LALIVE

Insight

New model bit for African states facilitates counterclaims against foreign investors

Authors

Lorraine de Germiny
Partner
London

Anna Korshunova
Associate
Geneva

In recent years, in certain investment arbitration proceedings, States have brought counterclaims alleging that foreign investors had failed to comply with CSR principles. In all but two cases, these counterclaims have been unsuccessful.

With new-generation IIAs, counterclaims may have a greater chance of success. For example, the recently-released Africa Arbitration Academy Model Bilateral Investment Treaty for African States imposes on investors CSR obligations related to the environment, anti-corruption, anti-money laundering, counter-terrorism financing and human rights, and allows States to bring counterclaims. This model BIT may thus make it easier – in the traditionally asymmetrical investment arbitration system – for States to hold foreign investors responsible for wrongful conduct.

As discussed earlier, investors' violations of corporate social responsibility ("**CSR**") obligations may not only prevent them from successfully bringing an investment claim in arbitration but also could lead to counterclaims by the respondent States.[1]

To date, there have only been two (related) publicly known investment arbitration cases in which counterclaims for CSR violations have been successful. In the cases of *Burlington* (2017) and *Perenco* (2019), Ecuador was awarded around USD 100 million for environmental damage caused by the claimant investors.[2] The underlying international investment agreements ("**IIAs**") did not refer to CSR obligations, but the tribunals upheld the counterclaims based on the Ecuadorian environmental law.

All other known attempts by respondent States to hold claimant investors responsible for environmental damage, human rights and/or other CSR violations through counterclaims have failed, mainly due to a finding that the tribunal lacked jurisdiction over the counterclaims and/or that there was no cause of action.

The Model Bilateral Investment Treaty for African States published by the Africa Arbitration Academy in July 2022 (the "**African Model BIT**") addresses these obstacles.[3] It imposes the following obligations on investors:[4]

- to apply the principle of Ubuntu, which accords respect to human dignity and equality to any person;
- to comply with the environmental and social assessment screening criteria and assessment processes of the host State;
- to respect labour and human rights and to promote gender equality;
- to protect indigenous peoples' and local communities' rights and resources;
- to abstain from corruption, money laundering and terrorism financing; and,
- to ensure that its investments meet or exceed accepted standards of corporate governance.

Article 18 of the African Model BIT entitled "Corporate Social Responsibility" also requires investors to "adopt high degrees of socially responsible practices in accordance with the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises" and to "contribute to the sustainable development of the Host State".

The African Model BIT allows a host State to bring a counterclaim "for breach of the obligations set out under this Agreement", which could include a breach of the above provisions.

So how could the African Model BIT – if adopted by African States – and other new-generation IIAs (which refer to CSR principles)[5] facilitate State counterclaims in the future? Short answer: by giving the tribunal jurisdiction over counterclaims and obliging investors to comply with the CSR principles, as explained below.

Jurisdiction

For an investment arbitration tribunal to find jurisdiction over a counterclaim, the counterclaim must fall within the scope of the parties' consent to arbitrate. This is commonly determined by the dispute settlement provision in the IIA. The investor may accept the State's offer to arbitrate by submitting an investment claim but may not limit its scope, *e.g.* by excluding counterclaims. Therefore, the IIA's specific wording is crucial.

Tribunals have found that the claimant investor's consent to arbitrate *includes* counterclaims if IIAs:

- contain a broad arbitration clause covering "any dispute arising out of investment" or expressly allowing States to bring claims; or,
- exclude jurisdiction over counterclaims in defined circumstances, thereby impliedly allowing for counterclaims in general.

The latter interpretation was adopted in *Aven v Costa Rica*. In its 2018 award, the tribunal found that Costa Rica's environmental counterclaims fell within the scope of the investor's consent to arbitrate under the CAFTA-DR. (This finding may assist Guatemala in establishing jurisdiction over its pending USD 2 million environmental counterclaim under the same treaty.[6])

Tribunals have concluded that the claimant investor's consent to arbitrate *excludes* counterclaims if, according to the IIA:

- only the investor has the right to initiate proceedings;
- the tribunal's jurisdiction is limited to adjudicating treaty breaches committed by the State; or,
- the governing law of the dispute is the IIA and international law.

The vast majority of IIAs comprise one or more of these provisions. IIAs were designed to protect investments, so they commonly provide that only an investor may initiate arbitration proceedings. IIAs also traditionally provide rights only to investors and do not impose reciprocal obligations on them.

In *Burlington* and *Perenco,* there was no investor consent to counterclaims in the underlying IIA; however, after the arbitration began,Ecuador concluded a special agreement with the investors to arbitrate counterclaims.

Significantly, some more recent IIAs, including the African Model BIT, expressly incorporate consent to and permit counterclaims.[7]

Cause of action

Although several investment arbitration tribunals have observed that investors are no longer immune from international liability for CSR violations[8], it remains a challenge for States to identify a binding, legal obligation of claimant investors to comply with CSR principles.

First, IIAs generally do not impose obligations on investors, including in connection with CSR obligations. This is equally the case for most modern IIAs

that refer to CSR standards and principles but stop short of imposing direct obligations on investors.[9] In contrast, the African Model BIT provides for specific CSR obligations on investors, as mentioned above.[10]

In *Aven,* the tribunal found that the provision of the DR-CAFTA, which allowed the State to adopt and enforce measures to ensure that investors implement investments in an environmentally friendly manner, imposed international obligations upon investors to comply with environmental regulations of the host State. It stated: “No investor can ignore or breach such [environmental] measures [of the host State] and its breach is a violation of both domestic and international law”.[11] Nevertheless, the tribunal concluded that the provisions of DR-CAFTA were neither specific enough to impose affirmative obligations upon investors, nor provided a legal basis for a counterclaim.[12]

Second, tribunals have found that neither general international law nor non-binding international CSR instruments create legal obligations for investors that may be enforced by counterclaims.

