Environmental Counterclaims in Investor-State Arbitration

Perenco Ecuador Ltd v Republic of Ecuador, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015 (Peter Tomka, Neil Kaplan, J Christopher Thomas)

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Keywords

The question of counterclaims in investment treaty arbitration is inevitably complicated given the asymmetry of the arbitration agreement underpinning most investment claims.1 Both the ICSID Arbitration Rules2 and UNCITRAL Arbitration Rules3 permit counterclaims in certain circumstances, although it must be remembered that neither set of Rules were drafted exclusively for investment treaty arbitration. It is for this reason that there is a doctrinal debate concerning whether the reference to counterclaims in the Rules is sufficient to grant jurisdiction to a tribunal or whether there is a need to demonstrate additional consent to the counterclaims.4 Due in part to these uncertainties, past attempts by States to bring environmental counterclaims have been rare.

2 ICSID Convention, art 46; ICSID Arbitration Rules, Rule 40.
and generally unsuccessful. In this light, the Interim Decision on the Environmental Counterclaim (the Decision) in the *Perenco* case provides a significant example of a State being permitted to bring counterclaims against an investor in the context of investment treaty arbitration.

Yet, it is not only the fact that the counterclaims were allowed that is interesting about this Decision, but also the content of those counterclaims. The counterclaims in this case were based upon an alleged breach of environmental rules in Ecuadorian law. In this respect, the Decision also raises a number of important issues concerning how investment tribunals address complex environmental disputes in terms of applicable law, standards of proof and the consideration of scientific evidence. The Tribunal was not only faced with radically opposed arguments concerning the interpretation and application of the applicable rules, going to the heart of liability for environmental harm, but it also had to deal with conflicting expert evidence as to the attribution and the seriousness of the alleged harm. The difficulties of bringing successful environmental claims to international arbitration are fully apparent from the complex legal and factual issues raised in this case. Indeed, no final answer is forthcoming as the Tribunal ultimately decided that it cannot settle these arguments without the input of further independent scientific evidence. This raises questions about the role of litigation in settling environmental claims.

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In April 2008, Perenco Ecuador (Perenco) filed a request for arbitration against Ecuador relating to a dispute over its investment in an oil drilling concession in the Amazon region of Ecuador. The claims were brought both under the concession contracts entered into between Perenco and Ecuador, as well as the bilateral investment treaty between Ecuador and France (the BIT).

As with many investment treaty disputes, the facts underpinning the claims are highly complex. Perenco had become involved in drilling for oil in Ecuador in 2002 as part of a consortium with Burlington Resources (Burlington). The dispute arose following the enactment of amendments to the Ecuadorian Hydrocarbon Law in 2006 and 2007, which had the effect of increasing the revenues that were to be paid to the Ecuadorian government. The companies made initial payments under protest, but following unsuccessful negotiations,