

## **ENVIRONMENTAL COUNTERCLAIMS:**

### **Enforcing International Environmental Law Through Investor-State Arbitration**

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#### **INTRODUCTION**

Article 2 of the Charter of Economic Rights and Duties of States acknowledges that a State has “full permanent sovereignty, including possession, use and disposal, over all its wealth [and] natural resources.”<sup>1</sup> Inherent in both the Charter all other instruments of international law is the presumption that a State has the right to freely dispose of the natural resources found on, above, or below its territory and to contract with private parties to assign that right. That power is the cornerstone of the principle of sovereignty that underlies every facet of international law and functions as the starting-point for every international treaty regime.

In recent years, two separate bodies of international law have independently sought to restrict a State’s power over its natural resources. The first is international environmental law, which began as a regime designed to ensure the equitable use of shared natural resources between states but which has expanded out of a recognition of the need for concerted effort to protect the planet. The second is international investment law, which allows states to voluntarily relinquish certain sovereign rights over commerce through Bilateral Investment Treaties (BITs) or multilateral agreements to attract foreign direct investment. Over the past couple decades, these regimes have largely been in conflict with one another, as a State’s attempts to regulate the

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<sup>1</sup> *Charter of the Economic Rights and Duties of States*, A/RES/29/3281, Article 2 (UN General Assembly, 1974).

environment have been seen as a form of expropriation by foreign investors in the regulated industries.

This paper argues that investor-state arbitration provides a mechanism through which to resolve this conflict. If investment tribunals allow States to bring environmental counterclaims against investors, and if tribunals are willing to award States compensation in at least a few instances, investor-state arbitration can provide an incentive structure to prompt investors to comply with international environmental norms. If investors know they can be held liable for environmental harm in the event of a dispute, they are more likely to develop investment projects with a mind toward environmental protection. At the very least, investors will be incentivized to comply with domestic environmental regulation and States will be able to enforce regulations designed to bring domestic law in line with international norms against investors.

The paper proceeds in three parts. Part I provides a brief overview of the background conflict between international environmental law and international investment law. It looks at the treaties and customs which create the underlying norms of environmental protection that states are bound to follow and at how domestic environmental regulation has been challenged as a form of expropriation. Part II then takes a broad view of counterclaims in investor-state arbitration. It begins with the procedural mechanisms that allow States to bring counterclaims. It then argues that Tribunals have become more willing to extend jurisdiction to State counterclaims and to import obligations on investors from international law and domestic regulation. Finally, Part III focuses on environmental counterclaims and their use in two recent ICSID cases—*Burlington v. Ecuador* and *Perenco v. Ecuador*. It argues that these two cases show how counterclaims can function as a mechanism through which States can enforce international environmental norms against investors.

## **I. THE CONVENTIONAL INTERPLAY BETWEEN INTERNATIONAL ENVIRONMENTAL LAW AND FOREIGN DIRECT INVESTMENT**

This Part provides a brief overview of the background norms governing both international environmental law and international investment law. In particular, it focuses on the structure of both these bodies of law and explores the origins of the assumption that foreign investment and environmental protection are fundamentally in conflict with one another. Part A focuses on the background norms and instruments which create and codify a state's international obligations, paying particular attention to the enforcement mechanisms in these instruments. Part B then turns to customary environmental law, as articulated in three key environmental disputes focused on pollution caused by private actors. Part C explores the conflict between environmental regulation and foreign investment and on the idea that the enforcement of environmental regulation can provide investors with a viable claim of expropriation under the terms of a bilateral or multilateral investment treaty.

### **A. The Background of International Environmental Law**

In the past few decades, international environmental law has expanded from a set of customary norms governing shared natural resources to a body of principles and obligations designed to promote conservation. This expansion, which began in the 1970s with the United Nations Conference on the Human Environment, was largely the product of an acknowledgement by the international community that the planet is not indestructible.<sup>2</sup> Accompanying this increasing awareness of the need for concerted efforts between states to protect and preserve the environment came a series of conferences, which produced a series of

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<sup>2</sup> Johanna Rinceanu, *Enforcement Mechanisms in International Environmental Law: Quo Vadunt?* 15 J. Env'tl. L. & Litig. 147, 148 (2000).

declarations and treaties focused on conservation.<sup>3</sup> Though the number of these kinds of protocols and treaties governing the environment has increased, the vast majority of these obligations are articulated through aspirational declarations that seek to codify customary law rather than bind States through treaties. The 1992 Rio Declarations, for example, articulated the international community’s goals for sustainable development and conservation, but did not confer concrete obligations on States.<sup>4</sup>

Even when a State’s environmental obligations *are* codified in treaties, these obligations are hazy at best. The 1992 Framework Convention on Climate Change, for example, articulated the need for coordinated action between states to combat climate change. It did not require States to take specific actions to combat climate change, opting instead to require only that States “promote sustainable management, and promote and cooperate in the conservation and enhancement” of the environment.<sup>5</sup> The Convention also does not articulate a clear enforcement mechanism: it allowed States parties to seek “a settlement of [a dispute between two or more Parties concerning the interpretation or application of the Convention] through negotiation or any other peaceful means of their own choice.”<sup>6</sup> Its successors—the 1998 Kyoto Protocol and the 2015 Paris Agreement—took steps to articulate clear targets for State Parties<sup>7</sup> but simply incorporated the dispute resolution clause found in the Framework Convention, meaning neither

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<sup>3</sup> For a more detailed description of these conferences and the resulting conventions, see Pierre-Marie Dupuy, *Looking at the Past to Shape the Future*, in Pierre-Marie Dupuy and Jorge E. Vinuales, eds. *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* 12–13 (Cambridge 2013).

<sup>4</sup> See *Rio Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development, A/CONF.151/26 Vol. 1 (1992).

<sup>5</sup> United Nations Framework Convention on Climate Change, Article 4 (1992).

<sup>6</sup> *Id.* Article 14.

