



## UvA-DARE (Digital Academic Repository)

### David R Aven v Costa Rica: The Confluence of Corporations, Public International Law and International Investment Law

Bose, D.

**DOI**

[10.1093/icsidreview/siaa010](https://doi.org/10.1093/icsidreview/siaa010)

**Publication date**

2020

**Document Version**

Final published version

**Published in**

ICSID Review

**License**

CC BY

[Link to publication](#)

**Citation for published version (APA):**

Bose, D. (2020). David R Aven v Costa Rica: <i>The Confluence of Corporations, Public International Law and International Investment Law</i>. Case note on: ICSID, 18/09/18, UNCT/15/3 (David R Aven v Costa Rica). *ICSID Review*, 35(1-2), 20-28.

**General rights**

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).


**Disclaimer/Complaints regulations**

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

*UvA-DARE is a service provided by the library of the University of Amsterdam (<https://dare.uva.nl>)*

## CASE COMMENT

# David R Aven v Costa Rica:<sup>1</sup> *The Confluence of Corporations, Public International Law and International Investment Law*

Debadatta Bose <sup>2</sup>

---

### I. INTRODUCTION

This case note concerns *David Aven v Costa Rica*, which develops the jurisprudence of *Urbaser v Argentina*.<sup>3</sup> Section I sets out the context, facts, claims, counterclaim and decision. In Section II, two legal issues from this case are highlighted: admissibility of counterclaims by way of investor obligations and investor environmental obligations. Section III reflects on the importance of key pronouncements in this case.

#### A. Aven in Context

It is not novel for a party appearing before an investor–State tribunal to raise arguments based on human rights issues.<sup>4</sup> *Aven* appears in a string of cases that mobilise human rights and environmental obligations of investors through counterclaims, as one particularly successful manifestation of environmental and human rights considerations in international investment law.

The Tribunal in *Burlington* was one of the first to rule on the merits of a counterclaim on an investor’s environmental obligations. However, the assumption of jurisdiction by the Tribunal was the result of an agreement between the contesting

<sup>1</sup> *David R Aven and Others v Republic of Costa Rica*, ICSID Case No UNCT/15/3, Award (18 September 2018) (Eduardo Siqueiros T, President; C Mark Baker; Pedro Nikken) (*Aven* case).

<sup>2</sup> Doctoral Researcher, Amsterdam Law School, University of Amsterdam.

<sup>3</sup> *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) (*Urbaser*).

<sup>4</sup> *Phoenix Action, Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009); *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Partially Dissenting Opinion of Philippe Sands (30 November 2017) paras 26–32; see also M Ng, ‘Can Human Rights Counterclaims Succeed in Investment Treaty’ (2018) *Transnational Dispute Management (TDM)* <<https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1726>> accessed 11 January 2020; Eric De Brabandere, ‘Human Rights and International Investment Law’ in Markus Krajewski and Rhea T Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar Publishing 2019); Kevin Crow and Lina Lorenzoni Escobar, ‘International Corporate Obligations, Human Rights, and the Urbaser Standard: Breaking New Ground’ (2018) 36 *Boston U Intl L J* 87; Vivian Kube and EU Petersmann, ‘Human Rights Law in International Investment Arbitration’ in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration*, vol 12 (Martinus Nijhoff 2018).

parties.<sup>5</sup> *Burlington* arose out of the alleged expropriation of oilfield operations. The Tribunal noted that it had discretion to invoke either international law or national law to establish investor obligations. However, it found that such obligations arose out of national law since the counterclaim was based on Ecuadorian tort law.<sup>6</sup> *Burlington* resulted in an award of compensation to Ecuador on the basis of the violation of environmental obligations under Ecuadorian law by the investor.<sup>7</sup>

*Burlington* was followed by *Urbaser*, which involved a counterclaim based on the human right to water. That case arose out of the alleged expropriation of water (and sewage) services. The Tribunal observed that international law could be invoked to establish investor obligations.<sup>8</sup> However, regarding the human right to water, the Tribunal found that international law supported only negative obligations for corporations not to destroy the enjoyment of rights.<sup>9</sup> Nonetheless, the Tribunal observed that obligations beyond this might be established (only) in domestic law and that such obligations could exist under the concession contract that formed part of domestic law.<sup>10</sup> That being said, the Tribunal noted that the primary obligation in international human rights law remains with the State. Hence, the counterclaim failed on its merits.<sup>11</sup> The Tribunal also noted that had the act concerned destroyed the enjoyment of human rights, the outcome might have been different. This is because a negative obligation not to destroy the enjoyment of rights would not require the invocation of domestic law, but rather find its basis in international law, binding States and private parties alike.<sup>12</sup>

*Aven* appears to expand on these observations by reaffirming counterclaims as a possible method of enforcing investor obligations on the environment and is the only case in which an international tribunal has been asked to enforce investor obligations concerning the environment under *international law*.

