relating to an investment, a Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the investor concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.'); Treaty Between the Government of the United States of America and the Government of the Republic of Estonia for the Encouragement and Reciprocal Protection of Investment, signed 19 April 1994, entered into force 16 February 1997, Article VI.6 (similar language).

25 Agreement Between the Argentine Republic and Japan for the Promotion and Protection of Investment, signed 1 December 2018, not in force yet, Article 25.14 ('respondent shall not assert, as a defense, counterclaim, right of set off or otherwise, that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract'); see also Free Trade Agreement between the Republic of Korea and the Republics of Central America (2018),

Kuwait–Singapore BIT contains the same prohibition, but articulates it in a more permissive sense, noting that:

> *[i]n any proceeding under this Article, any counterclaim or right of set-off may not be based on the fact that the investor concerned has received or will receive, pursuant to an insurance contract, indemnification or other compensation for all or part of its alleged damages from any third party whomsoever, whether public or private, including such other Contract Party and its subdivisions, agencies or instrumentalities.*

This provision appears to permit any counterclaim or right of set-off to be asserted, provided that it is not based on the investor's right to receive indemnification under an insurance contract or otherwise. Provisions including this broad language may provide an even clearer path to a state-asserted counterclaim than the language of DR-CAFTA that paved the way for consent in *Aven*.

Consent to arbitrate 'any' or 'all' disputes

Meanwhile, many investment treaties provide broadly for arbitration of 'all' or 'any' investment disputes, without distinguishing between claims and counterclaims. Absent other limitations in these clauses, tribunals frequently find that they implicitly permit counterclaims. For example, in *Saluka v. Czech Republic*, the tribunal found that Article 8 of the Czech–Netherlands BIT, consenting to arbitrate 'all disputes . . . concerning an investment', authorised arbitration of counterclaims in principle.[26] However, without more, this language often leads to confusion as to whether treaty drafters intended to include consent to state-asserted counterclaims.

No consent to arbitrate counterclaims

Many tribunals have interpreted certain treaty language that imposes limitations on the scope of arbitral disputes as prohibiting counterclaims entirely. For example, some seemingly broad clauses that permit the submission of 'any' or 'all' disputes to arbitration only contemplate submission by an investor. The Canada–Venezuela BIT provides for arbitration

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signed 21 February 2018 (not yet in force); Agreement between Australia and the government of the Republic of Peru on the promotion and protection of investments (2018), signed 12 February 2018 (not yet in force); Investment Agreement between The Government of the Hong Kong Special Administrative Region of The People's Republic of China and the Government of the Republic of Chile (2016), signed 18 November 2016 (not yet in force).

26 *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction Over the Czech Republic's Counterclaim, 7 May 2004, para. 39; see also *Metal-Tech Ltd v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 410-11 (reaching a similar conclusion under the Israel-Uzbekistan BIT); *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, 1 March 2012, para. 432 (reaching a similar conclusion under the Germany–Ukraine BIT). See also *Urbaser v. Argentina*, Award at para. 1187 (finding that reference in the investment agreement to arbitration of 'disputes' generally, authorised arbitration of counterclaims in principle); *Hesham T M Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, para. 661 (same). Notably, the Spain-Argentina BIT at issue in *Urbaser* also allows either the investor or the host state to submit an investment dispute to arbitration.

of 'any dispute', but provides that 'an investor may submit a dispute' to arbitration.[27] The tribunal in *Rusoro v. Venezuela* interpreted this language as providing standing to investors only – i.e., it did not permit a state to assert a counterclaim.[28] Similarly, in *Karkey v. Pakistan*, the tribunal found that the Pakistan–Turkey BIT contemplated only the investor submitting a dispute to arbitration and choosing the relevant arbitral institution. As a result, the tribunal found no consent to arbitrate counterclaims submitted by the host state.[29]

One very clear example of a prohibition on counterclaims was found recently in *Anglo-American PLC v. Bolivarian Republic of Venezuela*.[30] There, the UK–Venezuela BIT provided:

> *[t]he jurisdiction of the arbitral tribunal shall be limited to determining whether there has been a breach by the Contracting Party concerned of any of its obligations under this Agreement, whether such breach of its obligations has caused damage to the national or company concerned, and, if such is the case, the amount of compensation*.[31]

The tribunal found that this language imposed clear limitations on the tribunal's jurisdiction and excluded the possibility of counterclaims.[32]

What's new? Express consent to arbitrate counterclaims

Burlington v. Ecuador, although it did not arise in the mining context, is the only public award in which a tribunal has analysed an express agreement to arbitrate a state-asserted counterclaim.[33] The consent was based on a post-dispute agreement between the parties, however, not on the language of an investment treaty. In some new investment treaties, drafters and negotiators have incorporated consent to arbitrate state-asserted counterclaims. However, to our knowledge, no reported decision has yet considered an investment treaty provision that expressly permits counterclaims.