<sup>7</sup> See Kyoto Protocol to the United Nations Framework Convention on Climate Change, Article 3 (1998); Paris Climate Agreement, Article 2 (2015).

agreement provided a concrete mechanism through which the international community could enforce a State's climate change obligations.<sup>8</sup>

Unlike conventions which regulate the use of shared natural resources,<sup>9</sup> the Framework Convention on Climate Change does not require that a dispute be submitted to an international tribunal. Absent an explicit grant of jurisdiction to a tribunal, like the ICJ, the probability of States actually judicially enforcing the environmental obligations articulated by the Convention or its subsequent protocols is very small since this kind of enforcement requires state consent.<sup>10</sup> And it is difficult to imagine a circumstance where a State *would* consent to any tribunal's jurisdiction. Since protection of the environment also falls squarely in the realm of a state's domestic regulatory powers, it is also difficult to see how another State, absent concrete physical harm to its territory, can bring legal action to enforce environmental obligations. In particular, it is difficult to see how a State can bring a claim against another for its failure to implement a particular domestic regulatory regime: such a claim would strike at the very heart of the principle of sovereignty.

As a result, while States may (and sometimes do) bring disputes regarding environmental obligations before the ICJ or other international tribunals, environmental obligations are still largely enforced through foreign affairs and the exercise of political pressure between States.<sup>11</sup> The next section focuses specifically on the construction and enforcement of environmental obligations through the adjudication of disputes between States before international tribunals.

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<sup>8</sup> See Kyoto Protocol, Article 19; Paris Agreement, Article 24.

<sup>9</sup> See, e.g., United Nations Convention on the Law of the Seas, Section 5 (1982).

<sup>10</sup> Rinceanu, 15 J. Env't'l L. & Litig. at 155 (cited in note 2).

<sup>11</sup> *Id.* at 149.

## B. Environmental Law in International Tribunals

Though environmental treaties like the Framework Convention on Climate Change do not themselves have a way to require countries to refer disputes to international tribunals, States have referred some disputes to either the ICJ or ad hoc arbitration for resolution. Notably, three of the largest, and most frequently cited, disputes relating to environmental obligations have arisen as a result of allegations of pollution and degradation of a shared water resource. All three also were brought to enforce the obligations conferred on riparian states under a bilateral agreement regarding the management of a river; all three recognized and enforced a customary obligation not to cause harm to the territory of a neighboring state, but do not actually address the broader obligations regarding conservation and sustainable development articulated by international environmental law.

The earliest, between the United States and Canada, was also the first to articulate a State's environmental obligations to its neighbors under customary international law.<sup>12</sup> The dispute in *Trail Smelter* arose because the sulphur dioxide emitted by a smelting plant in Canada polluted both the air and the Columbia River, leading to environmental degradation in the United States.<sup>13</sup> Though the plant was owned and operated by a private corporation, the ad hoc arbitration tribunal to which the dispute was submitted held Canada liable for the harm caused by the pollution and ordered compensation.<sup>14</sup> In so doing, the Tribunal held that, under the principles of international law, "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or

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<sup>12</sup> See *Trail Smelter Case* (United States v. Canada), 3 Reports of International Arbitral Awards 1905 (1938, 1941).

<sup>13</sup> *Trail Smelter*, at 1917.

<sup>14</sup> *Id.* at 1933.

persons therein.”<sup>15</sup> States, the Tribunal found, have a legal obligation under customary law to regulate private action within their territory to prevent cross-border environmental harm, particularly to a shared natural resource.<sup>16</sup>

The ICJ has affirmed the obligation articulated in *Trail Smelter* in two cases that present a similar factual circumstance. In both, the ICJ was similarly called upon to adjudicate a dispute between riparian states and determine liability for water and soil pollution caused by industrial activities on the shared river. The earlier, between Hungary and Slovakia, focused on whether a State could walk away from a joint development project, even if doing so would cause massive ecological harm to both its territory and the territory of its neighbors.<sup>17</sup> Though it did not specifically cite *Trail Smelter*, the Court articulated a similar customary rule. States, the Court held, have an “general obligation . . . to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.”<sup>18</sup> In his separate opinion, Judge Weeramantry argued that this obligation should be extended further, to include a customary obligation to promote sustainable development.<sup>19</sup> Environmental protection was a foundational principle of international law because it was essential to the protection and promotion of the right to life and the right to health.<sup>20</sup> Though neither the ICJ nor international treaties have explicitly codified this obligation, subsequent tribunals, including investor-state

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<sup>15</sup> *Id.* at 1965.

<sup>16</sup> *Id.*

<sup>17</sup> *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment, 1997 ICJ Reports 7.

<sup>18</sup> *Id.* at ¶ 53.

<sup>19</sup> *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Separate Opinion of Vice President Weeramantry, 1997 ICJ Reports 88.

<sup>20</sup> *Id.* at 91–92.

tribunals, have picked up on this understanding of environmental protection as concomitant with human rights.<sup>21</sup>

The ICJ reiterated this customary obligation to prevent environmental degradation in 2010 in the context of a river dispute between Argentina and Uruguay. There, the Court again articulated the need to safeguard shared resources from environmental degradation.<sup>22</sup> In interpreting a multilateral treaty concerning the management of the Uruguay River, the Court once again read in a general customary obligation to prevent harm to the territory of a neighboring state.<sup>23</sup>

All three decisions articulate a customary obligation that extends beyond those codified in the treaties that make up the body of international environmental law—an obligation not to harm the territory and environment of a neighboring state. In all three, States were held liable and required to pay compensation for this kind of environmental degradation, even when the harm itself was caused by a private corporation operating within that State’s borders. In both *Trail Smelter* and *Pulp Mills on the River Uruguay*, the harm in question was caused, not by government action, but by the industrial activities of a private enterprise.<sup>24</sup> Yet, in both cases, the State, not the private actor was held liable for the harm and responsible for paying compensation; the customary obligations were imposed on the State and made it incumbent on the State to regulate private conduct within its territory. The mechanisms through which the State actually prevented private actors from polluting shared natural resources are ultimately a matter for domestic, rather than international law.

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<sup>21</sup> See the discussion of *Perenco v. Ecuador* in Part III.B.

<sup>22</sup> *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, 2010 ICJ Reports 14, ¶ 75.

<sup>23</sup> *Id.* at ¶¶ 75–76.

<sup>24</sup> See *Trail Smelter*, at 1915; *Case Concerning Pulp Mills on the River Uruguay*, at ¶ 28.

