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Young-OGEMID Author Interview with Dr Edward Guntrip (Book: Counterclaims in Investment Arbitration: Holding Foreign Investors Accountable for Violations of International Law) by J. Bownes

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Young-OGEMID Author Interview with Dr Edward Guntrip (Book: Counterclaims in Investment Arbitration: Holding Foreign Investors Accountable for Violations of International Law)

Dr Edward Guntrip, Senior Lecturer in International Law and Director of Recruitment and Admissions for the School of Law, Politics and Sociology at the University of Sussex

Counterclaims in Investment Arbitration: Holding Foreign Investors Accountable for Violations of International Law (Brill 2024)

Moderator: Professor S.I. Strong

Interview Reporter: Jack Bownes*

Introduction

The seventh instalment in the Young-OGEMID author interview series took place from 30 September 2024 to 4 October 2024 with guest speaker Dr Edward Guntrip.

Dr Guntrip is a Senior Lecturer in International Law at the University of Sussex and is currently Director of Recruitment and Admissions for the School of Law, Politics and Sociology. He previously taught at the University of East Anglia and Brunel University. Edward completed his undergraduate studies at the University of Western Australia in 2001 graduating with a BSc (Geography) and LLB (Hons). After qualifying as a solicitor in New South Wales and Western Australia, he specialised in commercial litigation with an Australian law firm. In 2005, he completed an LLM in international law at the University of Cambridge before returning to legal practice as a litigation solicitor in London when he acted for both commercial clients and states. After deciding to focus on an academic career, he commenced his PhD in 2008 at Brunel University.

Dr Guntrip joined Professor Strong and the rest of the Young-OGEMID community to discuss his new book, *Counterclaims in Investment Arbitration - Holding Foreign Investors Accountable for Violations of International Law*, published by Brill earlier this year.¹

Overview of the Book

Dr Guntrip opened the interview by providing the following opening remarks and overview of his book:

Dr Guntrip: Thank you very much for inviting me to discuss my book this week. I am looking forward to some interesting conversations.

* Associate, International Dispute Resolution, Gide Loyrette Nouel LLP, MCIArb, Solicitor of the Senior Courts of England and Wales.

¹ <https://brill.com/display/title/56636>

Before I talk about my book, I would like to take one step back and explain my motivation for writing the book. The idea resulted from my PhD thesis. My thesis examined the methodologies that could be used by host States to introduce arguments based on international human rights law into ICSID arbitration. My main finding was that counterclaim procedures provided the best means for host States to present human rights arguments. Yet, counterclaims are infrequently invoked in investment arbitration, and apart from some notable exceptions, have generally been unsuccessful. In my opinion, the lack of success is not because counterclaim procedures are flawed, but rather that counterclaims are not being used by host States as effectively as they could be. This is because when counterclaims refer to obligations sourced from international law several foundational questions remained unresolved. For example, host States still face fundamental challenges in relation to how to frame consent to counterclaims, how to argue that a sufficient nexus between the originating claim and the counterclaim exists, and how to invoke legal obligations sourced from international law against non-State entities. Consequently, my book seeks to demonstrate that, with some changes to State practice and litigation strategies, counterclaims in investment arbitration can be used by host States to hold foreign investors liable for violations of international law. In effect, what I have written is a 'how to' guide that is grounded in both academic literature and arbitral practice.

The focus of the book is counterclaim procedures contained in the ICSID Arbitration Rules and the ICSID Convention, the ICSID Additional Facility Arbitration Rules, and the UNCITRAL Arbitration Rules. The book examines each element that a host State must address to successfully establish a counterclaim in investment arbitration. The book commences with the issue of jurisdiction in Chapter 2. Most counterclaims in investment arbitration fail on jurisdictional grounds. Hence, this chapter examines how consent to counterclaims is framed. It identifies that host States often consent to counterclaims in terms that simultaneously allow wide-ranging originating claims, or alternatively, exclude counterclaims altogether. As host States can exercise significant control over the terms of party consent, it is suggested that host States should draft tailored consent clauses that specifically address the availability of counterclaims. Chapter 3 considers the nexus that must exist between the originating claim and the counterclaim. When identifying whether a connection exists, arbitral practice tends to seek out a reciprocal legal relationship between the claims that is sourced from the same legal instrument. If this approach is adopted most international investment agreements (IIAs) automatically preclude counterclaims because IIAs are asymmetrical and only bind host States. Yet, other arbitral practice takes a more flexible approach when identifying whether a connection exists. These strands of arbitral practice provide insights into how host States can dictate what amounts to a connection in their IIAs and can help them to argue that the requisite nexus between the claims does exist. Chapter 4 addresses applicable law. Host States must ensure that arbitral tribunals have the power to apply laws that contain foreign investor obligations. Most IIAs do not have dedicated applicable law clauses. In the absence of an applicable law clause, arbitration rules direct arbitral tribunals to focus on domestic law. Referring primarily to domestic law can (but does not necessarily) exclude international legal obligations from the scope of investment arbitration. Therefore, host States should include applicable law clauses in IIAs and ensure that the applicable law clause encompasses those sources of law that contain foreign investor obligations. Thus, Chapters 2 – 4 examine the procedural and technical aspects that enable an investment tribunal to consider the substance of the counterclaim.

When turning to the substance of the counterclaim, there is the initial problem that foreign investors do not inherently possess international legal personality. Consequently, Chapter 5 examines potential sources of law that could give rise to foreign investor liability. Foreign

investor obligations are most likely to be sourced from IIAs with provisions directed to foreign investors, domestic law that implements international obligations, and investment contracts that include provisions addressing foreign investor misconduct. These obligations can be interpreted in line with soft law instruments. Significantly, provisions that give rise to foreign investor liability already exist. However, arbitral tribunals are likely to find it easier to interpret and apply foreign investor obligations that are drafted more precisely than existing obligations. Chapter 6 considers the merits stage of investment arbitration. This chapter highlights that given the expertise of investment arbitrators, and the *ad hoc* nature of investment arbitration, there is a risk that obligations sourced from beyond international investment law will be interpreted inconsistently across legal regimes and between arbitral tribunals. These types of inconsistent interpretations risk undermining host State trust in investment arbitration. Hence, it is suggested that investment tribunals should, where possible, refer to experts when interpreting international obligations sourced from other legal regimes. Given that the use of experts will not always be feasible, the chapter sets out what factors host States should consider on a claim-by-claim basis to evaluate the risks of commencing a counterclaim in investment arbitration. Chapter 7 concludes and considers the wider implications of using counterclaims in investment arbitration in the proposed manner. It finds that foreign investors could be granted enhanced subjectivity in international law.

