
The enforcement of environmental norms in investment treaty arbitration

ZACHARY DOUGLAS

INTRODUCTION

The dense network of more than three thousand treaties¹ for the protection of foreign investments, the majority of which confer rights directly upon non-state actors, is without an analogue in any other branch of international law. The most potent feature of the common investment treaty is the creation of a mechanism for the compulsory adjudication of investment disputes between a national of one of the contracting state parties and the contracting state party that is host to that national's investment. The mechanism is international arbitration: an ad hoc tribunal is created to resolve the dispute and render an award in accordance with an existing set of arbitration rules and that award can be enforced in most countries of the world under a multilateral treaty regime for the recognition and enforcement of arbitral awards.² The jurisprudence of these ad hoc tribunals is now vast and is supplemented by new awards on almost a weekly basis. The stakes are high in these cases not just in terms of the quantum of the compensation claimed by the protagonists – which often runs into billions of US dollars – but also in terms of the public interest. Decisions taken at the highest level of all three branches of constitutional power are frequently reviewed and sometimes condemned by the ad hoc tribunals established to hear these cases.³

¹ UNCTAD, *UNCTAD World Investment Report 2011: Non-Equity Modes of International Production and Development* (2011), 100, available at www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf.

² The most important of which are the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965).

³ A brief overview of the investment treaty system is provided in Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), 1–6.

The incentive for commercial actors that is created by this network of treaties is to characterise their disputes with public authorities as ‘investment disputes’ within the criteria designated by an investment treaty that is binding upon the state in question. This may entail, for instance, placing emphasis on certain rights in property as being central to the dispute (so as to discharge the requirement of having a covered investment under the treaty) or selecting an entity within a corporate group as the nominal investor (so as to ensure that the claimant meets the nationality requirements under the treaty). There is nothing inherently wrong with such a litigational strategy: the network of investment treaties has created the incentive and commercial actors cannot be criticised for being incentivised. Indeed the privileged position of investors within the global institutional framework for the settlement of disputes has been made possible only by the international community of states giving priority to investment and trade over and above other matters of international concern such as the environment.

What this does mean, however, is that the ad hoc tribunals established pursuant to investment treaties are adjudicating upon ‘investment disputes’ that involve questions of environmental protection with increasing frequency. In *Methanex Corporation v. United States of America*,⁴ for instance, an international tribunal considered the legality of the domestic ban on the commercialisation of a fuel additive in accordance with the investment protection standards set out in Chapter XI of NAFTA. In other cases the host state’s measure is said to be mandated by its obligations in international environmental law. In *S.D. Myers v. Canada*,⁵ Canada justified a ban on the importation of waste materials by reference to the Basel Convention on Hazardous Waste⁶ and that justification was rejected by the tribunal. The ongoing dispute in *Chevron v. Ecuador* is perhaps the most complex example.⁷ A group of indigenous Ecuadorians living in an area of the Amazonian rain forest alleged to have been devastated by the oil extraction activities conducted by a subsidiary of Texaco (which Chevron later acquired) brought a claim before a court in New York. That claim was eventually dismissed on *forum non conveniens*

⁴ *Methanex Corporation v. United States of America*, UNCITRAL, Award (3 August 2005).

⁵ *S.D. Myers Inc. v. Canada*, UNCITRAL, Partial Award (13 November 2000).

⁶ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989, 1673 UNTS 57.

⁷ *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009–23 (pending).

grounds but the plaintiffs subsequently refilled their claim against Chevron before their local court in Lago Agrio (Ecuador). While that case was pending, Chevron commenced an investment treaty arbitration against Ecuador. The tribunal upheld its jurisdiction on the theory that investment protection continues until the investment is finally disposed of, such that the contingent liability represented by the court proceedings in Lago Agrio meant that Chevron's investment in Ecuador persisted even though commercial operations had ceased some twenty years earlier, in 1993.⁸ The essence of Chevron's claim in the arbitration is that it has suffered a denial of justice before the Lago Agrio court. This case is notable for making domestic accountability regimes for environmental damage subject to the supervisory jurisdiction of an investment treaty tribunal.

Environmental issues are thus often at the core of investment disputes submitted to compulsory third-party adjudication through the mechanism of investor/state arbitration. Given this reality, it is important to inquire as to whether the architecture of the typical investment treaty also allows the vindication of environmental norms under the same roof. In the absence of a comparable network of treaties creating compulsory international adjudicative mechanisms for environmental disputes, the effectiveness of international environmental law is to some extent contingent upon its ability to set up lodgings in the institutions created for other branches of international law.

The focus of this chapter is on the *enforcement* of environmental norms through an action in damages within the context of an investor/state arbitration. It will be immediately obvious that this possibility is at the most challenging end of the spectrum of techniques for reconciling the investment protection and environmental protection regimes. Other techniques at first blush seem far more promising. For instance, the 'greening' of investment protection norms such as the fair and equitable standard of treatment is within the judicial power of every ad hoc international tribunal established to decide an investment dispute.⁹ Whether by reference to Article 31(3)(c) of the Vienna Convention of

⁸ Third Interim Award on Jurisdiction and Admissibility (27 February 2012), para. 4.13.

⁹ See the chapter by J. E. Viñuales in this book. Examples in the jurisprudence are: *Southern Pacific Properties (Middle East) Limited (SPP) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992) (reference to the UNESCO World Heritage Convention); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award (11 September 2007) (as above); *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (2 August 2010) (reference to the Aarhus Protocol to the Convention on Long-Range Transboundary Air Pollution).

the Law on Treaties or otherwise, there is no obstacle preventing a tribunal from interpreting the fair and equitable standard of treatment in a manner that is sensitive to the legitimate regulatory objectives of the host state as defined by international environmental law. In other words, there is no inevitable conflict between investment protection and environmental norms that is latent in the interstices of the text of the investment treaty. Any clash of such norms in a particular case depends upon a subsequent human failure on the part of a specific tribunal – a failure to utilise the interpretative tools for norm reconciliation that are available to all international tribunals.¹⁰

In this chapter, I defend an interpretation of the juridical foundations of the investor's claim and the host state's counterclaim that facilitates the operationalisation of international norms extraneous to the investment treaty, including environmental norms. I also provide a brief sketch of how environmental norms might serve as a basis for an action for damages at the suit of the investor and the host state. It is not my intention to survey the field of environmental law for suitable norms as this is the focus of other chapters in this volume.¹¹

15.1. The investor's right to claim damages under an investment treaty

15.1.1. *The proper conceptual basis for the investor's rights*

In earlier writings I have identified three possible rationalisations for the investor's rights under an investment treaty.¹² The first is that the

¹⁰ See e.g. the statement of principle in *CDSE v. Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000), 5 ICSID Rep 157, 171 ('While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of compensation to be paid for the taking ... Expropriatory measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies'). Does international law really treat an expropriation of land for the preservation of a wildlife reserve in accordance with international environmental norms in the same way as the expropriation of land to build a golf course for the presidential family? The Tribunal awarded CDSE US\$16 million in damages (comprising the principal amount and compound interest). CDSE had purchased the land for US\$395,000. This statement of principle was then applied in subsequent cases against Costa Rica: *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1 and *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20; See www.iareporter.com/articles/20120522_3.

¹¹ See the chapters by S. Maljean Dubois and V. Richard and E. Morgera in this book.