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27 *Rusoro v. Venezuela*, Award at para. 622.

28 See *Rusoro v. Venezuela*, Award at paras. 622–27. The tribunal in *Rusoro* was likely also influenced by the fact that Venezuela's counterclaim arose under Venezuelan law and could not 'be adjudicated by applying the Treaty or principles of international law.' id. at para. 628.

29 *Karkey v. Pakistan*, Award at paras. 1012–1014 ('The BIT contains no particular or general language that would enable the Tribunal to conclude, if interpreted in accordance with the Vienna Convention on the Law of Treaties, that the arbitral agreement between Pakistan and Karkey includes consent by Karkey to the submission of counterclaims by Pakistan').

30 *Anglo-American v. Venezuela*, Award.

31 id. at para. 526 (quoting UK–Venezuela BIT, Article 8(3)).

32 id. at paras. 527–28. Similarly, the tribunal in *Roussalis v. Romania* found that there was no consent to arbitrate counterclaims under a treaty providing for arbitration of 'disputes between an investor . . . and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former.' *Roussalis*, Award at para. 886 (quoting Greece–Romania BIT). The tribunal found that this clearly indicated that the parties only consented to arbitrate disputes related to the state's alleged breaches, meaning that there was no consent to arbitrate any counterclaims concerning possible breaches of obligations by the investor. *Roussalis*, Award at paras. 870–71. See also *Oxus Gold v. The Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, para. 948 (same).

33 See *Burlington v. Ecuador*, Decision on Counterclaims.

Providing for express consent

Several new investment treaties and free trade agreements expressly permit state-asserted counterclaims. Some examples are the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Investment Agreement for the COMESA Common Investment Area,[34] the Argentina–UAE BIT and the Slovak Republic–Iran BIT. Each of these expressly envisions, and permits, the assertion of counterclaims. For example, the Argentina–UAE BIT provides that 'the respondent may submit a counter-claim directly related with the dispute.'[35] Similarly, the Slovak Republic–Iran BIT notes that the respondent 'may . . . assert . . . [a] counterclaim'. And the CPTPP provides that 'the respondent may make a counterclaim. . . .'[36] Evidently, at least in terms of consent, these treaties provide a much clearer path for a state to assert a counterclaim.

Limiting the consent

Notably, while these treaties clearly allow counterclaims, they limit their subject matter. The limitations take two broad forms: (1) in some treaties, the counterclaim must be directly related with the dispute raised by the investor, and (2) in others, the counterclaim must be based on an investor's failure to comply with the investment treaty, including a failure to comply with host state laws.

Incorporating a connectedness requirement

Both the CPTPP and the Argentina–UAE BIT incorporate a 'connectedness' requirement into the consent to a counterclaim. The Argentina–UAE BIT only permits a counterclaim that is 'directly related with the dispute'. Ultimately, this language will lead to several treaty interpretation issues.[37] What does 'directly related' mean? How 'direct' must the relation be? And if an investor has employed creative pleading to block a state from asserting a counterclaim, can the standard be relaxed?

The CPTPP incorporates a more permissive 'connectedness' requirement. Article 9.19.2 establishes that, in response to certain investor claims, 'the respondent may make a counterclaim in connection with the factual and legal basis of the claim . . .' Again, this provision may give rise to several treaty interpretation issues. What does 'in connection with' mean? Is this a lower standard than 'directly' connected? And does the counterclaim have to have a factual and legal connection to a claim, or could it be one or the other?

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34 Investment Agreement for the COMESA Common Investment Area, signed 23 May 2007 ('A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages.').

35 Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates, signed 16 April 2018, not in force, Article 28(4).

36 CPTPP, Article 9.18.2 ('When the claimant submits a claim pursuant to paragraph 1(a)(i)(B), 1(a)(i)(C), 1(b)(i)(B) or 1(b)(i)(C), the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant.').

37 Tribunals have often applied a connectedness requirement based on the arbitration rules applicable to a given dispute. As a result, tribunals may use this same analysis to analyse the connectedness requirement now included in some investment treaties.