In short, the book argues that with some changes to how host States approach counterclaims in investment arbitration, it is feasible for foreign investors to be found liable for misconduct that breaches international law. It recognises that counterclaims are not a desirable course of action in every investment dispute. Nonetheless, increasing the availability of counterclaim procedures confers host States with another option of how to address foreign investor misconduct.

Questions

Stanislava Nedeva, Lecturer in Law, OGEMID Senior Rapporteur – Consent to Counterclaims; UNCITRAL Working Group III; the Scope of Counterclaims Provisions

If I understand correctly, you have focused on IIAs to develop the scope for host State counterclaims. Have you identified any IIAs which might define the power of host states to initiate counterclaims and might do so sufficiently well, according to your guide? For example, I can immediately think of some so-called 'new generation' IIAs, such as the Model Morocco BIT and the Netherlands International Investment Agreement 2019, which both have some clauses on counterclaims. In that sense, has there been recent arbitral case-law based on some of those new IIAs and respectively, how have tribunals interpreted counterclaim provisions?

There has also been some discussion as to whether the UNCITRAL Working Group's workings should include the further expansion of tribunals' jurisdiction to include counterclaims. What are your thoughts on the place and suitability of international reform of ISDS in the context of counterclaims?

Lastly, would there be scope for counterclaim provisions in investor-state contracts and would this approach resolve some of the issues that you have identified as existing in ISDS?

Dr Guntrip: Thank you very much for your questions.

I am going to start by answering your third question. In theory, it is much easier for host States to include provisions in contracts that bind foreign investors because contracts don't have the classically asymmetrical structure of IIAs. So using contractual clauses may resolve some of the legal difficulties associated with establishing counterclaims under IIAs. However, because investment contracts are negotiated between the host State and the foreign investor there may be power differentials that could prevent host States from being able to insert this type of contractual clause. Power differentials exist between States too. Yet, the aim of an IIA may mitigate against States taking extreme positions. This is because IIAs are negotiated in the absence of specific investments and apply for a longer period of time. Hence, there is more incentive for States to protect their position and to permit counterclaims in case they need to use them in the future. I suspect that contractual negotiations may be more one-sided in favour of the foreign investor given that the foreign investor does not have the same incentive. Nonetheless, I am speculating because it is very difficult to access investment contracts to see what provisions are included.

Turning now to your first question. In my book I argue that consent to counterclaims should be established in an independent clause. This prevents the risk associated with using wide terms of consent (e.g. 'all disputes') that can also expand an arbitral tribunal's jurisdiction over originating claims. I have found some provisions that do this quite effectively. For example, Article 28.9 of the COMESA Agreement establishes consent to counterclaims in a stand-alone clause. However, the examples I have found are from IIAs that are not yet in force, or alternatively, do not provide recourse to investment arbitration. Hence, they cannot be invoked. As a result, there isn't any arbitral practice that addresses these provisions yet.

Finally, turning to your question on UNCITRAL Working Group III. I think that international reform may be a good way to increase the availability of counterclaims because it can overcome some of the issues associated with power differentials between States and/or foreign investors that I mentioned above. When all states have agreed the circumstances in which counterclaims are permissible, host States are not reliant on their negotiating power in IIA or contractual negotiations to insert counterclaim clauses. As negotiating power differs between different actors, we end up with variable practice. International reform can potentially overcome this (if done correctly) and permit universal access to counterclaims.

Jorge Escalona Gálvez, FCI Arb – Close Connection Test as an Admissibility or Jurisdictional Requirement; Solution to Asymmetrical Nature of ISDS

You describe that States find it challenging to argue that a sufficient nexus between the originating claim and the counterclaim exists. Yet, is this "nexus" or so-called "close connection" test a matter of admissibility, jurisdiction, or perhaps, in some instances, it might fall in a hybrid of the two?

My second question is related to their use as an effective tool to convince and further States' conviction and trust on the current system of investor-State arbitration. In your view, do you believe that if arbitral practice starts recognizing more States' right to counterclaim, will serve as a tool to counterbalance the perceived asymmetry in ISDS and eventually make States feel that investor-State arbitration is more fair and balanced?

Dr Guntrip: I needed to make a decision about whether the 'nexus' or 'close connection' test was a question of jurisdiction or admissibility (or both) when writing the book. Arbitral practice on this point remains unclear and the legal implications of failing to meet this test have not

been fully explored. Given this, there was no clear answer. I decided to classify the need for a 'close connection' as a matter of admissibility. I took this approach because I felt that a counterclaim could fall within an investment tribunal's jurisdiction (e.g. based on Article 25 ICSID Convention) but still fail to possess a sufficient connection to the originating claim. As these elements could be distinguished in this way, I classified them as issues of jurisdiction and admissibility respectively.

I believe that counterclaims can contribute to rebalancing investment arbitration, but I think that invoking counterclaim procedures by themselves will be insufficient to make many States feel that the system is balanced. This is based on the awards that have considered counterclaims at the merits stage (*Urbaser v Argentina*,² *Burlington v Ecuador*³ and *Perenco v Ecuador*⁴). As I discuss in Chapter 6 of the book, in each of these awards there is some element of inconsistent decision-making. In *Urbaser*, the arbitral tribunal adopts interpretations of international human rights law that don't align with how these rights are understood in the human rights law regime. The divergent interpretations of these rights across two legal regimes is likely to undermine host State confidence in investment tribunals to address legal questions beyond international investment law. In *Burlington v Ecuador* and *Perenco v Ecuador*, the two independent investment tribunals reached opposing interpretations of Ecuador's domestic law despite being presented with the same evidence. Although this is a risk in ad hoc dispute resolution fora, it is less than desirable. In my opinion, the unpredictability of how arbitral tribunals currently apply law that forms the foundation of the counterclaim is likely to reduce host State trust. I think that States will only feel that investment arbitration is fair and balanced when they can invoke counterclaims procedures with the confidence that the law being applied to the counterclaim is going to be interpreted in accordance with how it is understood in the legal regime from which it is sourced.