¹² Douglas, *The International Law of Investment Claims*, 11–38.

investment protection obligations exist purely on an inter-state level and the procedural mechanism allowing the investor to enforce them is a privilege granted by the national state of the investor in derogation of its right of diplomatic protection. In other words, the investor is permitted for convenience to step into the shoes of its national state to assert what is in essence a diplomatic protection claim (and thus the procedural right of the national state). I have set out the arguments against this 'derivative' model elsewhere.¹³ It finds support most notably in *Loewen v. USA*,¹⁴ but was rejected after a lengthy analysis by the English Court of Appeal in *Occidental v. Ecuador*,¹⁵ and since then has not attracted many adherents.

The second and third rationalisations rest upon the (correct) premise that the procedural right to assert claims against the host state in arbitration is vested directly in the investor. The question is then whether the substantive investment protection obligations are owed directly to investors that qualify as such under the investment treaty. An affirmative answer was preferred by the Court of Appeal in *Occidental v. Ecuador*¹⁶ and is supported by dicta in some investment awards.¹⁷ This can be labelled the second rationalisation.

There is a third possibility that I have articulated in the following terms:

Upon the claimant's filing of a notice of arbitration, the claimant investor perfects the host state's unilateral offer to arbitrate, and the two parties thus enter into a direct legal relationship in the form of an arbitration agreement. At the same time, the claimant becomes a counterparty to the host state's obligation to submit to international arbitration for an assessment of its conduct towards the claimant's investment on the basis of the norms of investment protection set out in the treaty. This obligation encompasses the duty of the host state to pay compensation if the international tribunal adjudges its conduct to be violative of these norms. The minimum standards of investment protection could thus be

¹³ *Ibid.*, 11–32.

¹⁴ *Loewen Group Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), para. 233.

¹⁵ *Occidental Exploration and Production Company v. Republic of Ecuador* [2005] EWCA Civ 1116 [2006] QB 432.

¹⁶ *Ibid.* para. 18.

¹⁷ See e.g. *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction (17 July 2003), para. 45; *American Manufacturing and Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award (21 February 1997), para. 6.06.

characterised as the applicable adjudicative standards for the claimant's cause of action rather than binding obligations owed directly to the investor.¹⁸

It is submitted that this third rationalisation is superior to the direct model of the investor's rights represented by the second rationalisation for the reasons that now follow.

15.1.2. *The contractual analogy*

It is often stated that the triangular arrangement created by an investment treaty as between the investor, the host state and the national state of the investor has an analogy in domestic law in the instances where third parties are permitted to enforce a stipulated benefit under a contract as an exception to the doctrine of privity.¹⁹ But those legal institutions in domestic law either rely upon the fiction that the third party becomes a party to the contract or they grant the third party the same remedies to enforce its rights as if it were a party to that contract. Neither approach can be sustained in the investment treaty context: the investor does not have the capacity to be a party to a treaty in international law and it is not granted the same remedies in international law as its own national state in respect of a breach of the treaty (e.g., the adoption of countermeasures is not available to the investor).

International law, perhaps regrettably, has opted for a division between the law of the instrument and the law of obligations set out in that instrument.²⁰ An investor does not acquire rights under the law governing the instrument creating the obligation as opposed to the law applicable to the breach of that obligation. By way of example, the general power of the state parties to exercise their rights under the Vienna Convention on the Law of Treaties to amend the investment treaty or

¹⁸ Douglas, *The International Law of Investment Claims*, 35.

¹⁹ This possibility was not permitted in classical Roman law: 'alteri stipulari nemo potest'. A contract for the benefit of a third party is recognised in the principal continental legal systems: in Germany, §§329–31 BGB; in France, Article 1165 Code civil, 'stipulation au profit d'un tiers'. It has been accepted in the USA at least since *Lawrence v. Fox* 20 NY 268 (1859). In England the doctrine of privity excluded the recognition of a contract for the benefit of third parties as a legal institution of general application until Parliament intervened with the Contracts (Rights of Third Parties) Act 1999. See generally K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Oxford University Press, 1998), 456–69.

²⁰ See generally S. Rosenne, *Breach of Treaty* (Cambridge: Grotius Publications, 1984).

to terminate it in accordance with its terms is unaffected by the existence of a class of third parties with protected interests under that investment treaty (i.e., qualified investors).²¹ This may be contrasted with situations in domestic contract law where third parties acquire rights under a contract: the right of the contracting parties to rescind or vary the contract without the consent of a third-party beneficiary is generally limited.²²

The paradigm of a contract for the benefit of a third party in domestic law does not sit comfortably alongside the mechanism for enforcing investment protection obligations in investment treaties. Investment protection obligations are not defined with sufficient precision so as to constitute a benefit that is capable of being enforced by third parties in the sense permitted under domestic laws (e.g., where A promises B to pay C upon the occurrence of a particular event such as under a life assurance policy).²³ Investment protection obligations are rather formulated as abstract standards of conduct that a host state must adhere to even where the particular investor is not reasonably within its contemplation. Investment treaties in this sense are more accurately described as *traités-loi* than *traités-contrat* and certainly do not exhibit the features of synallagmatic contracts in domestic law.

15.1.3. *The tort analogy*

A more fruitful analogy can be found in the domestic law of tort for the breach of a statutory duty. The legislature frequently imposes statutory duties upon public authorities (as well as private entities) to comply with minimum standards of conduct. In many countries there is a distinct form of delictual liability for a breach of statutory duty where someone is harmed by conduct falling below the requisite standard fixed by the statute.²⁴ This form of liability typically plays a prominent role in the area of industrial safety.

²¹ It may be otherwise if there is an express provision in the treaty limiting the exercise of this general power.

²² See e.g. Contracts (Rights of Third Parties) Act 1999 (UK), s. 2.

²³ For this reason investment protection obligations may also be contrasted with the types of treaty provisions that have been characterised as conferring direct rights upon non-state actors in the past by international tribunals outside the field of human rights. See Douglas, *The International Law of Investment Claims*, 34.

²⁴ In Germany, §823, para. 2 BGB (liability arises when a 'statute designed to protect another' is culpably breached); in England, see e.g. *X v. Bedfordshire County Council* [1995] 2 AC 633. On the modern position in England, see K. M. Stanton, 'New Forms of the Tort of Breach of Statutory Duty' (2004) 120 *Law Quarterly Review* 324.

The elements of this cause of action, at least in England, are as follows: (i) the claimant is within the class of persons protected by the statute; (ii) the defendant has breached the statutory provision enshrining the minimum standard of conduct; (iii) the defendant has thereby caused damage to the claimant; and (iv) that damage is of the type contemplated by the statute.

Whether or not the regulatory provisions of a statute are actionable in tort is a question of statutory interpretation that must often be resolved in the absence of any express language in the statute. Nonetheless, an example of an express stipulation can be found in the Financial Services and Markets Act 2000 (UK), s. 150(1):

A contravention by an authorised person of a rule is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

This model of delictual liability can be readily transposed to the investment treaty context: the state parties confer a right upon investors to assert a claim for damages as a means of obtaining reparation for the breach of one or more of the minimum standards of treatment set out in the investment treaty.

The language of some investment treaties would appear to give direct support for this model for conceptualising the investor's rights. For instance, Article 1116 of NAFTA reads:

An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under [Chapter 11 of NAFTA] and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

It is not difficult to extract from this formulation the vesting of a right to pursue a remedy to vindicate a breach of an investment protection obligation.