The decisions in these three cases, then, should incentivize States to establish environmental regulations and enforce these regulations against private parties within their territory to prevent environmental harm. These decisions suggest that, while international law cannot force States to implement a certain domestic regulatory regime to protect the environment, it can hold States liable for harm caused by private actors in the absence of a regulatory regime.

### **C. Environmental Regulation as Expropriation**

However, this framework falls apart in the context of foreign direct investment. In both *Trail Smelter* and *Pulp Mills on the River Uruguay*, the private actor which caused the environmental was a national of respondent State and therefore was bound by its domestic regulatory regime. Foreign investors, however, are arguably not subject to the same environmental regulations and have the right to seek compensation from the State for losses they incurred as a result of a State's environmental regulation.

Structurally, international investment law does not seem like it would be in conflict with environmental regulations. Bilateral and multilateral investment treaties generally recognize a State's right to implement domestic environmental regulations against foreign investors. Some treaties, including several BITs to which the United States is a party, specifically include clauses preventing states from weakening domestic environmental protection or derogating from international environmental obligations to encourage investment.<sup>25</sup> The protections offered by international investment law can also, in theory, incentivize investments in green technology and sustainable environmental management. States can use these protections to attract investment

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<sup>25</sup> See 2012 United States Model Bilateral Investment Treaty, Article 12.

from corporations focused on sustainable development to build a private market for green technology.<sup>26</sup>

Despite this theory, environmental regulation has frequently been in direct conflict with international investment law. Foreign investors have historically challenged the application and enforcement of domestic environmental regulations as a form of expropriation. Investors, particularly those involved in mining and hydrocarbon exploration, have frequently argued that environmental regulations decrease the value of their investment to such an extent that compliance would render their investment economically inviable.<sup>27</sup>

In the early 2000s, for example, two companies, Metaclad Corporation (Metaclad) and Tecnicas Medioambientales Tecmed (Tecmed) brought claims against the Government of Mexico before an investor-state Tribunal organized under the Additional Facility of the International Center for the Settlement of Investment Disputes (ICSID). Both corporations had been awarded contracts by the federal government in Mexico to build and operate hazardous waste landfills but had been denied the necessary construction permits by municipal authorities.<sup>28</sup> In both, the municipal governments had denied the necessary permits in response to concerns about the environmental impact of the proposed landfills. In *Metaclad*, the municipal government also issued a decree declaring a portion of the proposed landfill site a protected area and banned all construction to protect the area's ecosystem.<sup>29</sup> This decree, like the denial of

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<sup>26</sup> For a more detailed discussion of this kind of development model, see Shaun Larcom and Timothy Swanson, *Investment in Green Growth and How it Works*, in Pierre-Marie Dupuy and Jorge E. Vinuales, eds. *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* 97–127 (Cambridge 2013).

<sup>27</sup> Dupuy, *Looking at the Past to Shape the Future*, at 20–21 (cited in note 3).

<sup>28</sup> See *Metaclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (2000); *Tecnicas Medioambientales Tecmed v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (2003).

<sup>29</sup> *Metaclad*, ICSID Case No. ARB(AF)/97/1, at ¶ 59.

zoning permits, fell squarely within the police powers of the municipal government and were the response of a democratically elected body to the demands of its constituency. However, in both *Metaclad* and *Tecmed*, the Mexican government was found liable for expropriation because these state-level regulations deprived the companies of the value of their investment, a violation of the investment protections codified in the North Atlantic Free Trade Agreement (NAFTA) and the Spain-Mexico BIT.<sup>30</sup>

Not all such claims have been successful. Two similar cases were brought by Canadian investors under NAFTA against the United States to challenge state-level regulations as a form of expropriation. In the early 2000s, Methanex, a leading producer of MTBE, a gasoline additive, challenged a California regulation banning MTBE from all gasoline sold in the state on the grounds that MTBE harmed the environment.<sup>31</sup> The regulation, Methanex argued, closed off the California market to their products and deprived them of the benefit of their investment.<sup>32</sup> Similarly, in 2009, a Canadian mining company challenged California regulations preventing certain forms of open-pit mining to prevent the degradation of land held sacred by certain indigenous groups.<sup>33</sup> Again, the investor alleged that the regulation made their mining project economically infeasible and constituted an unlawful expropriation in violation of NAFTA.<sup>34</sup> In both cases, the Tribunal held that the state regulations were not discriminatory—unlike the denial of permits in *Tecmed* and *Metaclad*, the California state government did not explicitly target the investments made by Methanex or Glamis Gold. In theory, the regulations applied universally to

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<sup>30</sup> *Id.* at ¶ 85; *Tecmed*, ICSID Case No. ARB(AF)/00/2, at ¶¶ 133,157.

<sup>31</sup> *Methanex Corp. v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits (2005).

<sup>32</sup> *Methanex*, UNCITRAL, at ¶ II.D.14.

<sup>33</sup> *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (2009).

<sup>34</sup> See *Glamis Gold*, UNCITRAL, at ¶ 358.

both domestic and foreign investors. They were also not an unlawful expropriation because both corporations could, in theory, adjust their operations to satisfy the state regulations.<sup>35</sup>

Though the claims brought by Methanex and Glamis Gold ultimately failed on their merits, both highlight the conflict between domestic environmental regulation and international investment law. Even when an investor's claim is not successful, as in those two cases, the process of defending a state's environmental regulation is expensive and laborious. States are called upon to defend their domestic regulations—or regulations passed by a political subdivision thereof—before an international tribunal. For a country like the United States which has the means to defend these suits, the process may ultimately result in a favorable outcome. However, for States which depend heavily on foreign investment to develop their natural resources likely do not have the capacity to invest millions into defending their environmental policies. For these states, the fact that investors can (and do) seek arbitration to avoid environmental regulation may prevent the State from passing or enforcing environmental regulations at all.<sup>36</sup>

Combined with the fact that States can be liable to their neighbors for environmental harm, this places States in a bind. It forces them to choose between their environmental obligations on the one hand and their need for foreign direct investment on the other. In the absence of strict enforcement mechanisms under the majority of environmental treaties, a State is likely to simply ignore its environmental obligations in the hope of attracting foreign direct investment.