Jorge Escalona Gálvez, FCI Arb, Young-OGEMID Rapporteur – Violation of Domestic Law as a Basis for State Counterclaims

Thank you for your answers, Dr. Guntrip. I agree that there is certain ambiguity on whether the nexus or close connection test is a matter falling in admissibility, jurisdiction, or both. I also believe that States will feel more comfortable with an investment arbitration mechanism that provides predictability and trust when interpreting counterclaims under the legal regime from where it is rooted (i.e., specific treaty, applicable domestic laws, etc.).

If you allow me, I have another question concerning counterclaims based on violations of domestic law by foreign investors. Could a counterclaim be based on violations of investors' domestic law obligations? I raise this point as I was reminded of the case of *Saluka v. Czech Republic* (UNCITRAL Rules 1976),⁵ where the tribunal highlighted that as the counterclaims involved alleged noncompliance with the host State's general laws, it concluded that those counterclaims were to be decided under Czech law procedures as opposed to investment treaty arbitration. In your view, domestic law obligations for

² *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26.

³ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*).

⁴ *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6.

⁵ *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL.

investors could rise to the level of international law obligations and have arbitrability for submitting a counter-claim?

Dr Guntrip: The question of domestic law is a very good one because counterclaims based on domestic law are usually rejected (the exceptions being in *Burlington v Ecuador* and *Perenco v Ecuador*). The reason for this, as you have stated, is that there is a general view that domestic legislation is best dealt with using the host State's domestic dispute resolution procedures. Arbitral practice has also justified this position by referring to *Amco v Indonesia*,⁶ which sets out the general proposition that domestic legislation does not generate an investment dispute for the purposes of Article 25(1) ICSID Convention, and therefore, falls beyond the jurisdiction of an investment tribunal. This principle has been used to support the view that counterclaims based on domestic legislation cannot share a connection with the originating claim and must be dealt with separately.

I think that it is arguable that domestic legislation can be used as the foundation of a counterclaim. I consider this in the book in the context of domestic legislation that implements an international legal obligation, but the position I take should extend to all domestic legislation. To start with, I think addressing counterclaims in host State courts can present problems. These include duplication of work (and costs), the lack of availability of financial remedies in many domestic administrative courts, and understanding how the two dispute resolution fora may draw inferences/conclusions about their dispute from the other claim. These are more practical considerations. I also think that *Amco v Indonesia* is being applied incorrectly in this context. My logic is that *Amco v Indonesia* does not support a general proposition that jurisdiction is lacking if a counterclaim is based on domestic legislation. The full proposition in *Amco v Indonesia* permits a tribunal to hear disputes involving laws of general application if they generate an investment dispute. Hence, for the purposes of Article 25 ICSID Convention, domestic legislation can be within an investment tribunal's jurisdiction provided it is connected to the investment. If we transpose these principles to counterclaims (their application in this context is questionable but is common practice) my view is that if a counterclaim that is based on domestic legislation has a close connection to the dispute, I think it should be permitted. Hence, my approach adopts the second aspect of the proposition in *Amco v Indonesia*. This test would still exclude generally applicable law (e.g. tax law). However, it would permit connected counterclaims. For example, if an investment dispute centres around host State environmental regulation, a counterclaim based on domestic environmental law would demonstrate a clear connection.

Ricardo Marroquin, Young-OGEMID Rapporteur – Applicable Law Clauses

Thank you for sharing your insights on this interesting topic. I understand that one of your suggestions is for host States to include applicable law clauses in IIAs to ensure they encompass sources of international law that contain foreign investors' obligations. Do you recommend using a specific form of applicable law clause that States should adopt? Would a general reference to customary international law suffice, or would it be more effective to refer to specific legal instruments from which investor's obligations arise? Personally, I believe that the first option might be seen as vague or ambiguous, and the second option could unnecessarily limit the scope of the investors' obligations.

⁶ *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1.

Dr Guntrip: I think the form of applicable law clause may vary depending on each State's interests and the type of FDI they attract. At a minimum, the applicable law clause will need to capture those sources of law that contain international legal obligations. These would include customary international law, treaty law and general principles of international law. I would also include other sources like domestic law (so that domestic law that implements international legal standards is captured) and written agreements (to capture contracts that may include foreign investor obligations). Whilst all encompassing, these sources are vague and may not provide sufficient guidance to a tribunal. As a result, I suggest more detailed clauses to ensure that any relevant legal instruments are identified. In fields like international human rights law, reference to the ICCPR and ICESCR is likely to capture most general international human rights obligations and is unlikely to date. However, in fields like international environmental law, where new treaties may come into play during the lifetime of an IIA there may need to be more flexibility given that new obligations could be excluded. Hence, if a host State attracts FDI in the extractive industries, it might want to refer to international environmental law treaties rather than specific instruments. In short, the degree of specificity really depends on the State, but some reference to key sources is likely to assist an arbitral tribunal to identify the relevant applicable law.

Umang Bhat Nair, Young-OGEMID Rapporteur – Alternative Recourses against Investors Available to Host States

You mentioned that the book recognises that counterclaims are not a desirable course of action in every investment dispute. My question is what are the other, if any, methods/recourses available to Host States who wish to hold foreign investors liable for misconduct. One option that I could think of is that the Host State could raise the argument that the misconduct by way of violations of domestic laws justify the initial illegality of the foreign investor's investment (for e.g. the *Mamidoil v. Albania* award).⁷ If successful, the Host State could escape having to pay damages to the foreign investor, and in a way - hold them liable for their misconduct. Could you share any other instances of Host States being able to do so?

Dr Guntrip: I stress in my book that counterclaims only provide one means of addressing foreign investor misconduct. As such, they should be viewed as part of 'toolbox'. There are several other 'tools' that could be used to challenge foreign investors.