The important insight from this analogy to the tort for a breach of a statutory duty is that the source for the cause of action is distinct from the source of the norm regulating the conduct in question. The law in Germany provides a clear illustration. The source of the cause of action in tort is §823 para. 2 BGB, which states that liability arises when a 'statute designed to protect another' is culpably breached. The civil code thus provides the cause of action to the claimant, whereas the particular statute that is designed to protect the claimant supplies the standard to

adjudge the conduct. The distinction is even more pronounced in the context of delictual liability for a breach of a statutory duty in European Community law. Here the source of the norm regulating the conduct actually comes from a distinct legal order. Thus, where a private entity suffered harm as a result of an abuse of a dominant position in the common market by a trade association in breach of Article 82 of the EEC Treaty,²⁵ the House of Lords ruled that the English law of torts provided a cause of action for damages for breach of a statutory duty.²⁶ Another example is provided by the Alien Tort Statute (ATS) in the USA, which reads: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.²⁷ The ATS vests the district courts with jurisdiction over a cause of action supplied by the federal common law whereas the norms regulating the standards of conduct for the cause of action are to be found in international law.²⁸

The situation in investment treaty arbitration can be deconstructed in the following way. The investor/state mechanism for the prosecution of claims against the host state by international arbitration is the source of the procedural right to arbitrate and supplies the cause of action for reparation for a breach of the investment protection obligations. The investment protection obligations are the norms regulating the standards of conduct. The investor is not privy to the substantive investment protection obligations or directly vested with a corresponding right in respect of each. There is no right/duty correlation at this level. In the same way it would be incoherent to describe a general statute regulating the conduct of a public authority in domestic law as creating a web of bilateral relationships between rights-holders and the duty-bearing public authority. Like a statutory regime of this nature, the class of protected persons or entities under an investment treaty is unlikely even to be ascertainable at any given time.

The substantive obligations in investment treaties are better conceived as a set of codified standards for the treatment of foreign investments. Like the tort for breach of a statutory duty, the question is simply whether the person or entity complaining of a breach of those standards falls within the class of protected persons or entities under the treaty. Membership of that protected class allows recourse to the cause of action

²⁵ Now Article 102 of the Consolidated Version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C83/47, 30.3.2010.

²⁶ *Garden Cottage Foods v. Milk Marketing Board* [1984] AC 130.

²⁷ 28 USC §1350. ²⁸ *Sosa v. Alvarez-Machain*, 542 US 692 (2004).

created by the treaty to seek reparation for damage caused by a breach of the investment protection standards.

This seems to be a far more promising rationalisation of the investor's cause of action than the contractual model suggested by the theory that investment treaty obligations are owed to investors directly. The investor is not enforcing a promise by the host state to accord fair and equitable treatment to the investor as a third-party beneficiary to the treaty instrument. Rather, the investor is claiming reparation for the failure on the part of the host state to adhere to the standard of fair and equitable treatment in respect of its investment. The investor is not by this analysis invoking the international responsibility of the host state on the international plane. In no sense is the investor stepping into the shoes of its own national state and claiming the performance of secondary obligations that would arise between the host state and the national state of the investor. The investor is making the host state liable in damages but not responsible in international law.

15.1.4. *The enforcement of international environmental norms by the investor*

The disaggregation of the investor's cause of action from the substantive investment protection obligations in the investment treaty unlocks certain possibilities for the enforcement of environmental norms against the host state. So long as the host state's consent to investor/state arbitration is expressed in broad terms, such as 'all disputes relating to an investment', there is no restriction upon the source of obligations that form the basis of the investor's claim.²⁹ The investor can, therefore, claim damages for the host state's failure to comply with an environmental obligation in domestic law³⁰ or international customary or conventional law so long as

²⁹ See Douglas, *The International Law of Investment Claims*, 234–40.

³⁰ J. E. Viñuales has unearthed such a claim by a Canadian investor, Peter A. Allard, against Barbados for the failure to enforce domestic environmental law (adopted to implement the international environmental law obligations of Barbados) and it is described in his 'Foreign Investment and the Environment in International Law: An Ambiguous Relationship' (2009) 80 *British Year Book of International Law* 244, 250: 'the investor, who acquired 34.25 acres of natural wetlands and subsequently developed it into an ecotourism facility, claims that, through its acts and omissions, Barbados has *inter alia* failed (a) to prevent the repeated discharge of raw sewage into wetlands, (b) to investigate or prosecute sources of runoff of grease, oil, pesticides and herbicides from neighbouring areas, and poachers that have threatened the wildlife within the ecosystem'. Apparently

such failure has caused damage to its covered investment. This direct method for enforcing environmental norms against the host state is expressly or at least tacitly permitted by the common applicable law provisions found in investment treaties, which serve merely to confirm that the tribunal is competent to apply the stipulated sources of law, rather than prescribe the connecting factors necessary to determine the applicable laws in any given case.³¹ For instance, Article 8(6) of The Netherlands/Czech Republic bilateral investment treaty (BIT) reads:

The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

the law in force of the Contracting Party concerned;
the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
the provisions of special agreements relating to the investment;
general principles of international law.³²

these failures damaged the natural ecosystem adjacent to the investor's ecotourism facility thereby resulting in a fall in tourism revenues.

³¹ See e.g. China Model BIT, Art. 9(7), *UNCTAD Compendium*, vol. 3 (1996), 155–6: 'the tribunal shall adjudicate in accordance with the law of the Contracting Party to the dispute accepting the investment including its rules of conflict of laws the provisions of this Agreement as well as the generally recognized principles of international law accepted by both Contracting Parties'; Egypt Model BIT, Art. 8(3), *ibid.*, vol. 5 (2000), 296: 'the arbitration tribunal shall decide in accordance with the provisions of this Agreement; the national law of the Contracting Party in whose territory the investment was made; and Principles of International Law'; Sri Lanka Model BIT, Art. 8(3), *ibid.*, 343; OPEC Model BIT, Art. 10.01 *ibid.*, vol. 6, p. 490; Belgo–Luxembourg Economic Union Model BIT, Art. 10(5), *ibid.*, 276; South Africa Model BIT, Art. 7(4), *ibid.*, vol. 8, p. 277; Greece Model BIT, Art. 10(4), *ibid.*, 291–2; Benin Model BIT, Art. 9(4), *ibid.*, vol. 9, p. 284; Burundi Model BIT, Art. 8(5), *ibid.*, 292; Burkina Faso Model BIT, Art. 9(4), *ibid.*, 292; Kenya Model BIT, Art. 12, *ibid.*, vol. 12, p. 310: 'Except as otherwise provided in this Agreement, all investments shall be governed by the laws in forces in the territory of the Contracting Party in which such investment are made including such laws enacted for the protection of its essential security interests or in circumstances of extreme emergency provided however that such laws are reasonably applied on a non-discriminatory basis'; Uganda Model BIT, Art. 7(5), *ibid.*, vol. 12, p. 318; Canada Model BIT, Art. 40(1), *ibid.*, vol. 14, p. 247: 'A Tribunal established under this Section shall decide the issues in disputes in accordance with this Agreement and applicable rules of international law'; USA Model BIT (2004), Art. 30; China Model BIT (2003), Art. 9(3): 'the arbitration award shall be based on the law of the Contracting Party to the dispute including its rules on the conflict of laws, the provision of this Agreement as well as the universally accepted principles of international law'; Energy Charter Treaty, Art. 26(6): 'a tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law'; North American Free Trade Agreement, 17 December 1992, 32 ILM 296, Art. 1131.