Limiting counterclaims to violations of host state law

The Slovak Republic–Iran BIT also limits the subject matter of counterclaims, by establishing that '[t]he respondent may assert as a defense, counterclaim, right of set off or other similar claim that the claimant has not fulfilled its obligations under this Agreement to comply with Host State law or that it has not taken all reasonable steps to mitigate possible damages.'[38] This language, which permits the assertion of a counterclaim for any violation of host state law that also constitutes a breach of the BIT, could give rise to a broader range of counterclaims than the language in the Argentina–UAE BIT. The Slovak Republic–Iran BIT appears to allow a state to assert a counterclaim on the basis of a failure to comply with environmental laws or regulations, even if an investor's claims have no connection to environmental issues. But how this limitation will be interpreted in the context of the governing arbitration rules and tribunal practice remains to be seen.

The next step: creating a cause of action

Even where a tribunal finds that a treaty provides consent to state-asserted counterclaims, the respondent cannot prevail unless the treaty also provides a cause of action for the particular counterclaim.[39] Few tribunals have found that a cause of action exists for counterclaims under an investment treaty.[40] This is because investment treaties traditionally protected the rights of investors by imposing international obligations on states; they did not historically impose reciprocal obligations on investors. However, in several recent arbitrations, tribunals found that the treaty incorporated domestic and international law obligations to provide a cause of action.[41] Moreover, treaty negotiators have taken steps to reference such domestic and international law obligations in the text of investment treaties, perhaps in the hope of incorporating them as treaty obligations incumbent on foreign investors.

Next we will discuss counterclaims based on violations of host state law, and the support for these causes of action in newer treaties. Then, we discuss counterclaims based on international obligations, and how these obligations are being incorporated into treaties.

Breach of domestic law

Incorporating domestic law into investment treaties

In the context of state-asserted counterclaims, tribunals have historically found that they can only adjudicate causes of action arising under the treaty in question.[42] For example, in *Rusoro v. Venezuela*, Venezuela counterclaimed that Rusoro Mining had breached its mining

38 Agreement Between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, signed 19 January 2016, entered into force 30 August 2018, Article 14(3).

39 *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, para. 1066 (rejecting the respondent's counterclaim on the basis that it did not 'concern the existence or scope of a legal right or obligation' contained in the Treaty).

40 Respondents have been more successful asserting counterclaims under investment agreements negotiated directly with investors. See, e.g., *MINE v. Government of Guinea*, Decision on Annulment at 8.01 (upholding the award of damages on Guinea's counterclaim as *res judicata*).

41 See, e.g., *Aven v. Costa Rica*, Final Award at paras. 73–34; *Urbaser v. Argentina*, Award at para. 1192.

42 *Roussalis v. Romania*, Award at paras. 870–71 (noting that where the BIT does not incorporate domestic law obligations, only a cause of action arising under the BIT falls within the tribunal's jurisdiction).

plan for the gold mine it operated, resulting in damage to Venezuelan resources and increased costs for future operation of the mine by the state. The tribunal found that if Rusoro had any obligation to comply with the mine plan, the obligation arose pursuant to Venezuelan law and not under the Canada–Venezuela BIT. And nothing in the BIT gave the tribunal authority to adjudicate a cause of action arising under Venezuelan law.[43]

As a result, the traditional thinking has been that 'the arbitration agreement should refer to disputes that can also be brought under domestic law for counterclaims to be within the tribunal's jurisdiction.'[44] Multiple tribunals have suggested that a state could only assert a counterclaim based upon domestic law if the treaty incorporated some sort of umbrella clause raising an investor's breaches of contractual or domestic law obligations to the level of international law obligations.[45]

From a state's perspective, language in newer treaties may solve the problem that Venezuela faced in *Rusoro*. For example, the Slovak Republic–Iran BIT, discussed above, expressly permits a state to assert a counterclaim based on a violation of the investor's 'obligations under this Agreement to comply with Host State law'.[46] Thus, while this treaty does not impose express obligations on an investor, its counterclaim consent provision could create a potential cause of action for a violation of host state law.

Acknowledging a state's right to regulate

Nonetheless, in at least one instance, a tribunal found treaty language supported a counterclaim based on a violation of host state law. In *Aven v. Costa Rica*, the tribunal found that language protecting the state's right to regulate and enforce measures in the interest of the environment imposed treaty obligations on investors. The DR-CAFTA investment chapter at issue in *Aven* provides:

> *Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.*[47]

The *Aven* tribunal interpreted this language to incorporate the state's domestic environmental measures into the treaty. The tribunal found that any investor who ignored or breached the state's environmental measures would violate 'both domestic and international

43 See *Rusoro v. Venezuela*, Award at para. 628. See also *Anglo-American v. Venezuela*, Award at paras. 529–530 (finding that the treaty provided no cause of action for counterclaims based upon the investor's alleged breaches of Venezuelan law).