1. Host States can try to rely on foreign investor misconduct to demonstrate that investment protection standards have not been breached. This approach has had limited success in the context of the fair and equitable treatment standard. This has arisen when foreign investors have sought to rely on legitimate expectations created by the host State regarding the legal framework that will apply to the investment, but have failed to take into account foreseeable host State laws and regulations.
2. Host States could raise contributory fault based on Article 39 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts. This provision permits a tribunal to take into account any 'wilfully negligent act or omission' that materially contributes to the injury when remedying the injury. This means a host State could have any compensation awarded against it reduced if it can be shown that the foreign investor has contributed to its own loss through wilful negligence or omission.

⁷ *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24.

3. Finally, you have mentioned illegality. If an 'in accordance with host State law' clause exists this can be used to deny an investment tribunal jurisdiction over the claim. However, the foreign investor's illegal conduct must take place in the pre-establishment phase, meaning that any illegality after this point should be dealt with by the host State in the domestic courts.

The reason that I prefer counterclaims is that the first two approaches mentioned above reduce a host State's liability and rely on a host State being found to be in breach of investment protection standards. Illegality does have a direct impact on a foreign investor's ability to claim but in a very limited timeframe. I think that counterclaims have the added value of establishing foreign investor liability independently from the originating claim. The risk of liability (which remains if the foreign investor's claim is unsuccessful) might disincentivise foreign investors from breaching international law in the first place.

Professor S.I. Strong, Moderator on behalf of Anonymous – Parallel ISDS Counterclaims and Domestic Court Proceedings; Fork in the Road Provisions; Res Judicata; Forum-Shopping

I am very impressed with the high quality of the discussion so far and thank all of the participants so far. Since I am not as adept in this subject matter as I would like, our friend, Anonymous, has come to my aid and provided a few gnarly questions for Edward ("gnarly" is not only true, but a linguistic nod to Anonymous's roots - no arboreal pun intended).

1. Most BITs and investment chapters mitigate the risk that an ISDS claimant may try to bring its claim in multiple forums through a "Fork in the Road" or "No U-Turn Waiver" provision compelling the investor to make a binding choice among possible forums (subject of course to possible disputes about the similarity of the respective claims). Proposals to strengthen a Host State's ability to bring counterclaims, in contrast, typically do not seek to restrict the Host State's ability to bring in its national courts a claim substantively similar to the counterclaim, whether before the ISDS counterclaim, simultaneously with the ISDS counterclaim or after the ISDS claim and counterclaim are resolved by final award (e.g., the Indian Model BIT). In effect, the ISDS proceeding would bar a claimant from forum-shopping but permit a Host State to pursue the substance of its counterclaim in multiple forums. What are your thoughts about this asymmetry - should Host States also be barred from employing multiple forums.

2. Should an ISDS agreement provide that resolution of a Host State's counterclaim in ISDS be res judicata in other forums (such as the Host State's national courts), binding on both claimant investor and respondent State?

3. Proponents of strengthening a Host State's ability to bring ISDS counterclaims often support that proposition by pointing out that one of the strongest arguments against ISDS in its current form is that it is a one-sided system solely for the benefit of foreign investors. Enhancing a Host State's ability to bring counterclaims would, they say, improve the legitimacy of ISDS. Opponents of expanding counterclaims argue that current ISDS instruments permit the Host State to bring connected counterclaims and also the very same points as setoff defenses to the investor's claim. Any excess over the awarded setoff or a denial of the investor's claim can apparently under current international investment agreements still be brought as an affirmative claim by the Host State in its own national

courts (which have jurisdiction over investments in the territory of the Host State). What are your thoughts on this topic?

4. Why are counterclaims in ISDS even necessary? The Host State can always bring its claim in its own national courts, which may very well be a more favorable forum.

Dr Guntrip: I am very impressed with the quality of the questions so far.

Before I move to the moderator's questions, I received some additional questions offline. The contributor has given me permission to publish the questions and my answers.

In your view, what are the prospects of an investor defending a counterclaim on the basis that a host State's enforcement of an international environmental, labour, or human rights norm is inconsistent (selective, or even discriminatory)?

I think that there may be scope for an investor to claim that the host State has been inconsistent in its application of the obligation that forms the basis of the counterclaim. The question for me is then how the foreign investor would present its discrimination claim. I am not sure whether non-discrimination investment protection standards would provide a formal defence because these provisions would not negate the wrongfulness of the investor's conduct. However, any discriminatory or selective conduct on behalf of the host State could potentially be taken into account by an investment tribunal when deciding whether the counterclaim should succeed on the merits. I would be interested in reading an investment award on this point!

Do you see any fundamental difficulty in counterclaims based on obligations addressed to States rather than individuals?

There are significant challenges in transposing international obligations intended for States onto foreign investors, both in terms of granting a foreign investor international legal personality and determining the scope of the foreign investor's legal obligation. My position is that the foreign investor must initially be bound by the obligation and this usually requires the obligation to be set out in an IIA, domestic legislation or an investment contract. Once a foreign investor is bound, my recommendation is that the provision should be explicit in terms of what the host State expects the foreign investor to do/refrain from doing. As such, the obligation may need to be reframed to focus on what the individual must do to comply. Nonetheless, there is a balance to be struck between being overly prescriptive and being general enough to provide the host State with flexibility. In contrast to my position, the Canadian Supreme Court in a preliminary ruling in *Nevsun Resources v Araya* found that it was not 'plain and obvious' that customary international human rights law could not directly bind private individuals.⁸ It will be interesting to see how the Court proceeds to apply customary international human rights law directly onto *Nevsun* if the proceedings reach that stage. There is treaty body guidance that may be of assistance, but I think that relying on this approach is too risky in the context of counterclaims at this stage of their development.

⁸ [2020] 1 SCR 166.

In your response on counterclaims based on domestic legislation you said, “This test would still exclude generally applicable law (e.g. tax law).” Superficially, it would seem to me that a counterclaim based on unpaid taxes (related to the investment) is well suited to a counterclaim, but perhaps I am misunderstanding why tax law should be excluded.

I should clarify my position in relation to domestic legislation and tax law. Counterclaims based on tax law have been excluded from investment arbitration partly because of concerns about generating extra-territorial jurisdiction contrary to the principle of the non-extraterritorial enforceability of public law. Hence, it would be difficult to establish a counterclaim based on tax law. I also think that investment tribunals would be reluctant to address disputes where host States challenge foreign investors for non-payment of general taxes when other domestic fora exists. However, other generally applicable law that displays a close connection to the investment could form the basis of the counterclaim.