³² Douglas, *The International Law of Investment Claims*, 43.

Such a provision would allow the tribunal to have recourse to treaties between the Contracting Parties in the sphere of environmental law and also to rely upon environmental norms that have passed into custom. But there is little doubt that the tribunal would have such a power in the absence of an express provision.

There is an alternative indirect approach available to the investor, which is to formulate a claim for breach of an environmental norm by reference to one of the investment protection obligations in the treaty, such as the fair and equitable standard of treatment. The essence of the claim would be that a failure on the part of the host state to comply with its international engagements with respect to the environment is indicative of unfair and inequitable treatment in the circumstances of the case, especially if it is accompanied by bad faith or discrimination. There are numerous examples in practice of claims for a breach of the fair and equitable standard that rely upon extraneous international obligations of the host state to supply a threshold for liability that is attuned to the particular subject-matter of the dispute.³³

In respect of some investment treaties – including NAFTA, the Energy Charter Treaty and treaties concluded on the basis of the USA Model BITs – only the indirect method of enforcing environmental norms is available to investors. The reason is that the consent to investor/state arbitration in these treaties is stipulated on a narrower basis. For instance, Article 24(1) of the USA Model BIT (2012) reads in relevant part:

[T]he claimant, on its own behalf, may submit to arbitration under this Section a claim ... that the respondent has breached (A) an obligation under Articles 3 through 10, (B) an investment authorization, or (C) an investment agreement; and ... that the claimant has incurred loss or damage by reason of, or arising out of, that breach.³⁴

Unless the host state's international engagements relating to the environment were also encapsulated in the investment authorisation or investment agreement with the investor, then the only course upon to the

³³ For instance, in *Saluka v. Czech Republic*, the claimant (which owned one of the four leading banks in the Czech Republic) relied upon the EU rules on State aid to demonstrate that the quantum of aid granted by the Czech Government to the claimant's competitors to the exclusion of the claimant violated the fair and equitable standard of treatment as a result of the resultant distortions in the market for banking services. *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006).

³⁴ USA Model BIT (2012), available at www.ustr.gov.

investor would be to claim damages for a breach of such engagements through the medium of one of the investment protection obligations in the treaty.

15.2. The host state's right to counterclaim under an investment treaty

15.2.1. *The source of the host state's right to counterclaim*

Whilst investment treaties are silent on the possibility of counterclaims by the respondent host state, numerous international tribunals have uniformly recognised their jurisdiction to hear counterclaims in circumstances where their constitutive instruments do not confer an express power to do so. Thus, for instance, the Permanent Court of Justice,³⁵ the International Court of Justice³⁶ and the International Law of the Sea Tribunal³⁷ have adopted procedural rules for the adjudication of counterclaims, despite the silence of their constitutive instruments on this possibility. The same approach has been taken by several mixed claims commissions³⁸ and the Iran–US Claims Tribunal in relation to counterclaims by one of the state parties.³⁹ If a general principle can be discerned from this practice, it is that the jurisdiction *ratione materiae* of an international tribunal extends to counterclaims unless expressly excluded by the constitutive instrument.⁴⁰

³⁵ Statute of the Permanent Court of International Justice (13 December 1920) PCIJ (Ser. D) No. 1; Article 40 of the 1922 Rules of Court, Art. 40; 1936 Rules of Court, Art. 63.

³⁶ Statute of the International Court of Justice (26 June 1945) Acts and Documents concerning the Organization of the Court, No. 5; 1946 Rules of Court, Art. 63; 1972 Rules of Court, Art. 68; 1978 Rules of Court, Art. 80; 2000 Rules of Court, Art. 80.

³⁷ Statute of the International Tribunal for the Law of the Sea, Annex VI of the United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3; Rules of the Tribunal, Art. 98.

³⁸ England–Austria, Arts 26–8; England–Bulgaria, Arts 26–8; England–Hungary, Arts 26–8; Italy–Germany, Art. 34; Italy–Austria, Art. 34; Italy–Bulgaria, Art. 34; Italy–Hungary, Art. 34; France–Germany, Art. 14(e); France–Bulgaria, Art. 14(e); France–Austria, Art. 14(e); France–Hungary, Art. 14(e); Greece–Germany, Art. 14(e); Greece–Bulgaria, Art. 14(e); Greece–Austria, Art. 14(e); Greece–Hungary, Art. 14(e); Romania–Germany, Art. 13(e); Romania–Hungary, Art. 13(e); Siam–Germany, Art. 14(e); Czechoslovakia–Germany, Art. 24. See *Recueil des Décisions des Tribunaux Arbitraux Mixtes institués par les traités de paix* (vols 1–5 (1922)).

³⁹ *Iran v. United States of America* (Case ITL 83-B1-FT, 9 September 2004) (Counterclaims).

⁴⁰ *Installations Maritimes de Bruges v. Hambourg Amerika Linie* 1 RIAA 877 (1921): ‘Att. que les deux requêtes introductives sont basées sur un seul et même fait, qui est la

Several investment treaty tribunals have acknowledged the host state's right to counterclaim either explicitly or implicitly.⁴¹ In private international law this would be considered to be a question of procedure⁴² and thus it is significant that the most common arbitration rules do recognise the right to counterclaim expressly.

15.2.2. *The scope of permissible counterclaims*

The most common procedural rule governing investor/state arbitrations is Article 47 of the ICSID Convention:

collision survenue le 25 octobre 1911 entre le vapeur Parthia et Duc d'Albe et un mur du port de Zeebrugge, et que la seconde requête eût pu prendre la forme d'une simple demande reconventionnelle si l'article 29 du Règlement de procédure ne l'interdisait absolument'. The tribunal in *Saluka v. Czech Republic* decided that, as a matter of principle, where the consent to arbitration is expressed in wide terms in an investment treaty, the tribunal is conferred jurisdiction *ratione materiae* over counterclaims by the respondent host state. In that case, Article 8 of The Netherlands/Czech Republic BIT conferred jurisdiction over 'all disputes between a Contracting Party and an investor of the other Contracting Party concerning an investment of the latter'. *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim (7 May 2004) (*Saluka v. Czech Republic*), para. 39.

⁴¹ *Saluka v. Czech Republic*; *Alex Genin, Eastern Credit Ltd Inc. and AS Baltoil v. Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001), paras. 201, 376–8 (counterclaim dismissed on the merits without consideration of jurisdiction); *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2 (16 October 2002) 8 ICSID Rep 388; Decision on Objections to Jurisdiction (6 August 2003) 8 ICSID Rep 406, 426–7; *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction (29 January 2004) 8 ICSID Rep 518, 528 (host State's right to counterclaim conceded by claimant); *RSM Production Company and others v. Grenada*, ICSID Case No. ARB/10/6, Award (13 March 2009), para. 226 (jurisdiction over respondent's counterclaim upheld); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010), paras 353–5 (jurisdiction over respondent's counterclaim upheld); *Paushok and others v. Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011) paras 693–9 (jurisdiction over counterclaims rejected but existence of right to counterclaim not disputed); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 December 2011) paras 821–5, 866–76 (jurisdiction over counterclaims rejected but existence of right to counterclaim not disputed; dissenting opinion on this point by Professor Michael Reisman). It has been reported that counterclaims have been made by Ecuador in investment treaty cases brought by Burlington Resources Inc. and Perenco Energy: *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5.