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<sup>35</sup> See *Glamis Gold*, UNCITRAL, at ¶ 536; *Methanex*, UNCITRAL, at Part IV, Chapter F.

<sup>36</sup> Dupuy, *Looking at the Past to Shape the Future*, at 20–21 (cited in note 3).

## II. COUNTERCLAIMS IN INVESTOR-STATE ARBITRATION

The conflict between domestic regulation and foreign direct investment is by no means limited to environmental protection. Investors have long challenged state regulations, whether they arise in the form of changes to the tax code, new tariff regimes, or environmental regulations, as a form of expropriation. In recent years, states been pushing back against these claims, either by raising domestic law as an affirmative defense to a claim of expropriation or by raising counterclaims.

This section focuses specifically on the later: on the use and success (or lack thereof) of counterclaims brought by states in investor-state arbitration. While this section will briefly mention environmental counterclaims, it will not spend a lot of time with them. Section III will focus specifically on the use of environmental counterclaims to enforce domestic environmental regulation while this Section looks at counterclaims more generally. Part A argues that, while counterclaims have historically been seen as antithetical to the principles underpinning investor-state arbitration, there are no procedural barriers to their use. The rules governing investor-state arbitration allow for and provide mechanisms to decide state counterclaims. Part B then turns to the question of jurisdiction and argues that Tribunals generally have broad jurisdiction to hear state counterclaims, and that this exercise of jurisdiction is wholly consistent with the purposes of arbitration. Part C then examines the relevant sources of law that tribunals use when analyzing counterclaims. It argues that, though counterclaims have largely been unsuccessful, this lack of success is not a product of structural or legal problems with the claims themselves.

### A. The Procedural Framework for State Counterclaims

Historically, both scholars and tribunals have been skeptical of State counterclaims and many have argued that giving States the right to raise claims against investors actually runs

contrary to the very foundations of investor-state arbitration. After all, investment treaties are intended to encourage foreign direct investment by giving investors certain basic guarantees to ensure that their investment is secure. These treaties do so by explicitly limiting a State’s sovereign power to regulate all economic activity taking place within its borders.<sup>37</sup> “Hardwired into the very structure of investment treaties therefore, is an apparent asymmetry between the rights of investors and the obligations of States.”<sup>38</sup> The rights given to an investor under these bilateral and multilateral investment treaties are enforced by allowing investors to bring disputes to neutral third party—an arbitral tribunal—rather than forcing them to seek resolution in the domestic courts of the home State which are presumably biased in favor of the State.<sup>39</sup> Allowing States to raise even a counterclaim against investors contradicts this inherent structure and undermines a system that is wholly designed to protect the investor from a State’s exercise of its police power.<sup>40</sup>

Despite this conventional understanding, there is nothing in the structure of investor-state arbitration that precludes a State from bringing counterclaim against an investor. The structural asymmetry that may be built into most Bilateral Investment Treaties (BITs) is not similarly built into the procedures governing investment arbitration. The two sets of procedural rules which govern the vast majority of investor-state disputes—the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules) and the International Center for the Settlement of Investment Disputes (ICSID) Convention and Arbitration Rules—both set forth

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<sup>37</sup> Yaroslau Kryvoi, *Counterclaims in Investor-State Arbitration*, 21 Minn. J. Int’l L. 216, 225 (2012).

<sup>38</sup> *Id.* at 218.

<sup>39</sup> See Zachary Douglas, *Enforcement of Environmental Norms*, in Pierre-Marie Dupuy and Jorge E. Vinuales, eds. *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* 419 (Cambridge 2013).

<sup>40</sup> Ina C. Popova and Fiona Poon, *From Perpetual Respondent to Aspiring Counterclaimant? State Counterclaims in the New Wave of Investment Treaties*, 2 BCDR Int’l Arb. Rev. 223, 224 (2015).

the mechanisms through which States can raise counterclaims. Article 4 of the UNCITRAL Rules, for example, require respondents to include “[a] brief description of counterclaims or claims for the purpose of a set-off” in their initial reply to the notice of arbitration filed by the claimant.<sup>41</sup> Counterclaims can similarly be raised in the respondent’s statement of defense and may, with the consent of the Tribunal, amend either its reply or statement of defense to include counterclaims.<sup>42</sup>

Similarly, the ICSID Convention and Arbitration Rules explicitly allow respondents to raise counterclaims during proceedings. Article 46 of the Convention specifically grants Tribunals the right to “determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute.”<sup>43</sup> These counterclaims must be within the jurisdiction of the Center and the Tribunal, and must be raised “no later than in the counter-memorial” without the authorization of the Tribunal.<sup>44</sup> Beyond this timing requirement, the ICSID Rules place no meaningful procedural restrictions on the right of a State to bring counterclaims against investors.

Under both the ICSID Rules and the UNCITRAL Rules then, there are few meaningful procedural limitations on a State’s right to raise counterclaims against its investors, provided that these counterclaims fall within the Tribunal’s jurisdiction. Both sets of rules specifically contemplate that states can and will bring counterclaims and provide the mechanisms through which these counterclaims can be decided. This does not mean that counterclaims have

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<sup>41</sup> United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules), United Nations Commission on International Trade Law, Article 4 (2014).

<sup>42</sup> UNCITRAL Rules, Articles 21–23.

<sup>43</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), Article 46 (2006).

<sup>44</sup> International Center for the Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (ICSID Rules), Rule 40 (2006).

historically been part of investor-state disputes. As the next section discusses, until recently, Tribunals have been reluctant to assert jurisdiction over counterclaims, in part because of the conventional understanding that investor-state arbitration was designed to protect the investor.