*Urbaser*, previously an outlier in investment law as the only case involving human rights claims against an investor, now stands as a *de facto* precedent in *Aven*. This restricts the reasoning of tribunals in future cases in which parties may invoke these two cases<sup>13</sup> as, despite the absence of a binding precedential value of awards, they are, more often than not, relied upon as a *de facto* horizontal precedent.<sup>14</sup> Even sceptics of *de facto* precedents in investment law concede that they exist to a certain extent.<sup>15</sup> Therefore, the importance of *Aven*, which follows *Urbaser* in most aspects, cannot be understated as a *de facto* precedent and, hence, an important tool for investment lawyers to progress towards the cause of reading specific investor obligations into international investment jurisprudence *sans* explicit mention in the treaty.

<sup>5</sup> *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Counterclaims (7 February 2017) paras 60–2 (*Burlington*).

<sup>6</sup> *ibid* para 74.

<sup>7</sup> *ibid* para 1075.

<sup>8</sup> *Urbaser* (n 3) para 1195.

<sup>9</sup> *ibid* para 1199.

<sup>10</sup> *ibid* para 1206.

<sup>11</sup> *ibid* para 1208.

<sup>12</sup> *ibid* para 1210.

<sup>13</sup> Zachary Douglas, 'Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?' (2010) 25(1) ICSID Rev—FILJ 104.

<sup>14</sup> *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Liability (14 December 2012) para 221; Eric de Brabandere, 'Arbitral Decisions As a Source of International Investment Law' in Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff 2012) 245.

<sup>15</sup> *ibid*.

### B. Facts

This case before the International Centre for Settlement of Investment Disputes (ICSID)-constituted Tribunal concerns a tourism project in Costa Rica in which the primary Claimant, David Aven,<sup>16</sup> made investments through the acquisition of certain Costa Rican Special Purpose Vehicles (SPVs).<sup>17</sup> This was done through the Dominican Republic–Central America–United States Free Trade Agreement (FTA).<sup>18</sup> These SPVs were thereafter awarded concession contracts by the municipality to carry out the establishment of certain hotels, clubs and residential buildings.<sup>19</sup> While Aven alleged that all required permits were granted by the authorities,<sup>20</sup> the dispute regarding the grant of the ‘Environmental Viability Permit’ assumes particular importance compared with the hindrances over other permits.<sup>21</sup>

The disputes arose when local residents complained about environmental impacts<sup>22</sup> on certain wetlands on the site.<sup>23</sup> This resulted in investigations and contradictory reports regarding the wetlands.<sup>24</sup> This fiasco ultimately culminated in many injunctions, judicial and administrative,<sup>25</sup> and criminal proceedings against Aven for violating Costa Rican environmental laws.<sup>26</sup>

### C. Claims and Counterclaim

The claims were then filed under Chapter X of the FTA, which relates to investment.<sup>27</sup> This was based primarily on allegations of discriminatory treatment towards Aven, violation of his right to fair and equitable treatment (FET), protected under the FTA, and indirect expropriation of his investment without compensation.<sup>28</sup>

Costa Rica argued that investment protection was secondary to the protection of the environment under the FTA, by which Chapter X should give way to Chapter XVII on environmental protection in the event of a conflict between the two.<sup>29</sup> Therefore, Costa Rica argued that its actions were in accordance with domestic and international laws on environmental protection.<sup>30</sup> It counterclaimed for reparations for environmental damage that Aven had caused, flowing from his breach of environmental law.<sup>31</sup>

### D. Decision and Reasons

The claim was disallowed, and it was held that Costa Rica’s actions were not in breach of the provisions of the FTA.<sup>32</sup> This dismissal was based on an elaborate

<sup>16</sup> *Aven* (n 1) paras 93–4.