⁴² In England *South African Republic v. Compagnie Franco-Belge du Chemin de Fer du Nord* [1897] 2 Ch 487 (CA).

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 the consent of the parties and are otherwise within the jurisdiction of the Centre.

The 'scope of the consent of the parties' in an investment treaty arbitration is defined to some extent by the arbitration agreement that is perfected upon the filing of a notice of arbitration. Some commentators argue that if the investor, upon the filing of its notice of arbitration, 'accepts the offer only in respect of its specific claim, consent will be restricted by the terms of the acceptance' such that the possibility of the host state's assertion of a counterclaim would in essence be eliminated.⁴³ This interpretation of the investor's acceptance is much too restrictive. When a claimant investor consents to investment treaty arbitration it must be taken to consent to the adjudication of the underlying dispute in accordance with the applicable arbitration rules. If consent were limited to the lowest common denominator represented by the precise formulation of a 'specific claim' by the investor, then the arbitral tribunal's power to order provisional measures would also have to be excluded by this logic. The investor would, moreover, be precluded from amending or supplementing its claims during the course of the arbitration as this would be a derogation from the meeting of the minds of the parties upon the perfection of the arbitration agreement. Such a restrictive interpretation is also at odds with other provisions of the ICSID Convention. Article 25 talks of the submission of a 'dispute' to the Centre and not of an individual 'claim', and Article 26 provides that if the parties have consented to ICSID arbitration then resort to any other remedy is excluded. The latter would be patently unreasonable if the tribunal's jurisdiction were limited to the consideration of the investor's particular claim and nothing more.

Whilst the majority of investment treaties refer simply to 'investment disputes' or 'disputes arising out of an investment' in their provisions on investor/state arbitration,⁴⁴ some treaties do use the more restrictive language of 'claims' rather than 'disputes' in describing what is being submitted to investor/state arbitration.⁴⁵ But in all cases the content of

⁴³ C. Schreuer, L. Malintoppi, A. Reinisch and A. Sinclair, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), 756.

⁴⁴ See Douglas, *The International Law of Investment Claims*, 234–5.

⁴⁵ See e.g. USA Model BIT (2012).

the arbitration agreement is best defined as the acceptance of an offer to arbitrate the dispute relating to a covered investment in accordance with the rules set out in the investment treaty and the applicable arbitration rules.

Unlike Article 47 of the ICSID Convention, most procedural rules say nothing at all about the scope of permissible counterclaims. Article 21 of the UNCITRAL Arbitration Rules (2010) simply regulates the timing and formal requirements for the respondent to exercise its right to make a counterclaim. The previous Article 19(3) of the 1976 version of the UNCITRAL Rules had limited the scope of counterclaims to those 'arising out of the same contract' and it was noted during the working group sessions for the revision of the rules that this was inappropriate for investment treaty arbitration.⁴⁶

In all cases, the scope of the tribunal's jurisdiction to determine counterclaims by the host state ultimately depends upon a factual nexus between the dispute submitted by the claimant and the counterclaim.⁴⁷ That nexus is required by virtue of the consensual basis for the tribunal's jurisdiction. The claimant investor is in the driver's seat to the extent that the outer boundaries of the dispute are fixed by the tribunal's appraisal of the claimant's notice of arbitration. But no symmetry is required in the legal foundations of the claim and counterclaim. The articulation and application of the factual nexus in any given case is a function entrusted to the arbitral tribunal by virtue of its general power to regulate the procedure, which is ubiquitous in all modern arbitration rules.⁴⁸

The subject-matter of the dispute is defined, in turn, by the rights comprising the investment and the disagreement between the investor and host state on questions of law and fact relating to those rights.⁴⁹ This is the meaning of the reference to the 'subject-matter of the dispute' in Article 47 of the ICSID Convention. It is, moreover, consistent with other

⁴⁶ Douglas, *The International Law of Investment Claims*, 258–60.

⁴⁷ *Saluka v. Czech Republic*, above, n. 40, para. 61: 'a legitimate counterclaim must have a close connexion with the primary claim to which it is a response'. See also *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (10 May 1988) 1 ICSID Rep 543, 565 (*Amco v. Indonesia II*); *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Award (21 October 1983) 2 ICSID Rep 9, 17, 65.

⁴⁸ ICSID Convention, Art. 44; UNCITRAL Rules of Arbitration (2010), Art. 17.1; ICC Rules of Arbitration (2012), Art. 19; LCIA Rules of Arbitration (1988), Art. 14.2.

⁴⁹ See Douglas, *The International Law of Investment Claims*, 337.

instances where an international or transnational instrument has defined the nexus between claim and counterclaim, such as the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, which provides that a person domiciled in a member state can be sued 'on a counter-claim arising from the same contract or *facts on which the original claim was based*, in the court in which the original claim is pending',⁵⁰

Contrary to the ruling in *Saluka v. Czech Republic*, the test cannot be the identity of the source of the norms underlying the claim and counterclaim. In that case, the tribunal insisted upon the 'interdependence and essential unity of the instruments on which the original claim and counterclaim [are] based'⁵¹ such that if the counterclaims were based upon the general law of the host state they must be resolved exclusively through the appropriate procedures of the host state's law.⁵² Such an approach would exclude the tribunal's jurisdiction over counterclaims whenever the investor's claim is based upon a treaty obligation because the host state's counterclaim cannot be based upon the same instrument in this case.

The *Saluka* tribunal cited precedents where the primary claim was based on a contractual relationship with the host state, whereas the counterclaim by the respondent host state was founded upon an obligation in general law such as tax legislation.⁵³ In *Amco v. Indonesia No. 2*,⁵⁴

⁵⁰ Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Art. 6(3). Emphasis added.

⁵¹ *Saluka v. Czech Republic*, above, n. 40, paras 78 and 79.

⁵² *Ibid.* The Tribunal in *Hamester v. Ghana*, above, n. 41, followed the same approach as in *Saluka*: 'the Counterclaims arise out of Mongolian public law and exclusively raise issues of non-compliance with Mongolian public law, including the tax laws of Mongolia. All these issues squarely fall within the scope of the exclusive jurisdiction of Mongolian courts, are matters governed by Mongolian public law, and cannot be considered as constituting an indivisible part of the Claimants' claims based on the BIT and international law or as creating a reasonable nexus between the Claimants' claims and the Counterclaims justifying their joint consideration by an arbitral tribunal exclusively vested with jurisdiction under the BIT' (para. 694).

⁵³ *Amco v. Indonesia II*, above, n. 47; *Harris International Telecommunications v. Iran* (Case 323-409-1, 2 November 1987), 17 Iran-US CTR 31, 57-61 (*Harris v. Iran*). See also: *Blount Brothers Corp v. Ministry of Housing and Urban Development* (Case 74-62-3, 2 September 1983), 3 Iran-US CTR 225, 226; *Behring International, Inc v. Islamic Republic Iranian Air Force* (Case ITM/ITL 52-382-3, 21 June 1985), 8 Iran-US CTR 238, 265; *International Technical Products Corp v. Iran* (Case 196-302-3, 28 October 1985), 9 Iran-US CTR 206, 226-7.

⁵⁴ *Amco v. Indonesia II*, above, n. 47.