44 P. Lalive and L. Halonen, 'On the availability of Counterclaims in Investment Treaty Arbitration', Czech Yearbook of International Law, 2011 p. 141, n. 7.19.

45 See, e.g., *Oxus v. Uzbekistan*, Final Award at para. 958. See also *Roussalis v. Romania,* Award at paras. 871–873 (rejecting the state's argument that the umbrella clause could elevate domestic law breaches to breaches of the BIT, because the particular umbrella clause only required that the state observe its obligations, and did not apply to obligations of investors).

46 Agreement Between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, signed 30 August 2017, Article 14(3).

47 *Aven v. Costa Rica*, Final Award at para. 733.

law'.[48] As a result, while the DR-CAFTA did not impose any express affirmative obligation on investors to protect the ecology of the host state, the tribunal found it could elevate breach of domestic environmental regulations to a treaty breach, forming the cause of action for a counterclaim.[49]

Although the standard may differ slightly, many new investment treaties include the same, or similar, language. For example, the Comprehensive Economic Partnership Agreement between the EFTA States and the Republic of Ecuador provides that 'nothing in this Chapter shall be construed to prevent a Party from imposing maintaining or enforcing measures . . . necessary to protect human, animal or plant life or health.'[50] The Chile–Hong Kong BIT includes similar language.[51]

However, the award in *Aven* suggests that a state could likely make a convincing argument that asserting a counterclaim based on the violation of an environmental measure is one way of 'enforcing' that measure.[52] Of course, there are also convincing arguments to the contrary. These arguments will centre around treaty interpretation issues. What did the treaty drafters mean by 'enforcing' a measure? Does the assertion of a counterclaim based on a violation of the 'measure' constitute 'enforcing' it? If the state has other means (and is employing them) to enforce the measure, is it also permissible to assert a counterclaim in international arbitration on the same basis? And ultimately, did treaty drafters intend to give

48 *Aven v. Costa Rica*, Final Award at para. 734.

49 Nonetheless, the tribunal in *Aven v. Costa Rica* found that the respondent failed to meet the UNCITRAL pleading requirements to state a counterclaim; therefore the counterclaim was dismissed as inadmissible. See Final Award at paras. 745–47.

50 Comprehensive Economic Partnership Agreement between the EFTA States and the Republic of Ecuador, signed 25 June 2018, Article 6.3. This language establishes a standard that a state must meet for the measures to be permissible – they must be 'necessary' to protect human, animal or plan life or health.

51 Hong Kong–Chile BIT, Article 15.1. ('Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its area is undertaken in a manner sensitive to environmental, health or other regulatory objectives.') This language establishes a somewhat lower standard. The state only needs to show that it found it appropriate to adopt, maintain or enforce the environmental measure in question. These provisions, which permit a state to enforce its own environmental measures, can be contrasted with similar provisions that expressly carve out public health, social and environmental and security protections from indirect expropriation claims. The United Arab Emirates–Uruguay BIT provides that regulatory measures that are not discriminatory or arbitrary and designed and applied to protect legitimate objectives of public health, security, the environment and social questions do not constitute indirect expropriation Agreement between the United Arab Emirates and Uruguay for the Promotion and Reciprocal Protection of Investments, signed 24 October 2018, Article 8. Thus, with several caveats, this provision prevents an investor from invoking legitimate environmental regulations as a basis for an indirect expropriation claim. While addressing the same subject matter – a state's environmental (and other) regulations, it could be more difficult to use these provisions as a basis for asserting a counterclaim.

52 The tribunal in *Aven* did not consider whether asserting an environmental counterclaim constituted enforcing environmental measures. However, it noted that the environmental enforcement clause was included in Section A of the investment chapter of DR-CAFTA, and Section A forms the basis for causes of action for investment arbitration under DR-CAFTA. Because of the context surrounding the clause, the *Aven* tribunal found that the environmental enforcement clause created an 'obligation, not only under domestic law but also under Section A of Chapter 10 of DR-CAFTA to abide [by] and comply [with] the environmental domestic laws and regulations, including the measures adopted by the host State to protect human, animal or plant life or health.' *Aven*, Final Award at para. 734.

states a substantive cause of action by including this provision?[53] Given the variations in the treaty landscape, tribunals likely will need to examine these questions anew.