<sup>17</sup> *ibid* paras 98 and 192.

<sup>18</sup> Dominican Republic–Central America–United States Free Trade Agreement 43 ILM. 514 (2004) (FTA).

<sup>19</sup> *Aven* (n 1) para 100.

<sup>20</sup> *ibid* para 6.

<sup>21</sup> *ibid* paras 150 and 181.

<sup>22</sup> *ibid* para 122.

<sup>23</sup> *ibid* para 121.

<sup>24</sup> *ibid* para 181.

<sup>25</sup> *ibid* paras 145, 150 and 161.

<sup>26</sup> *ibid* para 175.

<sup>27</sup> *ibid* para 5.

<sup>28</sup> *ibid* para 183.

<sup>29</sup> *ibid* paras 185, 389 and 392.

<sup>30</sup> *ibid* para 387.

<sup>31</sup> *ibid* para 185.

<sup>32</sup> *ibid* para 688.

analysis on the merits, which found that the Costa Rican authorities had acted fairly in Aven's case.

The counterclaim was also disallowed, but on procedural grounds, for the fact that it did not adhere to the same standards of substantiation as the claim.<sup>33</sup> This was because the counterclaim was not sufficiently precise as to the damages sought and did not follow any proper method of valuation for remedies,<sup>34</sup> as required under articles 20 and 21 of the United Nations Commission on International Trade Law (UNCITRAL) Rules of Procedure. Costa Rica had also failed to substantiate the facts supporting its counterclaim and instead referred to expert reports. The personal experience of one expert also formed the basis of a general quantification of damages sought in the relief.<sup>35</sup> It is pertinent to note that, unlike *Urbaser*, in which the counterclaim failed on its merits, the counterclaim in *Aven* suffered only a procedural failure.

The procedural and substantive issues in the counterclaim were intertwined in the sense that the finding of investor obligations gave rise to the jurisdiction on counterclaims (see Section II). However, the Tribunal found that the counterclaim was only sufficiently precise in the post-hearing briefs, the assertions in which the Claimant had no means of challenging.<sup>36</sup> Otherwise, the initial counterclaim submission only contained a general statement of violations of environmental law relying solely on expert reports.<sup>37</sup> Thus, while the Tribunal could exercise jurisdiction over the counterclaim, no decision on the merits could be given owing to the vagueness of the counterclaim.<sup>38</sup>

Notably, this was the first time that a counterclaim was held to be admissible under the FTA. No damages were awarded to either party.<sup>39</sup>

## II. LEGAL DEVELOPMENTS IN *AVEN*

### *A. Counterclaims Admissible through Investor Obligations*

Following the *Urbaser* jurisprudence, the Tribunal reaffirmed that investors 'cannot be immune from becoming subjects of international law'.<sup>40</sup> It further noted that investors as rights holders under international investment law must have corresponding obligations, especially regarding the protection of the environment.<sup>41</sup> Citing the *Barcelona Traction* case, the Tribunal concluded that such environmental obligations were *erga omnes* in nature.<sup>42</sup>

<sup>33</sup> *ibid* para 747.

<sup>34</sup> *ibid* para 745.

<sup>35</sup> *ibid*.

<sup>36</sup> *ibid* para 746.

<sup>37</sup> *ibid* para 745.

<sup>38</sup> *ibid* para 747.

<sup>39</sup> *ibid* §XIV.

<sup>40</sup> *ibid* para 738.

<sup>41</sup> *ibid* para 739.

<sup>42</sup> *ibid* para 738. Obligations *erga omnes* were invoked in this case to demonstrate that the protection of environment was not merely a bilateral issue of the investor and Costa Rica or even the signatories of the FTA, but was rather the concern of all States in the international community as a whole. So, while protection of the environment was an obligation under the FTA, it was not merely a treaty obligation: Jochen A Frowein, 'Obligations Erga Omnes', *Max Planck Encyclopedia of Public International Law* <<https://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e1400>> accessed 11 January 2020.