## **B. The Jurisdictional Barrier**

Though neither the UNCITRAL Rules nor the ICSID Rules prevent States from raising counterclaims against investors, both require that these counterclaims fall within the jurisdiction of the Tribunal. Under the ICSID Rules, this means that counterclaims have to fall “within the scope of the consent of the parties and . . . within the jurisdiction of the Center;”<sup>45</sup> under the UNCITRAL Rules, a respondent may raise counterclaims only “provided that the arbitral tribunal has jurisdiction over [the claims].”<sup>46</sup> This jurisdictional component has served as one of the primary barriers preventing States from bringing counterclaims. As a threshold matter, the underlying BIT authorizing the Tribunal to hear the case cannot limit the Tribunal’s jurisdiction only to claims brought by investors.<sup>47</sup> While many bilateral and multilateral treaties do not include this limitation on jurisdiction, many others do, and such a restriction forecloses on a State’s right to bring counterclaims under the terms of the BIT.<sup>48</sup>

Even when a BIT does not explicitly limit a tribunal’s jurisdiction to only counterclaims that arise from the same investment or contract on which the original claim was based.<sup>49</sup> This meant that, in order for a Tribunal to assert jurisdiction over a State counterclaim, the nexus

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<sup>45</sup> ICSID Convention, Article 46.

<sup>46</sup> UNCITRAL Rules, Article 21.

<sup>47</sup> Popova and Poon, 2 BCDR Int’l Arb. Rev. at 228 (cited in note 40).

<sup>48</sup> It is interesting to note here that neither the 2012 U.S. Model BIT nor the U.K. Model BIT include language limiting a tribunal’s jurisdiction only to claims raised by the investor. The U.S. Model BIT, however, does prevent the respondent from raising as a counterclaim the argument that the claimant will receive indemnification or compensation from an insurance contract. 2012 U.S. Model BIT, Article 28(7).

<sup>49</sup> Douglas, *Enforcement of Environmental Norms*, at 430–31 (cited in note 39).

between that counterclaim and the claimant’s case-in-chief needed to be strong enough to warrant the two claims to be resolved in the same proceeding. Historically, this jurisdictional barrier was considered insurmountable, and the vast majority of State counterclaims failed, not because of a procedural barrier, but because of the jurisdictional one. In *Amco Asia Corp. v. Indonesia*, for example, the Tribunal found that it did not have jurisdiction to hear Indonesia’s counterclaims against the claimants because the counterclaim—based on the claimants’ failure to pay certain corporate taxes—did not arise out of the investment, but rather came from an independent obligation conferred on the investors by Indonesian domestic law.<sup>50</sup> Other Tribunals have similarly held that counterclaims arising from an investor’s failure to abide by the home State’s domestic regulation do not arise as under the same contract as the principle claim and are therefore outside the jurisdiction of the Tribunal.<sup>51</sup>

However, in the past two decades, more investor-state tribunals have been willing to exercise jurisdiction over State counterclaims and counterclaims have become more common. In large part, this willingness indicates a recognition on the part of arbitral tribunals of the need for efficiency. By rejecting jurisdiction over a State counterclaims, Tribunals were, in effect, directing States to pursue legal action in their domestic courts against investors for violations of domestic regulation. This, in turn, resulted in a duplication of proceedings and forced investors through the process that investment arbitration was designed to avoid.<sup>52</sup> The same principle was articulated in 2016, by the Tribunal in *Urbaser v. Argentina*. There, the Tribunal found that Argentina’s right to bring counterclaims against investors is “supported by the need to avoid the

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<sup>50</sup> *Amco Asia Corp. et. al. v. Republic of Indonesia* (Resubmitted Case), ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 161 (1988).

<sup>51</sup> See Popova and Poon, 2 BCDR Int’l Arb. Rev. at Annex A (cited in note 40).

<sup>52</sup> See *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Separate Opinion of Michael Reisman (2012); Kryvoi, 21 Minn. J. Intl’l L. at 221 (cited in note 37).

duplication of procedures and to prevent the risk of contradictory decisions.”<sup>53</sup> Though the Tribunal acknowledged that consent was the foundation of arbitration and inquired as to whether the counterclaim had a sufficient nexus to the underlying investment contract, the Tribunal ultimately upheld its own competence to hear the counterclaim.<sup>54</sup> Based on this nexus, it would be “wholly inconsistent to rule on Claimants’ claim in relation to their investment in one sense and to have a separate proceeding where compliance with [that same contract] may be ruled upon in a different way.”<sup>55</sup> Both the structure of international law and the “[r]easonable administration of justice cannot tolerate such a potential inconsistent outcome.”<sup>56</sup>

A couple years earlier, the *Al-Warraq* Tribunal similarly extended its competence to decide a State’s counterclaims against investors. Like the *Urbaser* Tribunal, the *Al-Warraq* Tribunal acknowledged that the foundation of arbitration is party consent and that counterclaims are problematic “because of the ‘inherently asymmetrical character’ of an investment treaty.”<sup>57</sup> However, Indonesia had the right to bring counterclaims that were closely related to the investor’s conduct. The underlying investment agreement, the Tribunal held, including an affirmative obligation on the part of the investor to observe the laws and customs of the host State. The investor’s failure to do so constituted a violation of the treaty obligation that was substantially related to the initial investment, and therefore had a close enough nexus to the principle claim for the Tribunal to exercise jurisdiction.<sup>58</sup> In doing so, the *Al-Warraq* Tribunal acknowledged the same need for the efficient resolution of interrelated disputes.

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<sup>53</sup> *Urbaser, S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 1118 (2016).

<sup>54</sup> *Urbaser S.A. v. Argentina*, ICSID Case No. ARB/07/26, at ¶ 1151.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Hesham Talaat M. Al-Warraq v. Republic of Indonesia, UNCITRAL, Award, ¶ 659. (2014).

<sup>58</sup> *Al-Warraq v. Indonesia*, UNCITRAL, ¶ 664.

While Tribunals remain hesitant in some cases to extend jurisdiction to hear counterclaims, *Al-Warraq*, *Urbaser*, and similar cases show that Tribunals have become more willing to entertain and hear the merits of counterclaims.<sup>59</sup> Indeed, because counterclaims allow for the efficient resolution of related disputes by the same judicial body, there is nothing problematic about Tribunals expanding their competence to hear these claims. If anything, a Tribunal's willingness to hear a State's counterclaim furthers the goals of investment arbitration, because it prevents investors from being dragged into the home State's domestic courts as defendants.