Indonesia raised a counterclaim for ‘tax fraud’ on the part of the claimants in the second arbitration proceedings and sought the restitution of sums representing the tax allegedly evaded by claimants throughout the relevant period of the investment. The tribunal found that such a claim was outside the tribunal’s jurisdiction *ratione materiae*. The tribunal noted that there was no a priori rule or principle that might serve to remove tax claims from the jurisdiction of an ICSID tribunal. The question was simply the nexus between the tax claim and the investment. For the purposes of Article 25(1) of the ICSID Convention, the test was whether the tax claim was a ‘legal dispute directly arising out of the investment’. The tribunal identified the relevant principle in the following terms:

[I]t is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State’s jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host State. Legal disputes relating to the latter will fall under Article 25(1) of the Convention. Legal disputes concerning the former in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention. The obligation not to engage in tax fraud is clearly a general obligation of law in Indonesia. It was not specially contracted for in the investment agreement and does not arise directly out of the investment.⁵⁵

The *Saluka* tribunal appears to have relied heavily on this passage in excluding from its jurisdiction counterclaims based upon ‘rights and obligations which are applicable, as a matter of the general law of the Czech Republic, to persons subject to the Czech Republic’s jurisdiction’.⁵⁶ But this does not accurately reflect the *Amco* tribunal’s finding, which did not rest solely upon the general law nature of the legal obligation forming the basis of the counterclaim. A caveat was added: ‘unless the general law generates an investment dispute under the Convention’ so that it ‘arises directly out of an investment’.⁵⁷

In *Roussalis v. Romania*, an ICSID tribunal ruled out the possibility of a counterclaim by Romania for the investor’s alleged breach of an investment agreement and misappropriation of funds⁵⁸ on account of the text

⁵⁵ *Ibid.*, 565. ⁵⁶ *Saluka v. Czech Republic*, above, n. 40, para. 79.

⁵⁷ A similar caveat was made in *Harris v. Iran*, above, n. 53, pp. 57–61.

⁵⁸ *Roussalis v. Romania*, above, n. 41, paras 792–6.

of the consent to investor/state arbitration in the Greece/Romania BIT (1997), which defines the scope of disputes that can be submitted by the investor as those ‘concerning an obligation of the [host State] under the [BIT], in relation to an investment [of the investor]’.⁵⁹ The majority of the tribunal considered that in view of the tribunal’s limited jurisdiction over *claims*, it followed that ‘the BIT does not provide for counterclaims to be introduced by the host state in relation to obligations of the investor’ because the ‘meaning of “dispute” is the issuance of compliance by the State with the BIT’.⁶⁰ This reasoning should not be endorsed.⁶¹ A limitation upon the scope of the host state’s consent to arbitration in respect of the investor’s *claims* does not necessarily apply to the host state’s *counterclaims*; indeed, there are compelling reasons militating against such a conclusion in the ICSID context especially given that once a notice of arbitration is filed it must be the exclusive forum for resolving the dispute as noted earlier. The host state’s consent to ICSID arbitration requires the full application of Article 47 insofar as it vests the tribunal with the power to adjudicate counterclaims with the required factual nexus to the dispute.⁶² Professor Reisman’s dissent on this point is to be preferred:

In rejecting ICSID jurisdiction over counterclaims, a neutral tribunal – which was, in fact, selected by the claimant – perforce directs the respondent State to pursue its claims in its own courts where the very investor who had sought a forum outside the State apparatus is now constrained to become the defendant... Aside from duplication and inefficiency, the sort of transactions costs which counter-claim and set-off procedures work to avoid, it is an ironic, if not absurd, outcome, at odds, in my view, with the objectives of international investment law.⁶³

It follows from this discussion that the legal basis of the claim is not dispositive for determining the scope of the tribunal’s jurisdiction over counterclaims. So long as the factual matrix for the counterclaim directly relates to the dispute between the parties concerning the investment in question, the legal basis for the host state’s counterclaim could be a contractual obligation, a domestic regulatory obligation and so on.

⁵⁹ *Ibid.*, para. 868. ⁶⁰ *Ibid.*, para. 869.

⁶¹ I have previously expressed a tentative preference for the majority’s approach: Douglas, *The International Law of Investment Claims*, 257. I was wrong to do so.

⁶² Indeed, by entering into an arbitration agreement in accordance with the BIT provisions, the investor and the host state cannot be taken to have opted out of Article 47, which would require an express agreement to that effect in accordance with its terms.

⁶³ *Roussalis v. Romania* (Dissenting Opinion of Professor Michael Reisman).

15.2.3. *The scope for enforcing international environmental norms through counterclaims by the host state*

International environmental norms may be operationalised within the host state's domestic legal order by the enactment of legislation. To the extent that such legislation grants third parties (whether the host state's government specifically or third parties generally) the right to claim damages against an entity that has violated the environmental norms reflected in that legislation then there is no a priori impediment to such a right being asserted by way of counterclaim by the host state in investment treaty arbitration. In the majority of cases, however, the legislation in question will designate the courts of the host state as having exclusive jurisdiction. For instance, in the USA, the 1980 Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), known as the 'Superfund' Act, provides that the 'owner and operator of a vessel or a facility ... shall be liable for ... all costs of removal or remedial action incurred by the United States Government',⁶⁴ but stipulates that the 'United States district court shall have exclusive original jurisdiction'.⁶⁵ Those familiar with the jurisprudence of investment treaty arbitration may sense some irony in this conclusion given how frequently tribunals manage to dilute the effectiveness of an exclusive jurisdiction clause in investment agreement when adjudicating upon the investor's claims. Nonetheless, if the host state has established a domestic regime for environmental liability that is self-contained in the sense of conferring exclusive jurisdiction to its own national courts then this must be respected at the transnational level of an investment treaty tribunal.

Another possibility is that international environmental norms are incorporated by reference into a contract between the investor and the host state. By way of example, the Concession Agreement between the Republic of Liberia and Firestone Liberia, Inc., contains an applicable law clause that obliges the investor to act consistently with Liberia's international obligations to the extent that they are recognised in domestic law:

Applicability of Liberian Law – Except as explicitly provided in this Agreement, Firestone Liberia shall be subject to Law as in effect from time to time, including with respect to labor, environmental, health and safety, customs and tax matters, and shall conduct itself in a manner

⁶⁴ 42 USC § 9607(a). ⁶⁵ 42 USC § 9613(b).

consistent with Liberia's obligations under international treaties and agreements insofar as those have the effect of Law in Liberia.⁶⁶

In another concession agreement between the Republic of Liberia and ADA Commercial Inc., the investor is obliged to comply with international standards regardless of their status within domestic law:

ENVIRONMENTAL MEASURES – Investor's obligations with respect to the environmental shall be as prescribed by Law including the Environmental Protection and Management Law of Liberia and international standards, including the Equator Principles.⁶⁷

An arbitral tribunal apprised of an investment dispute under an investment treaty would be able to adjudicate upon a counterclaim for breach of the investor's contractual undertaking to comply with environmental standards by the host state so long as the dispute submitted by the investor was related to the investment memorialised by the same contract.

15.3. Can a host state enforce international environmental norms by way of counterclaim without a foothold in an investment contract or in domestic law?

The question that must now be addressed is whether the host state can counterclaim for the investor's failure to comply with international environmental norms in the absence of a contractual stipulation of this nature or in circumstances where the host state has failed to give proper effect to international environmental norms within its domestic legal system.