Under Chapter X section A of the FTA, investors have an obligation to comply with environmental measures undertaken by the host State.<sup>43</sup> In *Aven*, a breach of such an obligation has been held not to be immune from counterclaims even if a State cannot bring a direct claim for such a breach.<sup>44</sup> In that case, the Tribunal effectively decided that obligations of an investor can arise under the FTA itself, apart from the obligations that arise under the domestic laws of Costa Rica or the concession contract.<sup>45</sup>

The Tribunal in *Urbaser* stated that the positive obligations of the company arose only under domestic law, whereas international law primarily gave rise to negative investor obligations.<sup>46</sup> Under (general) international law, while States may have *positive* obligations towards furthering the enjoyment of human rights, corporations may not have this high threshold of being required to *take action* to fulfil their international legal obligations. Rather, they are subject to the lower threshold of being required *not* to interfere with the enjoyment of human rights. This view was reaffirmed in *Urbaser*.

The actions of the investor in *Aven*, however, have been held to constitute a parallel breach of both domestic and international law regardless of such a positive–negative distinction.<sup>47</sup> While the failure of the *Urbaser* Tribunal to assert that corporations have positive obligations for pressing social needs was a missed opportunity in international law,<sup>48</sup> the *Aven* Tribunal utilised this opportunity. It stated that the investors had breached ‘customary international law to respect the environment’.<sup>49</sup> Thereafter, it went on to analyse the alleged breach as a wrongful act under the law of international responsibility.<sup>50</sup>

Other investment tribunals have been reluctant to entertain counterclaims without any explicit legal basis in a bilateral investment treaty (BIT). Having no explicit mention in the FTA, the procedural foundation for the counterclaim in *Aven* was similar. The Tribunal, taking this into account, discussed *Urbaser* and *Burlington*, which were some of the few cases that admitted counterclaims without explicit mention in the BIT governing the dispute.<sup>51</sup> *Aven* was distinguished from *Burlington* since jurisdiction was not contested in *Burlington* and the parties had reached an unequivocal agreement regarding the admissibility of counterclaims.<sup>52</sup> In *Burlington*, reliance was also placed on article 46 of the ICSID Convention,<sup>53</sup> which explicitly allows counterclaims before an ICSID tribunal.<sup>54</sup> The *Aven* tribunal noted that the *Urbaser* Tribunal had also invoked articles 25 and 46 of the ICSID Convention to admit the counterclaim.<sup>55</sup> This was after an elaborate interpretation of the Spain–Argentina BIT and its applicable law, which, as per the Tribunal in *Urbaser*, included general international law and international human rights law.<sup>56</sup>

<sup>43</sup> *Aven* (n 1) para 734.

<sup>44</sup> *ibid* para 739.

<sup>45</sup> *ibid* para 734.

<sup>46</sup> *Urbaser* (n 3) paras 1209–10.

<sup>47</sup> *Aven* (n 1) para 734.

<sup>48</sup> Florian Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* (Stanford University Press 2009); Michael A Santoro, ‘Post-Westphalia and Its Discontents: Business, Globalization, and Human Rights in Political and Moral Perspective’ (2010) 20 *Business Ethics Q* 285.

<sup>49</sup> *Aven* (n 1) para 699.

<sup>50</sup> *ibid* para 701.

<sup>51</sup> *ibid* para 736.

<sup>52</sup> *ibid*.

<sup>53</sup> Convention on the settlement of investment disputes between States and nationals of other States (concluded 18 March 1965, entered into force 14 October 1966) 575 U.N.T.S. 159.

<sup>54</sup> *Aven* (n 1) para 736.

<sup>55</sup> *ibid* para 737.

<sup>56</sup> *ibid*. Spain–Argentina Bilateral Investment Treaty (opened for signature 3 October 1991, entered into force 28 September 1992), art. 7(1).

In *Aven*, ruling on the counterclaim was adjudged to be to the benefit of both parties, per the dissenting opinion in *Spyridon*,<sup>57</sup> which stated that counterclaims improve efficiency and certainty and therefore reduce costs to both parties.<sup>58</sup>

The Tribunal noted that counterclaims were neither expressly prohibited nor expressly allowed in the FTA.<sup>59</sup> However, the FTA uses the language ‘claimant’ and ‘respondent’ in Chapter X and makes no distinction on who can bring a claim before a tribunal. It is thus neutral as to whether a State or an investor is a claimant.<sup>60</sup> The Claimants argued that the FTA was conceived as giving investors the option to sue host States and that ‘respondent’ could mean nothing other than the host State.<sup>61</sup> The definitions of ‘claimant’ and ‘respondent’ in Chapter X also support this interpretation, as ‘claimant’ is defined as ‘an investor of a Party (...)’.<sup>62</sup>