### C. Sources of Law

As their use has expanded over the past couple decades, counterclaims have provided States with a mechanism through which to enforce both domestic and international obligations against foreign direct investment.<sup>60</sup> In particular, they have allowed States to at least attempt to resolve the inherent conflict between a State's need to regulate certain industries and areas, and the broad protections offered to foreign investors. However, in order for counterclaims to function in this way, Tribunals have to be willing to find that an investor is bound by some obligation that comes from outside the four walls of the underlying BIT. In particular, Tribunals have to be willing to find *both* that investors are obligated to follow certain norms and directives either of international law or domestic regulation and that an investor's actions constituted a violation of those norms such that the State is entitled to compensation. This is a tall order and, as a result, the vast majority of counterclaims brought by States fail on their merits.<sup>61</sup>

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<sup>59</sup> See Popova and Poon, 2 BCDR Int'l Arb. Rev. at Annex A (cited in note 40).

<sup>60</sup> *Id.* at 226.

<sup>61</sup> *See id.* at 226, Annex A.

However, this is not to say that counterclaims can never serve as a means through which States can enforce international and domestic law against investors. In the past decade, Tribunals have been more willing to find that investors are bound by certain general obligations of international law, even if their actions do not necessarily violate those obligations. Even in the absence of express statements within a BIT to this effect, Tribunals have been willing to hold investors to obligations conferred by both international law and domestic regulation.

The *Al-Warraq* Tribunal, for example, looked to the domestic law of Indonesia as the source of law underlying Indonesia's counterclaims. In particular, the Tribunal held that a investor had a general obligation to respect domestic regulations and allowed Indonesia to bring a counterclaim to seek compensation for the investor's failure to comply with domestic banking regulations.<sup>62</sup> Though the counterclaims were eventually dismissed because the Tribunal found that the national Bank, rather than the Indonesian government, suffered the harm, it used Indonesia's domestic criminal and regulatory framework to determine the investor's legal obligations.<sup>63</sup>

Similarly, in *Urbaser*, the investors primary claim related to the revocation of a contract to build and maintain infrastructure to provide water and remove sewage from parts of Buenos Aires. Argentina's counterclaim focused on the fact that Urbaser's failure to develop this infrastructure deprived its citizens of the right to water and therefore constituted a violation of international human rights law.<sup>64</sup> Though the Tribunal ultimately held that Urbaser had not violated the right to water by failing to complete its sewage project, it found that the human rights obligations imposed by the International Convention on Civil and Political rights applied

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<sup>62</sup> *Al-Warraq v. Indonesia*, UNCITRAL, at ¶ 155.

<sup>63</sup> *Id.* at ¶ 670.

<sup>64</sup> *Urbaser v. Argentina*, ICSID Case No. ARB/07/26, at ¶ 34, 1156.

to “all parties, public and private.”<sup>65</sup> Human rights obligations, the Tribunal held, were not solely imposed on a state and investors were bound by those same obligations, even if the underlying BIT did not directly incorporate or reference those obligations.<sup>66</sup> A BIT, the Tribunal held “[is] not a set of rules defined in isolation without consideration given to rules of international law” and does not override either a State or a private party’s customary international law obligations.<sup>67</sup>

Tribunals have similarly been willing to use allow a State to use both domestic and international law as the legal foundation for a defense to a claim of expropriation. In *CMS v. Argentina*, for example, the government of Argentina cited the principle of necessity as articulated by international law and the domestic state of emergency as justifications for the challenged tariff regime. Though these defenses ultimately failed, the Tribunal specifically cited and applied both domestic and international law to the factual circumstances because the case presented “a close interaction between the legislation and regulations governing [the hydrocarbon industry], the [relevant investment], and international law.”<sup>68</sup> Several states have similarly cited to international norms regarding the protection of cultural heritage as justifications for domestic regulations when those regulations were challenged as a form of expropriation.<sup>69</sup>

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<sup>65</sup> *Id.* at ¶ 1199. The Tribunal ultimately held that, though Urbaser was bound by the International Convention on Civil and Political Rights, the treaty only required that Urbaser not affirmatively deprive a population access to clean water. Its failure to build sewage systems did not constitute a violation of this right. While Urbaser may have violated its contractual obligations to Argentina, it did not violate its human rights obligations to the Argentinian people.

<sup>66</sup> *Id.* at ¶¶ 1193, 1210.

<sup>67</sup> *Id.* at ¶ 1192.

<sup>68</sup> *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 116–117 (2005).

<sup>69</sup> For a more detailed discussion of cases in which this affirmative defense has been used, see Valentina Vadi, *Culture Clash? World Heritage and Investors’ Rights in International Investment Law and Arbitration*, 28 ICSID Rev. 123 (2013).

Though not all of these efforts have been successful, they highlight the fact that Tribunals are becoming more willing to look beyond the four walls of a bilateral or multilateral investment treaty to define the obligations imposed on investors. In particular, they show that Tribunals have been willing to entertain counterclaims that are based on international or domestic law. The fact that the majority of counterclaims have failed on the merits, then, is not the result of an absence of applicable law or because a Tribunal has been unwilling to require compliance with these obligations. Instead, their failure can be attributed to the way in which legal obligations, whether stemming from international law or from domestic regulation, are interpreted and applied. Indeed, these cases show that counterclaims, when decided on their merits, fail not because of a legal or procedural barrier but because of the structure or scope of the specific legal regime being applied.

### **III. COUNTERCLAIMS AS A MECHANISM TO ENFORCE ENVIRONMENTAL REGULATION**

As counterclaims become more common and as more Tribunals become willing to exercise jurisdiction to hear counterclaims on their merits, counterclaims may start to function as a mechanism through which States can enforce international and domestic obligations against investors. If an investor knows that, regardless of the likelihood of its success on the merits, it can be forced to defend against in the event of a dispute, that investor will have a strong incentive to comply with background norms of international law to prevent such a claim from being raised. The cost of even minimal compliance will likely be lower than the cost of defending against a counterclaim in arbitration.

This Part focuses on the use of environmental counterclaims in two recent investor-state cases: *Burlington v. Ecuador* and *Perenco v. Ecuador*. It argues that these two cases, taken together, highlight the potential of investor-state arbitration to function as a mechanism to

enforce international environmental norms against private investors. Part A will focus on *Burlington* while Part B focuses on *Perenco*.