15.3.1. An analogy with the Alien Tort Statute

The disaggregation of the various norms at play in a claim under the ATS is instructive in this context. As already noted, this legislation vests the federal district courts in the USA with jurisdiction over a tort claim for the violation of the law of nations. A cause of action in tort is not created

⁶⁶ Amended and Restated Concession Agreement between the Republic of Liberia and Firestone Liberia, Inc., Art. 30.1 (on file with author). My thanks to Mikella Hurley for bringing this example to my attention.

⁶⁷ Concession Agreement between the Republic of Liberia and ADA Commercial Inc., s. 13 (on file with author).

by the ATS; instead the cause of action is a creature of the federal common law and thus developed by federal court judges. The cause of action in tort has the ultimate purpose of enforcing standards reflected in international norms that, in the words of the Supreme Court in *Sosa v. Alvarez-Machain*, are 'accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms'⁶⁸ of assaults against ambassadors, violations of safe conducts and piracy.

Unlike the ATS, the investor's cause of action is created by the same instrument that confers adjudicative power to an international arbitral tribunal – the investment treaty. The cause of action allows a non-state entity to enforce, inter alia, the minimum standards reflected in inter-state obligations such as the obligation to accord fair and equitable treatment. The investor is not suing upon an inter-state obligation as such as if it were a contractual entitlement; instead, the normative standard reflected in that obligation becomes the actionable standard for liability sounding in damages. So, just as customary international law supplies the standard of conduct for a claim under the ATS, the investment protection obligation supplies the actionable standard for an investment treaty claim.

The crux of the matter is that the right to assert a claim under an investment treaty is not somehow parasitical upon the substantive investment protection obligations in the treaty: the cause of action and the applicable standards are disaggregated in the same way as a claim under the ATS. Indeed, at least since *SGS v. Philippines*,⁶⁹ it is generally accepted that an investment treaty with a broad grant of jurisdiction (e.g., 'any disputes relating to an investment') is neutral as to the source of norms that might supply the basis for a claim.

The host state's right to counterclaim is also juridically detached from the investment protection obligations in the treaty. It is simply the procedural counterpart of the claimant's cause of action to recover damages for prejudice to its investment on whatever legal basis the

⁶⁸ *Sosa v. Alvarez-Machain*, above, n. 28, 724–5. The Supreme Court relied upon *Blackstone's Commentaries on the Laws of England* as to the norms that were actionable at the suit of individuals in the eighteenth century. According to Blackstone, these three paradigms: 'are the principal cases in which the statute law of England interposes to aid and enforce the law of nations as a part of the common law, by inflicting an adequate punishment upon offences against that universal law committed by private persons'. *Blackstone*, book 4, chap. 5, p. 73.

⁶⁹ *Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction (29 January 2004) 8 ICSID Rep 518.

claimant seeks to invoke. If there is an impediment to the host state's ability to invoke international norms in a counterclaim against the investor, then it is not a jurisdictional one (assuming the factual nexus is satisfied) but instead must be found in the structure of the norms themselves.

Once again this leads us back to a discussion of the ATS. In the landmark case of *Filártiga v. Peña-Irala*,⁷⁰ the US Court of Appeals of the Second Circuit transposed the prohibition of torture as a peremptory norm of international law into an actionable basis of tort liability under the federal common law. In other words, a normative standard of international law was operationalised by recognising a legal right vested in a foreign national to claim damages against a state official who has violated that normative standard.

It is important to recognise that no such legal right could be discerned from international law. As stated by Judge Edwards in *Tel-Oren v. Libyan Arab Republic*: 'The Second Circuit [in *Filártiga*] did not require plaintiffs to point to a specific right to sue under the law of nations in order to establish jurisdiction under section 1350; rather, the Second Circuit required only a showing that the defendant's actions violated the substantive law of nations'.⁷¹ It is also the case that no corresponding duty attaching to individual state officials had been recognised by international law either. At the time of *Filártiga* there was no instance of an international tribunal imposing civil or criminal liability upon an individual for acts of torture. The reason that neither the right nor the duty had to be grounded in international law is that international law only supplies the relevant standard of conduct; it is the ATS and the federal common law that determines who can sue, who may be found liable and all the other elements of the cause of action. The current debate before the Supreme Court in *Kiobel v. Royal Dutch Petroleum*⁷² as to whether corporations are liable for violations of international law *as a matter of international law* starts from a false premise. It is the ATS and the federal common law, and not international law, that govern the question of whether a norm of international law should be actionable by means of a tort action and then whether such a tort action lies against a particular class of defendants.

⁷⁰ 630 F 2d 876 (2nd Cir., 1980).

⁷¹ *Tel-Oren v. Libyan Arab Republic*, 726 F 2d 774, 777 (DC Cir., 1984).

⁷² No. 10-1491 (pending).

Not all international norms are capable of being transposed into actionable standards for tort liability under the ATS. The Supreme Court in *Sosa*, as already noted, introduced a threshold of determinacy for candidate norms: they must be ‘defined with a specificity comparable to the features of the 18th century paradigms we have recognised’.⁷³ It is implicit from the Supreme Court’s reference to these ‘paradigms’ that the candidate norms must also be suitable for application to the conduct of non-state actors. By suitable I mean that the best interpretation of the norm in question dictates that it is capable of being applied to a spectrum of actors and not just to states. For instance, the rule that states can claim a territorial sea of up to twelve nautical miles from baselines drawn along their coastline certainly satisfies the threshold of determinacy. But it is difficult to imagine how such a norm could be interpreted to apply to non-state actors as a necessary condition for the objectives it serves. The candidate norms in the ATS context are likely to be found primarily among those which create individual responsibility in international law (e.g., various offences under international criminal law), those which oblige states to exercise prescriptive jurisdiction over persons in respect of the proscribed conduct (e.g., the grave breaches regime established by the Geneva Conventions and the Additional Protocol of 1977) and peremptory norms of international law (e.g., the prohibition of torture).

15.3.2. *The power of an investment tribunal to operationalise international environmental norms*

Reverting to investment treaty arbitration, does an arbitral tribunal have the power to operationalise international norms by transposing them as actionable standards for a counterclaim for damages by the host state? Taking into account the insights from the ATS, the answer cannot be simply that the international norms in question do not bind non-state actors as a matter of international law.

The investor/state arbitration regime establishes a mechanism for the investor to claim damages for prejudice caused to a covered investment and permits counterclaims by host states in relation to activities with a close nexus to that investment. It functions as an autonomous transnational civil liability regime. The proper scope of the tribunal’s judicial powers within this regime must be ascertained through the interpretation

⁷³ *Sosa v. Alvarez-Machain*, above, n. 28, p. 725.

of the principles underlying the investment treaty and the consent of the parties to the arbitration of an investment dispute. The state parties conferred a right upon investors to assert a claim for damages as a means of obtaining reparation for the breach of one or more of the minimum standards of treatment set out in the investment treaty. In essence, the state parties created a transnational tort for the benefit of the investor. The question is whether a corresponding right can be inferred for the benefit of host states within the jurisdictional limits of a counterclaim. The relevant standards would not be the minimum standards of treatment in the treaty – those standards are addressed to the contracting states exclusively – but rather those standards reflected in international norms that address the conduct of both states and non-state actors.

A definitive answer to this question cannot be provided within the scope of this chapter. But the roadmap provided up to this point may yet prove to be a guide to a futile journey in the context of international environmental law if it transpires that there is a paucity of suitable norms to supply the relevant standard of conduct for the host state's counterclaim.