International obligations

Similar to domestic law, international obligations arising under international instruments external to the investment treaty cannot provide a cause of action against an investor, unless they are incorporated into the applicable treaty explicitly or by reference.[54] However, the majority of international law instruments applicable to corporations are non-binding and voluntary. As the tribunal in *Urbaser v. Argentina* noted, the voluntary nature of these instruments makes it difficult to point to affirmative obligations that can serve as a basis for a treaty-based counterclaim.[55] Analysing a counterclaim alleging that *Urbaser* denied Argentine citizens the human right to water by failing to adequately furnish drinking water and sewage services, the *Urbaser* tribunal noted that instruments such as the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic Social and Cultural Rights recognise human rights to water and sanitation as a matter of customary international law.[56] But even as these instruments recognise that people have certain rights, they do not impose affirmative obligations on private parties to promote or implement those rights. At most, these instruments impose a prohibition 'not to engage in activity aimed at destroying such rights'.[57] Even when a state party assumes an obligation under international law to protect and promote environmental or human rights, that obligation is not transferred to foreign investors operating in that state by virtue of an investment treaty.[58]

However, in the changing treaty landscape, these voluntary standards and guidelines are now appearing in investment treaty provisions. These provisions mostly fall within the rubric of corporate social responsibility (CSR). Generally, CSR provisions are understood to include internationally recognised guidelines for business and investment that address the environment, human rights, community relations and labour issues,[59] and are embodied in instruments like the OECD Guidelines for Multinational Enterprises.[60] In the mining context, CSR instruments set out guidelines for businesses that are aimed at protecting and managing the environment and undertaking sustainable development.[61]

53 The *travaux preparatoires*, where they exist, are silent as to these issues.

54 See, e.g., *Urbaser v. Argentina*, Award at para. 1192 (opining that the Spain–Argentina BIT's reference to incorporating rights under other international agreements or 'general international law' contemplated a cause of action for claims and counterclaims under sources of international law external to the BIT).

55 *Urbaser v. Argentina*, Award at para. 1195.

56 *Urbaser v. Argentina*, Award at paras. 1196–98.

57 id. at para. 1199.

58 See *Urbaser v. Argentina*, Award at paras. 1209–2010.

59 Arcuri and Montanaro, *supra* note 13, at 2806; Giest, *supra* note 13, at 324.

60 OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, available at http://dx.doi.org/10.1787/9789264115415-en.

61 See, e.g., Government of Canada, NRCan, Corporate Social Responsibility Checklist for Canadian Mining Companies Working Abroad (2015), available at www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mineralsmetals/pdf/Corporate%20Social%20Responsibility%20Checklist_e.pdf.

For example, the Chile–Hong Kong BIT provides that:

> *The Parties reaffirm the importance of each Party encouraging enterprises operation within its area to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.*[62]

The Benin–Canada BIT (based on the Canadian model BIT) has similar language.[63] All of these treaties stop short of imposing direct obligations on investors. They recognise the importance of CSR by agreeing to 'encourage' businesses to adopt these principles. And adoption is voluntary. Commentators have noted that these provisions, on their own, may be unenforceable.[64] Stated in aspirational language, they lack the mandatory nature of many treaty provisions. Nonetheless, in the mining context, they may create a cause of action for states asserting environmental counterclaims.

There are several ways in which a state may impose CSR standards on a mining project. A state may incorporate these standards as regulations, or could expressly add them to a mining licence. Indeed, many investors themselves may voluntarily include CSR standards in documents they submit to a state to gain approval for exploration or production. Another possible way these provisions may be incorporated is through concessions or other agreements with state entities.

The 'double incorporation' of these standards could give rise to a counterclaim. If these CSR standards are echoed (in more mandatory terms) in a licence, or an internal regulation, then a state may choose to assert a counterclaim on the basis of an investor's failure to comply with these standards.[65] While the treaty language is only aspirational, a tribunal is unlikely to ignore the fact that the treaty drafters expressly included these CSR provisions. This situation is far different than the one in *Urbaser* where the treaty was entirely silent as to these issues.[66] It remains to be seen how tribunals will interpret these aspirational

62 Chile–Hong Kong BIT, Article 16.

63 Benin-Canada BIT, Article 16 ('Each Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labor, the environment, human rights, community relations and anti-corruption.').

64 Arcuri and Montanaro, *supra* note 13, p. 2806.

65 These provisions may carry more weight if the relevant investment treaty also includes a provision acknowledging a state's right to enforce its environmental regulations, which could provide an independent cause of action. For example, in *Aven*, the tribunal found that the inclusion of the language regarding Costa Rica's right to enforce its environmental measures in the section of the treaty that creates causes of action for investment arbitration, meant that the environmental right to regulate created a cause of action for a counterclaim. *Aven*, Final Award at para. 734.