*Burlington* and *Perenco* arise out of the same factual circumstances and the same contractual framework. In the early 2000s, Burlington Resources, Inc., a U.S. oil company, formed a consortium with the French oil company, Perenco Ecuador, Ltd., to negotiate a license from the government of Ecuador to explore a section of the Ecuadorian Amazon.<sup>70</sup> The licenses were explicitly governed by Ecuadorian law and indicated that laws and regulations in force at the time of its signature were incorporated by reference.<sup>71</sup> In 2005, after a spike in oil prices, Ecuador invited the Consortium to renegotiate the terms of the license to increase its share of the profits.<sup>72</sup> At the same time, the government amended existing oil and gas laws to increase the tax rate on all profits derived from the exploration of hydrocarbons. The tax rate was increased again in 2006, to 99%.<sup>73</sup> In 2008, Ecuador amended its environmental regulations to hold oil companies strictly liable for any harm caused by the exploration of hydrocarbons to the Amazon.<sup>74</sup> Both Burlington and Perenco filed their notice of arbitration that same year, arguing that Ecuador's 99% tax rate was a form of expropriation that deprived them of the benefit of their investment. Ecuador, in turn, filed a counterclaim alleging that the Consortium polluted the soil and groundwater and sought compensation under Ecuadorian law for the harm.<sup>75</sup>

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<sup>70</sup> See generally, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (2012); *Perenco Ecuador, Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability (2014).

<sup>71</sup> *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, at ¶ 20.

<sup>72</sup> *Id.* at ¶ 29.

<sup>73</sup> *Id.* at ¶¶ 37–38.

<sup>74</sup> *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, ¶ 52 (2017).

<sup>75</sup> Neither tribunal reached the issue of jurisdiction because neither Perenco nor Burlington objected to its exercise of jurisdiction over Ecuador's environmental counterclaims. See *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, at ¶ 60; *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on Environmental Counterclaims, ¶ 34–35 (2015).

### A. *Burlington v. Ecuador*

In April 2008, Burlington and its subsidiaries jointly filed a notice of arbitration with ICSID under the United States-Ecuador BIT, arguing that the increased tax rate and the eventual termination of the oil licenses constituted an unlawful expropriation. The tax rate, Burlington argued, unlawfully deprived it of the benefit of its investment. In its Decision on Liability, the Tribunal ultimately agreed with Burlington. Though States have the absolute right to establish and enforce a system of taxation within their borders, this enforcement can still constitute an illegal expropriation if it substantially deprives a foreign investor of the benefit of its investment.<sup>76</sup> The decisive factor, the Tribunal held, was whether “there is substantial deprivation [constituting] the loss of the economic viability of the investment,” particularly if the tax rate was increased after the initial investment was made.<sup>77</sup> Ecuador was therefore obligated under the terms of the United States-Ecuador BIT to provide just compensation to Burlington for the loss of its investment.

The Tribunal, however, also held Burlington liable for environmental harm caused to sections of the Ecuadorian Amazon. Burlington argued that the 2008 amendments to Ecuadorian environmental law did not apply retroactively, and that the relevant standard for liability should be negligence at best.<sup>78</sup>

The Tribunal disagreed. The 2008 Amendment, it found, was designed to bring Ecuadorian law in line with international norms and to ensure that Ecuador had satisfied its international obligations relating to hydrocarbon exploration.<sup>79</sup> The amendments incorporated international norms into Ecuador’s domestic regulatory framework and, as such, were part of a

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<sup>76</sup> *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, at ¶ 396.

<sup>77</sup> *Id.* at ¶ 397.

<sup>78</sup> *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, at ¶ 122.

<sup>79</sup> *Id.* at ¶ 81.

broader effort to comply with its international treaty obligations.<sup>80</sup> Though the Tribunal (unlike the *Urbaser* Tribunal) did not explicitly hold that Burlington and other private companies are bound by international environmental standards, the Tribunal did hold Burlington liable for violating Ecuador’s domestic regulatory scheme. Environmental harm, the Tribunal held, “is defined by reference to the regulatory criteria of the home state,” which in turn is designed to uphold the home State’s international obligations.<sup>81</sup> Even if the domestic regime came into force after Burlington’s initial investment, it was still bound by it and Ecuador was entitled to compensation for the environmental harm caused by the Consortium.<sup>82</sup>

In this regard, the Tribunal’s decision in *Burlington* is one of the first in which an investor-state tribunal awarded compensation on the basis of a state’s counterclaims. But it is also notable because of the Tribunal’s willingness to acknowledge both that some aspects of a State’s domestic regulatory regime were expropriatory and that the State was entitled to seek compensation under its domestic law. It also upheld a State’s right to enforce a regulatory regime against foreign investors to ensure compliance with its environmental obligations under international law.

### **B. *Perenco v. Ecuador***

Like Burlington, Perenco and its subsidiaries filed notice of arbitration against Ecuador to challenge the amendments to its tax laws in 2008. Though the two cases arose from the same set of facts, Perenco’s suit was governed by the France-Ecuador BIT and was decided by a different tribunal.<sup>83</sup> Like the *Burlington* Tribunal, the *Perenco* Tribunal ultimately found that the

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<sup>80</sup> *Id.* at ¶ 159.

<sup>81</sup> *Id.* at ¶ 275, 291.

<sup>82</sup> *Id.* at ¶ 1075.

<sup>83</sup> Though parties had moved to consolidate the dispute, this request was later denied. The two Tribunals also declined to grant *res judicata* effect to the decisions of the other specifically because

amendments to Ecuador’s tax code substantially deprived the Consortium of the benefit of its investment. Ecuador was obligated to pay just compensation to Perenco.<sup>84</sup>

The Tribunal similarly upheld Ecuador’s environmental counterclaims over Perenco’s protests. In its 2015 interim decision on counterclaims, the Tribunal acknowledged that “a State has wide latitude under international law to prescribe and adjust its environmental laws, standards and policies in response to changing views and a deeper understanding of the risks posed by various activities.”<sup>85</sup> Ecuador has a treaty obligation to ensure the preservation of the Amazon and is entitled to modify its environmental regulation at any time to ensure compliance with this obligation. It is similarly entitled to enforce this regulation against foreign investors operating in the regulated industry, regardless of when the initial investment was made or the state of domestic law at the time.<sup>86</sup>

Like the *Burlington* Tribunal, the *Perenco* Tribunal stopped short of stating that private companies were bound by the mandates of international environmental law. The Tribunal did, however, hold that nothing in the France-Ecuador BIT “precludes Ecuador from promulgating new regulations that hold oilfield operators to more stringent environmental standards (or indeed to prohibit such activities altogether in areas which it considers to be ecologically sensitive).”<sup>87</sup> The only meaningful restriction on a State’s exercise of its police power here is the Ecuadorian

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Perenco and Burlington were distinct legal entities protected by distinct Bilateral Investment Treaties. See, for example, *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Perenco’s Application for Dismissal of Ecuador’s Counterclaims (2017). The two disputes have proceeded separately, with the parties being represented by different counsel and the Tribunals moving on different timelines.