Consider the following hypothetical problem, which is designed to illustrate a paradigm case for the utility for such a counterclaim. Suppose a host state adopts a measure to shut down a mining company's operations because it has caused serious environmental damage to the surrounding area over the decades of its operation and that such damage is now posing a health risk to the local population. The foreign owner of the company asserts an expropriation claim in investment treaty arbitration and the host state counterclaims to recover some of the costs of remediation. At the time when the most significant damage was caused to the environment, the mining company enjoyed a privileged relationship with the host state's government such that no environmental regulations were enacted in respect of the company's operations. The mining company is insolvent as a result of the cessation of its activities and the foreign owner is not otherwise subject to the jurisdiction of the host state's courts.

Which norm of international environmental law, which can claim widespread acceptance within the international community, could be transposed to provide an actionable standard for the host state's transnational tort claim against the investor? The potential injustice presented by the hypothetical problem is that the entity responsible for the pollution will not contribute to the costs of cleaning it up in the absence of an enforcement mechanism under the national legal system. The obvious contender to address this injustice is the polluter pays principle. It is

described in the 1992 Rio Declaration on Environment and Development in the following terms:

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution with due regard to the public interest and without distorting international trade and investment.⁷⁴

The principle is stated to be a principle of international law in the preambles of several treaties.⁷⁵ Without entering the debate as to whether this designation can be sustained,⁷⁶ it is difficult to characterise the polluter pays principle as encapsulating a legal right. It would appear at best to be a guiding policy for the elaboration of legislative texts dealing with environmental protection, whether international or domestic. As one commentator has surmised: “The true substantive content of the [polluter pays principle] cannot be completely captured without the procedural and institutional framework within which the law and policies operate”.⁷⁷ It does not have the same normative value, for instance, as the prohibition of torture, which does encapsulate a legal right in the sense that it is enforceable on demand in adjudicative institutions.

The bulk of international environmental law is found in international treaties rather than in customary law. Those treaties that regulate the

⁷⁴ Declaration on Environment and Development, 13 June 1992, UN Doc. A/CONF.151/26, Principle 16.

⁷⁵ Kiev Protocol on Liability for Pollution of Transboundary Waters and Lakes (2003); London Protocol on Preparedness, Response, and Co-operation to Pollution Incidents by Hazardous and Noxious Substances (2000); UNECE Convention on the Transboundary Effects of Industrial Accidents (1992); Oil Pollution Preparedness and Response Convention (1990).

⁷⁶ Compare P. Birnie, A. E. Boyle and C. Regdwell, *International Law and the Environment*, 3rd edn (Oxford University Press, 2009), 322 (Principle 16 simply lacks the normative character of a rule of law); U. Beyerlin, ‘Policies, Principles and Rules’, in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), 441: ‘it is a “(potential legal) rule” that is not part of customary international law but is a “recognized legal rule in the European Community, the Organization of Economic Co-operation and Developments, and the UNECE context”’. See also *Rhine Chlorides Convention Arbitral Award* (France/Netherlands) PCA (2004) para. 103: ‘Le Tribunal observe que ce principe figure dans certains instruments internationaux, tant bilatéraux que multilatéraux, et se situe à des niveaux d’effectivité variables. Sans nier son importance en droit conventionnel, le Tribunal ne pense pas que ce principe fasse partie du droit international général’.

⁷⁷ P. Schwartz, ‘The Polluter-Pays Principle’, in M. Fitzmaurice (ed.), *Research Handbook on International Environmental Law* (Cheltenham: Edward Elgar, 2010), 249.

activities of non-state actors generally presuppose the establishment of a domestic institutional framework for their operationalisation. For instance, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal obliges the contracting state parties to enact legislation to establish a domestic regulatory regime and it is difficult to read the provisions of this treaty as encapsulating legal rights capable of enforcement against non-state actors. The Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, although not yet in force,⁷⁸ may be different. Article 5 states that 'any person shall be liable for damage caused or contributed to by his lack of compliance with the provisions implementing the [Basel] Convention or by his wrongful, intentional, reckless or negligent acts or omissions'. Within the transnational regime for civil liability established by investment treaties, this provision would not appear to require further legislative elaboration to be asserted as a legal right in adjudication so that if the Protocol is in force for the host state and the host state suffers damage caused by the investor in accordance with Article 5 then compensation might be recovered through the mechanism of a counterclaim in investment treaty arbitration. The only obstacle might be Article 17 of the Protocol, within the chapter entitled 'Procedures', which provides that 'Claims for compensation under the Protocol *may* be brought in the courts of a Contracting Party',⁷⁹ and then sets out three different territorial links that would establish the necessary basis for the exercise of jurisdiction by the national courts. This provision does not appear to vest the national courts of state parties with exclusive jurisdiction, although it is fair to assume that the possibility of claiming damages before international courts and tribunals was not an immediate concern of the drafters.

The possible utility of a counterclaim based upon the Protocol can be illustrated by a modification of the facts in *S.D. Myers v. Canada*. Suppose the USA and Canada are parties to both the Basel Convention and the Protocol. Suppose further that an incident occurs during the loading of PCBs onto freight trucks by the investor in Canada, causing damage to public lands.⁸⁰ Canada subsequently resolves to ban the export

⁷⁸ As of June 2012, there are thirteen signatories and ten parties. Pursuant to Article 29 of the Protocol, there must be twenty ratifications before it comes into force. See www.basel.int (accessed 15 June 2012).

⁷⁹ Emphasis added.

⁸⁰ And thus within the scope of application of the Protocol pursuant to Article 3.

of PCBs to the USA and the investor commences a claim under NAFTA for the resultant losses caused to its investment activities in Canada. The tribunal finds that the export ban can be justified by reference to the Basel Convention and rules that there is no breach of Canada's obligations under Chapter XI of NAFTA. Canada counterclaims on the basis of the Protocol to recover its remediation costs incurred after the incident, which it asserts was caused by the investor's negligence.

Conclusion

In this chapter I have defended a particular rationalisation of the investor's claim and the host state's counterclaim in investment treaty arbitration. The consent to investor/state arbitration vests a class of persons with a cause of action and procedural standing to seek reparation for a failure by the host state to adhere to the relevant standard of investment protection in the treaty in circumstances. The investment protection obligations are not directly 'owed' to the investor as a non-party to the treaty in a contractual sense. Instead they supply the conduct regulating norms that are actionable at the suit of the investor by virtue of the cause of action created by the consent to investor/state arbitration. The more appropriate analogy is to the tort for a breach of a statutory duty in domestic law. Likewise, the host state's counterclaim is vested by the same consent to investor/state arbitration and is disaggregated from the source of norms that might supply the actionable standard of liability in respect of the investor's conduct.

This rationalisation may permit both the investor and host state to enforce international environmental norms, albeit in different ways. Depending on the scope of the consent to investor/state arbitration, the investor can assert a claim for the host state's failure to comply with its conventional or customary environmental obligations if damage has been caused by such failure to its investment. It can also rely upon such obligations indirectly as giving content to the investment protection standards in the treaty such as the fair and equitable standard of treatment. The host state can enforce environmental norms entrenched in its own legal system or incorporated in an investment agreement with the investor if it has suffered damage by reason of the investor's conduct so long as the requisite nexus exists between the counterclaim and the facts underlying the dispute submitted by the investor to investor/state arbitration. Whether or not the tribunal can operationalise international environmental norms by transposing them as actionable standards for

the host state's counterclaim is more controversial, but an analogy with relevant practice under the ATS suggests that this is a serious possibility in the future.

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