66 C.f. Spain–Argentina BIT, Article IX(6) (providing merely that the arbitration should be governed by the BIT, any additional agreements between the State parties, and principles of host state and international law); *Urbaser v. Argentina*, Award at para. 1199 (finding that the reference to principles of international law did not impose affirmative obligations on investors, but could create a negative obligation 'not to engage in activity aimed at destroying' human rights protected by international law.

provisions – and whether they may create a cause of action that permits a state-asserted counterclaim to succeed on the merits.

Incorporating other substantive and procedural requirements in investment treaties

Finally, for a tribunal to entertain a counterclaim, the counterclaim must comply with other substantive and procedural requirements, often arising from the relevant arbitration rules. Both ICSID and non-ICSID arbitration regimes provide a pathway to admit counterclaims, so long as they fall within the scope of the parties' consent and are connected to the primary claim or investment. Nonetheless, counterclaims are frequently rejected for failure to meet the pleading requirements of the relevant arbitration rules, or because the state is not the damaged party and therefore lacks proper standing to raise the counterclaim. We address each of these issues briefly below and outline how treaty negotiators appear to take them into account in new treaty language. We will first analyse how treaties address what has historically been seen as an admissibility requirement, then we discuss counterclaim pleading requirements and how treaties incorporate them. Finally, we discuss standing requirements for the assertion of counterclaims, and options provided in new treaties.

Admissibility of counterclaims

Under the ICSID regime, both the ICSID Convention and the Arbitration Rules provide a pathway for counterclaims, so long as they arise 'directly out of the subject matter of the dispute provided that they are within the scope of consent of the parties and are otherwise within the jurisdiction of the Centre'.[67] Meanwhile, the UNCITRAL Rules acknowledge the possibility of counterclaims, provided they 'arise out of the same contract' as the primary claim.[68]

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67 See ICSID Convention, Article 46 ('Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject matter of the dispute provided that they are within the scope of consent of the parties and are otherwise within the jurisdiction of the Centre.'); ICSID Arbitration Rules, Rule 40(1) ('Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre').

68 See UNCITRAL (1976) Rules, Article 19(3); UNCITRAL (2010) Rules, Article 21(3). Consequently, tribunals operating under the UNCITRAL Rules rely on the text of the investment instrument to determine jurisdiction over and admissibility of counterclaims. See, e.g., *Saluka v. Czech Republic*, Decision on Jurisdiction Over Counterclaim at para. 39 (finding that Articles 19.3, 19.4, and 21.3 of the UNCITRAL 1976 Rules conferred jurisdiction 'in principle' to hear counterclaims, so long as the arbitration agreement in the BIT was broad enough to encompass them). The rationale under other institutional rules such as the ICC, SCC or LCIA Rules, is largely the same as under the UNCITRAL Rules. Although there are limited public awards where tribunals applying these sets of rules interpreted their ability to hear counterclaims, like the UNCITRAL Rules, these institutions provide generally for the admission of counterclaims, and any limitations would be found in the instrument of the parties' consent to arbitration – the investment treaty or investment agreement. See, e.g., *Limited Liability Company Amto v. Ukraine*, SCC Case 080/2005, Award, 26 March 2008, para. 118 ('The jurisdiction of an Arbitral Tribunal over a State party counterclaim under an investment treaty depends upon the terms of the dispute resolution provisions of the treaty, the nature of the counterclaim, and the relationship of the counterclaims with the claims in the arbitration.'). The first tribunal

As a result, regardless of which institutional rules apply, there typically must be a direct nexus between the counterclaim and the investor's primary claims (the 'subject matter of the dispute').[69] Historically, this has been interpreted by tribunals as an admissibility requirement.

As discussed above, many of the treaties that now include express consent to counterclaims also incorporate a connectedness requirement into that consent.[70] The Argentina–UAE BIT, for example, only permits a counterclaim that is 'directly related with the dispute'. The inclusion of an express requirement that a counterclaim be directly related to the investor's claims could elevate the 'connectedness' requirement to an issue of consent under the investment treaty – and therefore a question of jurisdiction – rather than one of admissibility. In some situations, this theoretically could create a higher hurdle for a state than if the requirement were simply one of admissibility.