(In response to the Moderator’s questions):

These questions are gnarly and raise some complex issues regarding the equality of arms between the host State and the foreign investor and the use of different dispute resolution fora to enforce legal obligations.

1. I don't think that host States should be automatically barred from commencing legal claims based on the same legal obligation in investment arbitration and domestic courts. Whether the counterclaim should additionally be permitted in a different forum will depend on whether it amounts to an abuse of process. I can probably best illustrate this by way of an example. If a host State commences a counterclaim in investment arbitration seeking compensation for foreign investor misconduct but the proceedings and the award are confidential, the host State may wish to use the same legal foundation and seek a non-pecuniary remedy in the domestic courts to (partially) satisfy its population that it has taken action against the foreign investor. In my opinion, this would not be problematic given that the claim in the domestic court serves a different purpose despite it being based on the same legal obligation. This example is based on Article 9.21.3 CPTPP. Conversely, if the host State sought compensation in both fora potentially leading to double recovery, this would amount to an abuse of process and should not be permitted. I appreciate that an asymmetry remains in that many foreign investors are subject to 'fork in the road' and 'no U-turn' provisions and host States are not, but the underlying policy remains the same and there might be some instances where host States need some flexibility to fulfil their public duties.
2. I am not sure that a provision in an ISDS agreement would necessarily be interpreted consistently, and as a result, may not be that effective in preventing duplicate claims. The issue of *res judicata* becomes particularly problematic when counterclaims are based on international law because of the different sources which may contain the foreign investor obligation. Consequently, difficulties may arise regarding whether the claim is considered to be the same or not, which in turn, depends on the definition of *res judicata* adopted. For instance, a host State brings a counterclaim based on an environmental protection provision in an IIA before investment arbitration and the host State loses the counterclaim. The host State then seeks to bring a claim in its domestic courts against the foreign investor but based

on an environmental protection clause in the investment contract governing the same foreign investor conduct. The question arises whether this is the same claim and should be prevented. If the definition of *res judicata* from *CME Czech Republic BV v Czech Republic* is used, this would not be same dispute because the cause of action is different.⁹ If a more flexible definition is adopted, then the claims may be seen as equivalent. Given the varied interpretations of *res judicata*, I am not sure that drafting a specific provision would change how the disputing parties would argue this point. At a more general level, as I set out in my answer to the first question, I think that there are instances where bringing very similar claims in different fora may serve a purpose (even after a judgment or award has been handed down) provided it does not amount to an abuse of process, so a general prohibition may be too prescriptive.

3. My view is that counterclaims need to be mainstreamed in investment arbitration. Counterclaims remain at the periphery of investment arbitration and have generally been unsuccessful. These factors may dissuade host States from considering a counterclaim. The current options for host States (counterclaims and set-off defences combined with national courts) presumes that arbitral tribunals will find a connection between claims and counterclaims. To find a connection, most arbitral practice seeks out a reciprocal legal obligation arising from a single source. IIAs do not generally provide this legal framework which means that it is very difficult to establish a counterclaim. Using set-off can also be problematic for the same reasons - it requires mutual obligations that can be discharged without the need for performance. Defences that absolve host States from responsibility for breaches (such as those found in the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts) have very high thresholds. Further, using domestic legal procedures to seek additional compensation can be time consuming for the host State. In my opinion, counterclaims are about procedural equivalence. I think this is important because foreign investors were given access to investment arbitration given their vulnerability to host State power and the need for a neutral forum to resolve disputes. However, host States can also be vulnerable to foreign investor misconduct so they should have similar access to counterclaims in investment arbitration.
4. Counterclaims are needed in ISDS because host State courts are not necessarily beneficial to host States. From a practical perspective, dividing an investment dispute across two separate fora results in a duplication of resources (primarily time and costs). If a foreign investor is unhappy with having a claim heard in the host State court, they may try to resist host State court proceedings further increasing the host State's costs. Depending on when the case is heard, the host State may need to enforce a domestic court judgement in a foreign jurisdiction, which is far more complex and expensive than enforcing an arbitral award. Host States may struggle to seek a financial remedy in domestic administrative courts, and even if a financial remedy is granted, it is unlikely to be on the same scale as compensation awarded in investment arbitration. Hence, it makes sense for all aspects of the investment dispute to be heard in the same forum.

⁹ *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL.

Mark Kantor, TDM Editor-in-Chief – Parallel ISDS Counterclaims and Domestic Court Proceedings; Res Judicata; ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts

Your answers to Anonymous's questions were very interesting. Allow me please to ask a few follow-up questions as if I were Anon :-)

Your response to the first question focused on circumstances where the State is seeking a different remedy in its national courts or the (decreasing number) of ISDS proceedings that are confidential in claim and result. Apart from different remedies or confidentiality, are there other circumstances you think should justify a State bringing both an international ISDS counterclaim and a similar substantive claim in national courts?

Your response to the second question, regarding *res judicata*, focused on the legal source of the counterclaim, which would of course usually be different between an international forum applying an international law cause of action and a national forum applying a national law cause of action. "Fork in the Road" and "No U-Turn" prohibitions binding on claimants, however, are not in general deterred by that distinction.

Moreover, *res judicata* often applies to factual findings that can easily translate from a determination in an international law cause of action into the factual elements of a different national law cause of action. What are your thoughts as to *res judicata* with respect to factual findings?

Your response to the third question states that defences in ISDS "have a very high threshold." But aren't claims and defences in ISDS generally subject to the same standards of proof for the same sorts of allegations? Only the "necessity" defence under the ILC seems to my mind to fit that characterization and have no claimant counterpart, and in ISDS awards the ILC "necessity" article has in any event been overtaken in practice by a less difficult "essential security" clause in the IIA that nowadays is often drafted to be self-judging by the State. A "high threshold" does not seem to apply to factual defences, defences based on differing interpretations of relevant IIA legal obligations, self-judging exceptions/exclusions, or elements of jurisdictional defences. Your views?