<sup>84</sup> See *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability (2014).

<sup>85</sup> *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaims, at ¶ 35.

<sup>86</sup> *Id.* at ¶¶ 34–35.

<sup>87</sup> *Id.* at ¶ 347.

constitution and the State's other international legal obligations.<sup>88</sup> Perenco is therefore obligated to comply with the Ecuadorian regulatory regime, as modified in 2008. Under that standard, it is strictly liable for environmental harm in the Amazon.<sup>89</sup>

However, the *Perenco* Tribunal went a step further and articulated a general responsibility imposed on States to provide its citizens with a pollution-free environment. This obligation, the Tribunal stated, is found both in international human rights law and in the Ecuadorian constitution, and served as the driving force behind Ecuador's modifications to its regulatory regime.<sup>90</sup> This obligation should motivate how the Tribunal analyzed the competing interpretations of Ecuador's regulatory regime presented to it: Ecuador argued that the regulatory regime applied to all hydrocarbon companies, regardless of when their initial investment was made while Perenco (like Burlington) argued that it only applied to investments made after the regulation went into force. "When choosing between certain disputed (but reasonable) interpretations of the Ecuadorian regulatory regime," the Tribunal held, "the interpretation which most favors the protection of the environment [should be] preferred."<sup>91</sup> The Tribunal is therefore clear that it will respect Ecuador's right to impose environmental regulations on foreign investors to ensure compliance with international norms and will enforce those obligations against foreign investors, regardless of when the environmental regulation went into force.

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at ¶ 320. The Tribunal here stopped short of determining the actual quantum of damage that Ecuador was owed, choosing instead to hire an independent investigator to conduct an environmental impact study to determine the cost to repair the damage to the Amazon's ecosystem. That assessment is ongoing.

<sup>90</sup> *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaims, at ¶ 379.

<sup>91</sup> *Id.* at ¶ 322.

In the context of international environmental law, then, state counterclaims can start to undo the double-bind that States frequently find themselves in. States have international obligations to protect the environment but also recognize that enforcement of these obligations through domestic regulation can expose them to liability in an investor-state dispute. Because international environmental treaties have few concrete enforcement mechanisms, states are more likely to resolve this double-bind by simply ignoring their environmental obligations or declining to enforce environmental regulations against foreign investors. Investors, meanwhile, have a strong incentive to simply ignore environmental regulations with the understanding that any attempt to enforce those regulations can give them a viable expropriation claim.<sup>92</sup>

Allowing state counterclaims based on an investor's failure to comply with environmental regulation tips the balance the other way. If states know that they can hold investors liable, or at least raise the issue of liability, for a failure to comply with environmental regulations, they are more likely to pass and enforce regulations that are in line with their treaty obligations. Similarly, if investors know that they can be held liable for failing to at least comply with international environmental norms or at least be called upon to defend against a counterclaim for doing so, they will have a strong incentive ensure compliance.

This is, of course, a theory, but *Burlington* and *Perenco* suggest that states are starting to utilize counterclaims in this manner. These two cases are, of course, only two examples and both very recent, so it is difficult to predict whether these cases will actually signal a shift in how investor-state tribunals approach environmental counterclaims or if they are outliers. When taken together, the two cases suggest the former—though they arise out of the same factual

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<sup>92</sup> For a more detailed description of this double-bind, see Dupuy, *Looking at the Past to Shape the Future*, at 20–21 (cited in note 3); Douglas, *Enforcement of Environmental Norms*, at 430–31, 438 (cited in note 39).

circumstances and the same investment, the two cases were decided under different treaties, by different tribunals, with different reasoning. Both tribunals, however, were clear that private actors were liable for environmental harm under a domestic regulatory regime designed to ensure a State's compliance with international law. In essence, both tribunals held private actors liable for their failure to comply with international environmental law, even if neither did so explicitly. If states become more willing to raise the kinds of counterclaims brought by Ecuador against both Burlington and Perenco, it is plausible that that investor-state arbitration can provide them with a mechanism through which to enforce environmental obligations. Investor-state arbitration can, therefore, provide tools to incentivize private actors, which are not bound by the obligations embodied in international environmental law, to comply with environmental norms.

### CONCLUSION

If states become more willing to raise environmental counterclaims in investor-state arbitration, these counterclaims have the potential to provide a mechanism through which to enforce international environmental norms against private parties. Allowing states to raise environmental counterclaims against investors can resolve some of the inherent tension between international environmental law and international investment law. In particular, counterclaims provide a mechanism through which States can enforce domestic regulation, implemented to bring the State's domestic law in line with international norms, and defend against a claim of expropriation.

However, the success of this model of investor-state arbitration depends on the willingness of Tribunals to continue to extend jurisdiction over a State's counterclaims and decide these claims on the merits. It also depends, at least in part, on the willingness of Tribunals

to uphold a State's counterclaims and award a State compensation. The decisions in *Perenco* and *Burlington* both suggest that Tribunals are moving in this direction and may signal a shift in how investment Tribunals approach and analyze the environmental obligations of private parties.

If *Perenco* and *Burlington* are, in fact, reflective of a new standard that other Tribunals will apply, then investment arbitration can serve as the vehicle through which private actors are brought into and bound by the norms and obligations codified in international environmental treaties. Investment arbitration can then serve as a way not only to protect investors, but also to ensure that private investment is used to facilitate, rather than hinder, sustainable, eco-friendly development.