Pleading deficiencies

On a number of occasions, tribunals have found that a counterclaim that otherwise falls within their jurisdiction is inadmissible because it fails to meet the pleading requirements of the relevant arbitration rules. In *Aven v. Costa Rica*, the tribunal found that the dispute resolution language in the DR-CAFTA was broad enough to permit adjudication of counterclaims in principle, but the state lost its ability to raise them because it failed to comply with the pleading requirements of Articles 20.2 and 20.4 of the UNCITRAL Rules (2010).[71] The tribunal in *Hamester v. Ghana* reached a similar conclusion under the ICSID Rules, finding that although the treaty provided consent in principle to counterclaims, the respondent failed to adequately particularise its counterclaims.[72]

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to consider the availability of counterclaims in an investment arbitration governed by the UNCITRAL Rules also found that any legitimate counterclaims should have 'a close connection with the primary claim to which it is a response', similar to the nexus requirement under the ICSID Convention. Later investment tribunals applying the UNCITRAL Rules have tended to follow *Saluka*, requiring (1) a nexus between the primary claim and counterclaim; and (2) consent under the relevant BIT. See, e.g., *Al Warraq v. Indonesia*, Final Award at paras. 655–59; *Oxus v. Uzbekistan*, Final Award at paras. 945, 954.

69 See *Metal-Tech v. Uzbekistan*, Award at para. 407. In practice, most tribunals have interpreted this nexus to require that the counterclaim be against the same party or parties that bring the primary claims in the arbitration. See, e.g., *Saluka*, Decision on Jurisdiction Over Counterclaim at paras. 61, 81 (concluding that the counterclaims were insufficiently connected to the primary claim, because they related to the conduct of a third party that was not the investor); *Paushok v. Mongolia*, Award at paras. 693, 696 (rejecting environmental counterclaims on the basis that they lacked a 'close connection with the primary claim', because they concerned actions by the claimants' local subsidiary, and 'no evidence was introduced by Respondent tying Claimants themselves to any of the breaches alleged'); *Al Warraq v. Indonesia*, Final Award at paras. 668–71 (dismissing counterclaims on the basis that they referred to the conduct of a third party that was not a party to the investment arbitration); *Inmaris v. Ukraine*, Excerpts of Award at para. 432 (same).

70 Slovak Republic–Iran BIT, CPTPP, Argentina–UAE BIT.

71 *Aven v. Costa Rica*, Final Award at paras. 744–745. There was also some debate under *Aven* as to whether the DR-CAFTA created a cause of action for Costa Rica's environmental counterclaims, but the tribunal was not required to come to a conclusion on this since the claims were inadmissible for improper pleading.

72 *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana* ICSID Case No. ARB/07/24, Award, 18 June 2012, para. 352 (rejecting counterclaims, because the state 'neither specified the basis for the Tribunal's jurisdiction over the counterclaim nor the losses allegedly suffered'). See also *Goetz v. Burundi*, Award at paras.

At least one new treaty appears to address this issue, expressly incorporating a pleading standard. The Argentina–UAE BIT requires that 'the disputing party shall specify precisely the basis for the counter-claim.'[73] However, without further clarification, the extent to which this clause raises the pleading standard is unclear. When faced with arguments relating to provisions like this one, tribunals will need to answer several treaty interpretation questions. Does this standard differ from the pleading standards in arbitration rules, and if so, how? What exactly does it mean to 'specify precisely the basis' for a claim? And in any given situation, has the respondent satisfied this standard?

Standing

Finally, another common question is whether the state is the correct party to assert a counterclaim, particularly counterclaims relating to human rights and environmental protections. Most notably, the tribunal in *Chevron v. Ecuador II* rejected environmental counterclaims raised by Ecuador on the basis that the proper parties to bring those claims were the individuals who suffered harm as a result of the environmental damage.[74] Newer treaties do not address this issue, as it typically must be analysed in the context of a particular dispute.

Conclusion

Despite the efforts of some treaty negotiators to make environmental counterclaims expressly available to states, the treaty landscape continues to be a patchwork of provisions that will leave the many players involved in investor–state dispute settlement guessing. It is unclear if these new treaty provisions will change tribunal practice in interpreting the requirements for the assertion of a counterclaim. While treaties that expressly permit counterclaims address consent head on, they often leave open important issues – like the creation of a cause of action.

For greater clarity, states and investors may find it helpful to negotiate investment agreements directly with investors that address the issues that may arise in the event of a dispute.[75] Indeed, for better or worse, many countries now are opting for regimes that solely recognise international arbitration claims brought under investment agreements. Brazil, a

286–87 (dismissing the counterclaim on the merits on the basis that the state failed to present a *prima facie* case showing damages or causation).