Dr Guntrip: Thanks for the follow up questions and for adopting the role of Anon 😊

In relation to the first question, I think that host States should not be able to bring the same claim before an arbitral tribunal and a domestic court unless there are justifiable reasons for doing so. My previous answer rejected a blanket position on this because my concern was that a 'fork in the road' clause that applied to a host State may require it to forego a financial remedy to perform a public function or vice versa. However, beyond the instances of different remedies or confidentiality that I identified in my previous post, I can't think of any other instances that would apply. Consequently, a host State's ability to claim in both fora would be limited, but I would be reluctant to limit these circumstances in case there are other reasons that do not amount to an abuse of process.

If I have understood your second question correctly, I think that you are referring to a subsequent tribunal accepting facts established by a prior tribunal. I think that there are practical benefits to transferring factual findings between tribunals because facts do not need

to be re-established and there is likely to be increased consistency between the decisions as a result. However, I am also thinking about its impact on the disputing parties. Factual *res judicata* can work both ways (i.e. from domestic decisions that lead to investment arbitration and from investment arbitration to domestic courts). I think that one of the reasons why foreign investors may wish to avoid domestic courts in the first instance is that findings at the domestic level have been relied upon in investment arbitration. Consequently, foreign investors may not want to risk a finding against them at a domestic level that could impair their claims in investment arbitration. When the situation is reversed, I wonder if host States may adopt a similar logic to foreign investors. That is, they would not raise a counterclaim in investment arbitration in case the factual findings go against them. Hence, factual *res judicata* could impact the disputing parties' choice of the initial forum.

From a legal perspective, I agree that defences are subject to the same standard of proof. The necessity defence is a clear example of a high threshold, which I recognise is invoked infrequently given the legal developments since the Argentina cases in the early 2000s. My thinking was also along the lines that host States seem to struggle to establish defences in investment arbitration claims. My perception is that they frequently lack sufficient evidence or support for their defence (I don't have any empirical evidence to support this claim so please correct me if I am wrong). Based on my perception, it appears that States struggle to convince an arbitral tribunal that they should not be held legally responsible and therefore, regularly fall short of the required threshold. It may be that the threshold is not necessarily higher, but that States do not have the evidence (or maybe the resources) to easily establish a defence.

Mark Kantor, TDM Editor-in-Chief – Success Rate of States in ISDS proceedings

Thank you for answering the follow-up questions.

You wrote:

... host States seem to struggle to establish defences in investment arbitration claims. My perception is that they frequently lack sufficient evidence or support for their defence (I don't have any empirical evidence to support this claim so please correct me if I am wrong). Based on my perception, it appears that States struggle to convince an arbitral tribunal that they should not be held legally responsible and therefore, regularly fall short of the required threshold. It may be that the threshold is not necessarily higher, but that States do not have the evidence (or maybe the resources) to easily establish a defence.

The study on *inter alia* ISDS outcomes I find most reliable is the 2021 work by Matthew Hodgson and BIICL which found that, for published awards with costs decisions through mid-2020, States succeeded in 54% of cases, whether on jurisdiction or merits, while investors succeeded on 44% - figure 34 in www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf

For ICSID awards, ICSID's latest annual report says that host States have succeeded on 51% of final ICSID arbitrations cumulatively while investors have succeeded in part or in full on 49% - figure 18 in icsid.worldbank.org/news-and-events/comunicados/icsid-releases-caseload-statistics-2024-fiscal-year.

Whichever number you prefer, States seem to hold their own in ISDS final awards.

Mark Kantor, TDM Editor-in-Chief – Success Rate of States in ISDS proceedings

I decided to play with generative text AI regarding ISDS outcomes. This is what Anthropic's "Claude" reported.

I can provide some statistics on ISDS outcomes up to April 2023, based on the data available at that time. Here's a summary of the key statistics:

According to UNCTAD's Investment Dispute Settlement Navigator, which tracks ISDS cases globally, as of early 2023:

1. Overall outcomes:

- *Approximately 37% of cases were decided in favor of the State*
- *Around 29% of cases were decided in favor of the investor*
- *About 21% of cases were settled*
- *The remaining cases were either discontinued or had other outcomes*

2. Breakdown of concluded cases:

- *Out of 722 concluded cases (where the outcome was known):*
- *270 (37.4%) were decided in favor of the State*
- *212 (29.4%) were decided in favor of the investor*
- *155 (21.5%) were settled*
- *85 (11.8%) were discontinued or had other outcomes*

3. Cases decided on the merits:

- *Of the cases that reached a decision on the merits:*
- *About 55% were decided in favor of the investor*
- *About 45% were decided in favor of the State*

4. Jurisdictional decisions:

- *In cases where tribunals made decisions on jurisdiction:*
- *About 73% of decisions affirmed jurisdiction*
- *About 27% of decisions denied jurisdiction*

5. Regional variations:

- Success rates for States varied by region, with some regions seeing higher rates of State victories than others

It's important to note that these statistics can be interpreted in different ways, and the outcomes of ISDS cases are often more nuanced than simple "wins" or "losses". Many cases involve partial awards or complex decisions that don't clearly favor one side entirely.

Also, keep in mind that a significant number of cases are settled or discontinued, which affects the overall statistics. Settlements, in particular, can be seen as a mixed outcome, as they often involve some concessions from both parties.

I hope this is useful.

Dr Guntrip: In which case I stand corrected! Thanks very much for providing me with these sources. Having had a very quick look at them, I am interested in the methodologies that have been used to determine what amounts to success. I think that my perception has probably been skewed by the fact that my research most commonly looks at international human rights law in investment arbitration. State defences that rely on human rights tend not to be very successful.

Iskren Radoslavov, Young-OGEMID Rapporteur for Europe – Standardized Interpretative Guidelines for Tribunals; Institutional Guidance

I found your discussion in Chapter 6 particularly interesting, where you address the challenges that arise at the merits stage of investment arbitration, especially in relation to the inconsistent interpretation of obligations drawn from areas beyond international investment law. In this context, you propose that, where possible, tribunals should seek the guidance of experts when interpreting such obligations. However, recognizing the practical limitations of relying on experts in every case, I wanted to ask for your thoughts on potential alternative instruments/mechanisms that could stimulate more consistent and uniform interpretation across arbitral tribunals.