In *Urbaser* (2016)*,* Argentina brought a counterclaim arguing that Urbaser’s failure to provide adequate drinking water and sewage services violated the human rights of local residents.

The tribunal agreed that the right to water forms part of customary international law but concluded that international law does not impose positive obligations on investors to protect human rights; such obligations exist only for States.[13]

Further, the tribunal considered international CSR instruments and concluded they did not contain binding obligations, unless adopted in mandatory form (*e.g.* by incorporation in a concession).[14]

Third, although CSR obligations are often found in the domestic law of the host State, investment tribunals may not have jurisdiction to enforce them.[15] As explained by the tribunal in *Roussalis* (2011), “where the BIT does specify that the applicable law is the BIT itself, counterclaims fall outside the tribunal’s jurisdiction.”

Indeed, “the arbitration agreement should refer to disputes that can also be brought under domestic law for counterclaims to be within the tribunal’s jurisdiction.”[16] Accordingly, in *Rusoro* (2016), the tribunal declined jurisdiction over Venezuela’s counterclaim for environmental damage, because it amounted to a violation of Venezuelan law, not the IIA.[17]

Some new generation IIAs may make it easier for States to establish a cause of action for CSR-related counterclaims. For example, those IIAs:

- impose direct obligations on investors;[18]
- incorporate obligations from domestic law or extend arbitration clauses to disputes arising from domestic law;[19] and/or,
- refer to CSR standards.[20]

As the *Aven* tribunal observed, the “trend” of counterclaims is “likely to continue”[21] – only time will tell whether new generation IIAs, including the African Model BIT, will cause an increase in (successful) counterclaims.

References

[1] E.g. in *Metro de Lima Línea 2 S.A. v. Republic of Peru* I, ICSID Case No. ARB/17/3, (6 July 2021) Peru counterclaimed USD 713 million for alleged socioeconomic (access to jobs) and environmental damage (greenhouse gas emissions) related to the investor’s failure to complete the project for construction of the metro line; and in *Daniel W. Kappes and Kappes, Cassidy*

& Associates v. Republic of Guatemala, ICSID Case No. ARB/18/43 (pending) ("Kappes") Guatemala counterclaims USD 2 million for environmental damage and adverse effects of the investment on local communities.

[2] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017 ("Burlington"); *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Award, 27 September 2019 ("Perenco").

[3] The drafters of the African Model BIT included a diverse pool of prominent arbitration practitioners and investment law experts from Africa and beyond. The model BIT aims to provide guidance to African governments and institutions for the negotiation and conclusion of BITs.

[4] The African Model BIT, Articles 1, 9-13.

[5] For a summary of references to CSR provisions in other new generation IIAs, see here.

[6] Kappes (n 1).

[7] CPTPP (2018), Articles 9.19(2), 9.25(2); COMESA Investment Agreement (2007), Article 28(9); Argentina-UAE BIT (2018), Article 28(4); Slovakia-Iran BIT (2016), Article 14(3); African Model BIT, Article 22(G)(1) and 22(F)(1).

[8] *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016 ("Urbaser"), para. 1195; *David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, Giacomo A. Buscemi, David A. Janney and Roger Raguso v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018 ("Aven"), para. 700.

[9] LALIVE Newsletter, Corporate Responsibility (CR) Series – Issue 2 (November 2021) https://www.lalive.law/wp-content/uploads/2022/01/CS-Newsletter-2-CSR-under-international-investment-treaties-Nov-2021.pdf.

[10] The African Model BIT, Articles 1, 9-13.

[11] *Aven* (n 8), para. 734.

[12] *Aven* (n 8), para. 743. The tribunal eventually dismissed the counterclaim on unrelated formal grounds (*id*., paras. 745-747).

[13] *Urbaser* (n 8), paras. 1208-1210. The tribunal observed that "the situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights [that …] can be of immediate application, not only upon States, but equally to individuals and other private parties." However, the tribunal did not have to consider that scenario.

[14] *Id.,* para. 1195.

[15] For example, successful counterclaims in *Burlington* (n 2) and *Perenco* (n 2) were based on Ecuadorian domestic law.

[16] *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, para. 871 *quoting* P. Lalive and L. Halonen, "On the availability of Counterclaims in Investment treaty Arbitration," Czech yearbook of international law, 2011, p. 141, n 7, 19.

[17] *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 628*. See also Anglo-American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019, paras. 529-530.

[18] Morocco-Nigeria BIT (2016), Article 18; SADC Model BIT (2012), Article 14; African Model BIT, Articles 9-13.

[19] Iran-Slovakia BIT (2016), Article 14(3); African Model BIT, Article 15.

[20] *E.g.* Investment Agreement between Australia and Hong Kong (2019), Article 16; EU-Viet Nam FTA (2019), Articles 13.10 and 13.14; Brazil-India BIT (2020), Article 12; UK-Japan CEPA (2020), Article 16.5; African Model BIT, Article 18.

[21] *Aven* (n 8), para. 697.