73 Argentina-UAE BIT, Article 28.4.

74 *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* PCA Case No. 2009-23, Partial Award on Track II, 30 August 2018, paras. 7.37-7.45. See also *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 356 (rejecting counterclaim based upon a contract to which the state was not a party); Alex Genin, *Eastern Credit Limited, Inc and A S Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 5 June 2001, para. 378, n. 101 (rejecting the counterclaim on the merits, but also questioning whether the state had standing to bring the counterclaim, since it was not the party damaged by the alleged breach). In some instances, the damaged non-state party may be permitted to intervene in the investment arbitration and file an amicus submission; however, the admissibility of environmental arguments by third-party non-disputants is beyond the scope of this chapter.

75 As the only modern instance where a state has fully prevailed on a counterclaim against an investor, it is likely that *Burlington v. Ecuador* will prompt some states to opt towards executing investment agreements that include consent and cause of action for counterclaims directly with major foreign investors.

country rich in mining resources, has long done so.[76] And Ecuador, with a nascent mining sector,[77] has recently withdrawn from its investment treaties and passed a law encouraging the negotiation of investment contracts for foreign direct investment projects.[78] Given the experience of *Burlington*, some investors may be wary to enter into such agreements. But as the treaty landscape changes, they may nonetheless find some comfort in the predictability of the terms of an investment agreement.

76 A. Di Franco and R. Zabaglia, *The International Arbitration Review*, Brazil, 9th ed., The Law Reviews, August 2018, https://thelawreviews.co.uk/edition/the-international-arbitration-review-edition-9/1171730/brazil (last accessed 21 March 2019).

77 Stephanie Rokter, Ecuador to grow mining industry to 4 per cent GDP by 2021, *Global Mining Review*, 2 November 2018, www.globalminingreview.com/exploration-development/02112018/ecuador-to-grow mining-industry-to-4-gdp-by-2021/ (last accessed 21 March 2019).

78 A. Hurtado-Larrea and C. Torres, *The International Comparative Legal Guide to: Investor-State Arbitration 2019*, Ecuador, 1st ed., Global Legal Group Ltd. London, 13 November 2018, https://iclg.com/practice-areas/investor-state-arbitration-laws-and-regulations/ecuador (last accessed 21 March 2019).

Appendix 1

About the Authors

Yasmine Lahlou
Chaffetz Lindsey

Yasmine Lahlou has over 18 years of experience of international arbitration and litigation. Initially trained in Paris and admitted in New York and Paris, Yasmine is experienced in civil and common law systems. Yasmine has represented clients in arbitration proceedings conducted under the ICC, ICDR, LCIA, UNCITRAL and *ad hoc* rules, related to energy-related construction disputes, post-M&A disputes and supply agreements, etc. She has acted as a sole and co-arbitrator in ICC and Stockholm Chamber of Commerce (SCC) arbitrations. Yasmine was ranked number one in *Who's Who Legal 2019: Future Leaders – Arbitration* for the Americas for the second year in a row.

Rainbow Willard
Chaffetz Lindsey

Rainbow Willard has over eight years of experience representing clients in international commercial and investment treaty arbitrations under the major international rules (ICC, UNCITRAL, ICSID, LCIA, SIAC, etc.) as well as in US federal court litigation. She has particular expertise in mining, oil, gas and energy disputes involving parties from Latin America, South Asia, Europe and the Middle East. Before joining Chaffetz Lindsey, Rainbow was a senior associate in the international arbitration group of Allen & Overy LLP, practising in both New York and London. Rainbow clerked for the Honorable Kathleen M Williams of the United States District Court for the Southern District of Florida, and served as an assistant federal public defender in the Southern District of Florida where she appeared as lead defence counsel in more than 100 federal felony cases.

Meredith Craven
Chaffetz Lindsey

Meredith has over five years of experience representing clients in international commercial and investment treaty arbitrations under the major international rules (ICC, AAA/ICDR, ICSID, UNCITRAL, HKIAC, etc.). She has particular experience representing clients in the energy, commodities and technology industries in disputes involving parties from the United States, South and Central America, Europe, and Africa. Before joining Chaffetz Lindsey, Meredith was an associate in the international arbitration group of Weil Gotshal and Manges.

Chaffetz Lindsey
1700 Broadway, 33rd Floor
New York, NY 10019
United States
Tel: +1 212 257 6960
Fax: +1 212 257 6950
yasmine.lahlou@chaffetzlindsey.com
rainbow.willard@chaffetzlindsey.com
meredith.craven@chaffetzlindsey.com
www.chaffetzlindsey.com

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