- 1. Do you see a role for the development of standardized interpretative guidelines or frameworks for investment tribunals, especially when they are confronted with complex obligations sourced from non-investment legal regimes?**
- 2. Additionally, considering the ad hoc nature of investment arbitration, do you think there is potential for greater institutional involvement, such as through investment treaty bodies or multilateral organizations, to provide authoritative interpretations or guidance on how tribunals should approach certain non-investment obligations? Could this institutional approach complement the use of experts while ensuring a higher degree of consistency?**

I would be very interested in your perspective on whether such instruments could help balance the need for flexibility in arbitral practice with the host State's need for a predictable and trusted dispute resolution system.

Dr Guntrip: I think that these are really interesting ideas to overcome the problem of inconsistent interpretations. Before I discuss, them, I want to emphasise that there is very limited arbitral practice where counterclaims have been addressed on the merits. As a result, I try not to identify any trends in the book, but instead highlight what I think might be the cause

of the problems in these awards. Therefore, it is difficult to extrapolate and say what might work in every instance.

In relation to your first suggestion, I think that for certain international legal regimes interpretative guidance already exists but it is found in the other regime. For example, international human rights law frequently sets out rights in the form treaty obligations but there is also guidance from treaty bodies that have clarified the scope of the rights based on how they have been applied. Consequently, guidance could be provided to investment tribunals on how to locate interpretative guidance in other legal regimes. I still have concerns that there are varied understandings of the scope of particular human rights that may be missed by non-experts in the field. Nonetheless, directing investment arbitrators to the relevant sources in an unfamiliar area of international law would be an improvement.

In relation to your second suggestion, I believe that greater institutional involvement may help. I think that introducing guidance within the international investment law framework would make references to law from other legal regimes a core part of investment arbitration. Thus, institutional involvement could create an expectation from within the investment arbitration framework that legal principles from other legal regimes should be interpreted broadly consistently. If this practice is combined with experts, interpretation of legal standards from beyond international investment law could become even more coherent.

Andrés Mazuera, Young-OGEMID Rapporteur for UK/Europe – International Law Tribunals' Advisory Opinions on Environmental Issues; States as Claimants

Congratulations on your book and for sharing your thoughts on this topic. In international environmental law, the current advisory opinions before the ICJ and the IACtHR (and the recent one issued by ITLOS) may clarify States' international responsibility for climate-related damages. As you have pointed out, States rarely raise counterclaims in ISDS. Do you see these advisory opinions triggering a more robust response from States in bringing counterclaims, especially regarding environmental-related issues?

Critics of ISDS have argued that the system is a one-way mechanism. In one of your previous answers, you said that counterclaims alone would not increase States' confidence in ISDS. You also argued that counterclaims have the added value of establishing foreign investor liability independently from the original claim. In this context, I would like to ask your thoughts on whether States should be allowed to bring direct claims against foreign investors under IIAs instead of waiting to be sued. Should ISDS "evolve" in this regard? Or should States be limited only to bringing counterclaims?

Dr Guntrip: International environmental law is becoming mainstreamed in international dispute resolution fora. I think that as States realise that their compliance with environmental obligations will be closely scrutinised that they may try to pass this responsibility onto foreign investors using counterclaims in investment arbitration. The main challenge to this approach is that foreign investors do not possess international legal personality. However, the District Court of the Hague in *Milieudefensie v Royal Dutch Shell* found that corporations are under a duty of care to reduce carbon dioxide emissions, in part, based on the UN Guiding Principles on

Business and Human Rights.¹⁰ So, if this trajectory continues, I don't see why counterclaims can't be used in this way.

I think that the original assumption that foreign investors are vulnerable to host State conduct does not always hold true. Foreign investors in many instances can exert power over host States. As a result, there is an argument that host States should be able to initiate originating claims against foreign investors. This would have to be an evolution from the current system. One of my conclusions from my book is that counterclaims could enhance the subjectivity of foreign investors in international law. If I am correct, the regular use of counterclaims may bring us closer to States being able to sue foreign investors on the international plane. Whether this would be a good thing depends on whether you accept that foreign investors hold more power than host States and should be challenged in this way. Whilst I point to several examples of foreign investors having more power than host States in the book, there are still plenty of instances where States possess more power and foreign investors need the protection afforded by the asymmetrical structure of investment arbitration. As a result, I don't think there is a clear cut answer on this yet (and I am not sure there would ever be an international consensus on this either).

Aayushi Singh, Young-OGEMID Rapporteur for Asia – Requirements for; Nexus between Originating Investor Claim and State Counterclaim

I am particularly interested in the barriers to implementation that you mention, especially regarding the need for tailored consent clauses. What specific institutional or political challenges do you think host States might face in adopting these approaches? How might they navigate these hurdles strategically?

Your analysis of the differing practices around establishing a nexus between originating claims and counterclaims also caught my attention. How do you envision harmonizing these various approaches across different arbitration frameworks? Are there specific arbitral tribunals that you believe have set precedents that could guide this process?

Dr Guntrip: There are many challenges that States are likely to face when trying to implement my proposed changes. Given that I suggest two main types of changes, I have focused on these broader categories.

1. Changes to IIAs - any change to an IIA will need to be agreed between the contracting States. Agreement may be hard to reach. Each State has its own economic interests and the power dynamics between States will vary considerably. As such, States may not be in a position to dictate the content of the clauses that it would ideally like to include. Some of these power differentials can be overcome by strong negotiation tactics, but politics will always play a role. When attempting to establish consent to counterclaims, my position is that most states are likely to accept foreign investors and may want to protect their position/challenge a foreign investor at some point in the future. This provides some motivation for States to agree to counterclaims.
2. Changes to litigation strategies - it is difficult to change how an arbitral tribunal approaches each element of a counterclaim using litigation strategies. My approach throughout the book is to revert to the policy that underpins each element and use

¹⁰ *Milieudefensie et al. v Royal Dutch Shell Plc*, Case No. C/09/571932 / HA ZA 19-379, 26 May 2021.

this as the foundation of any new legal argumentation. I refer to concepts like the good administration of justice and the legitimacy of investment arbitration to try and make convincing arguments. However, the success of these approaches depends on the receptiveness of the investment arbitrators. Therefore, it is important that host States appoint an arbitrator that will be open to new ideas (and potentially be able to influence the other members of the panel).

In relation to establishing a nexus, I focus not so much on the institutional frameworks, but on the wider concept of what amounts to a dispute and how defining a dispute can contribute to the good administration of justice. Arbitral practice tends to adopt a narrow definition of a dispute in terms similar to those established by the ICJ. The ICJ often requires competing causes of action or opposing legal views (i.e. discord over the parties legal positions). I focus on arbitral practice that also considers the wider context of the dispute to capture other forms of connection, such as factual connections. In this regard, I think that the *Urbaser* award (which found a factual connection between an investment claim and an international human rights law counterclaim on the basis that the claims related to the same investment) is a good example of how a connection might be established. By taking a wider approach, the tribunal still gave effect to the good administration of justice without requiring the opposing legal views to be sourced in the same legal regime. By going to more foundational concepts like these, I hope that my ideas will work in all institutional frameworks.

Wooseok Shin – Mitigation Against Host State Power to Regulate Domestic Law Foreign Investor Obligations

I am particularly interested in your arguments in Chapters 4 and 5. You noted that host states must ensure that arbitral tribunals have the power to apply laws that contain foreign investor obligations, including domestic law, with the caveat that reference to domestic law does encompass international legal obligations within the scope of investment arbitration.

When domestic laws are fully applicable to determine foreign investor obligations, host states may be in a superior position to impose obligations on foreign investors to the maximum extent. This may create an unfavorable environment for foreign investors when host states overregulate foreign investor obligations, which could reduce the influx of foreign investment, contrary to the purpose of the investment treaty agreement in facilitating and promoting investment flows between states. However, it would be at the state's discretion to balance the pros and cons of such an approach.

Here, I also think that if domestic laws are generally applicable to investment arbitration, there should be a certain expectation as to the source of applicable domestic law that could give rise to foreign investor liability, as you discussed in Chapter 5. Would there be any safeguards or buffers in place to limit the host state's potential conduct in expanding the potential sources of law determining the liability of foreign investors by exercising its legislative power to its fullest extent?

Dr Guntrip: Counterclaims in investment arbitration can be seen as a way of rebalancing the relationship between the foreign investor and the host State by conferring the host State with more power. However, in my opinion, there are factors that can mitigate against a host State having unlimited power. The first, as you indicate, is that if a host State wants to create an environment that attracts FDI, how they treat foreign investors is a significant factor. If host

States start to excessively regulate foreign investors then they are likely to be a less attractive destination for FDI. The second factor is that foreign investors are bound by host State law by virtue of operating within the host State's jurisdiction. The sources of law that can potentially bind a foreign investor (the applicable IIA, domestic legislation and investment contracts) should be examined as part of a foreign investor's due diligence prior to investing. Therefore, foreign investors should be aware of any foreign investor obligations, and if they find them too restrictive, they can choose not to invest. Finally, I think that if a host State legislates in a manner that is deemed to be excessive, a foreign investor can potentially rely on the concept of legitimate expectations to challenge the host State's conduct. I would be reluctant to go as far as placing specific limits on a host State's power (similar to a stabilisation clause in an investment contract) because host States will need to exercise their right to regulate during the term of the investment.

Professor S.I. Strong, Moderator – Final Day Questions

I don't know if any of you have ever watched the PBS series, 'Inside the Actors Studio,' but the longtime host, James Lipton, used to conclude the formal interview with a series of questions he said were based on those asked by French talk-show host Bernard Pivot. Pivot's questions were themselves based on a questionnaire developed by Marcel Proust. After some debate with colleagues, I decided not to ask the Lipton questions of our authors (lawyers being somewhat more reticent than actors), but have instead come up with our own list of questions that are in the same spirit. These questions are asked of all our interviewees.

Dr Guntrip: Thanks everyone for some really interesting conversations. I feel like this week has been a whirlwind tour of all things counterclaims. I hope it has provided you with some insights into my book (and how I view investment arbitration more generally).

I would also like to thank everyone involved in setting up and running this interview (in particular Stacie).

These questions take a slightly different turn so here goes:

1. What is your favourite word?

I am not sure that I have a favourite word, but I do like 'phenomenon'.

2. What is your least favourite word?

The word 'meeting' always fills me with a sense of dread. I also dislike 'rhythm' because I can never remember how to spell it.

3. Which fictional hero do you consider your own personal hero?

This may sound a bit strange but ... Paddington Bear! He comes from a different culture, has to fit into English life with a human family and faces daily struggles and misunderstandings. Despite all of the challenges he faces, he remains compassionate towards others.

4. Which historical figure do you identify most with?

Every major historical figure that comes to mind has some pretty terrible character traits... I'm not sure that I really want to identify with many of them! I do admire everyday people that stand by their principles in the face of adversity and I would like to think that I would do the same thing. I feel that people like Peter Norman (the Australian athlete who supported the Black Power salute on the medal podium for the 200m at the 1968 Mexico City Olympics) are a bit more relatable for people like me than many other historical figures.

5. What sound or noise do you love?

The sound of waves on a beach.

6. What sound or noise do you hate?

A dripping tap.

7. What profession other than your own would you like to attempt?

I am really interested how space and good design can make you feel so I would probably like to try being an architect.

8. What profession would you not like to do?

I get seasick quite easily so any profession that requires me to be on a boat.

9. What is your own personal motto?

Good enough will do. It means I waste less time on trying to make things perfect that really don't need to be.

10. What do you hope your colleagues will say about you when you retire?

That I managed to maintain a good work-life balance during my career.

Professor S.I. Strong, Moderator

Thank you, Dr. Guntrip, for your insights into your character as well as into investment arbitration! Good to know that someone else appreciates Paddington Bear - I always liked him a bit more than his famous bear counterpart, Winnie the Pooh (maybe it was the raincoat and wellies...).

This has been a fantastic interview and I hope you will all join me in thanking Dr. Guntrip for all his efforts in answering our very detailed questions. We'll have him remain on the listserv for a few more days in case any additional questions come up, but I'll call an official close to the event.

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