The Tribunal, accepting the Claimants’ arguments that only States can be respondents, also stated that the FTA accepts the possibility of a counterclaim.<sup>63</sup> The *Urbaser* Tribunal, however, had noted, in the context of the Spain–Argentina BIT, that the possibility of host States being the claimant, in such treaties using such neutral language, cannot be ruled out.<sup>64</sup>

The FTA uses the term ‘counterclaims’ and prohibits certain types of counterclaims arising from insurance or guarantee contracts,<sup>65</sup> and Costa Rica argued that, *a contrario*, all other counterclaims must be admissible.<sup>66</sup> Nonetheless, the Tribunal based its jurisdiction on the principle that when investors are envisaged to have obligations under the FTA, they cannot be immune from claims by the States under the FTA to enforce those obligations.<sup>67</sup>

### *B. Environmental Obligations and Regulatory Space*

The Tribunal took a view similar to that in *Urbaser*, stating that, solely by virtue of the breach of obligations arising under domestic environmental law, an investor cannot be said to have breached its obligations under the FTA.<sup>68</sup> Also, while States were granted a wide ‘margin of appreciation’ in environmental matters, that *per se* did not mean that the FTA imposed positive obligations on investors as a result of that deference to States.<sup>69</sup> Nonetheless, the FTA was found to produce obligations on investors, with a special emphasis on environmental laws.<sup>70</sup>

It must be emphasised that although old BITs lacked any environmental obligations, these have since been in place in various BITs and model BITs in the form

<sup>57</sup> *ibid* para 741. The Tribunal had declined to exercise jurisdiction over counterclaims in *Spyridon*, but it sparked an elaborate analysis of the scope of the parties’ consent to arbitrate, along with thresholds and principles of admissibility of counterclaims under art 46 of the ICSID Convention. What was clear from *Spyridon* was that there is no settled answer in law to the question on whether State parties may bring counterclaims before an investment tribunal: Jean E Kalicki and Mallory B Silberman, ‘Case Comment: *Spyridon Roussalis v Romania*’ (2012) 27 ICSID Rev—FILJ 9.

<sup>58</sup> *Aven* (n 1) para 741.

<sup>59</sup> *ibid* para 691.

<sup>60</sup> *ibid* para 692.

<sup>61</sup> *ibid* para 729.

<sup>62</sup> FTA (n 18) art 10.28.

<sup>63</sup> *Aven* (n 1) para 731.

<sup>64</sup> *Urbaser* (n 3) para 1143.

<sup>65</sup> *Aven* (n 1) para 693.

<sup>66</sup> *ibid* para 728.

<sup>67</sup> *ibid* para 739.

<sup>68</sup> *ibid* para 743.

<sup>69</sup> *ibid*.

<sup>70</sup> *ibid* para 732.

of preambles,<sup>71</sup> specific clauses<sup>72</sup> or provisions on corporate social responsibility.<sup>73</sup> The FTA, however, had an entire Chapter XVII relating to the environment, in line with the US Model BIT of 2004 and 2012,<sup>74</sup> which was *prima facie* in conflict with Chapter X.<sup>75</sup> Article 10.11 was most important in this regard, and reads:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that *investment activity in its territory is undertaken in a manner sensitive to environmental concerns*.<sup>76</sup>

While the Claimants claimed that several actions by different authorities (judicial and administrative) were in violation of the FET requirement,<sup>77</sup> the Respondent maintained that Aven could still exercise full property rights in compliance with environmental laws.<sup>78</sup> Costa Rica claimed that the parties to the FTA intended that actions furthering environmental obligations under Chapter XVII were not to be subject to the same standard as other measures under Chapter X, because the regulatory space regarding environment had a special protection.<sup>79</sup>

This text of the treaty was interpreted by the Tribunal as meaning that the rights of investors are subsidiary to environmental concerns of the State.<sup>80</sup> This right, however, was held to have its limitations: that both adoption and enforcement of such laws relating to environmental concerns were to be done in a fair and non-discriminatory manner through due process of law.<sup>81</sup>

Thereafter, the Tribunal noted that Costa Rica was a party to conventions regarding the protection of wetlands and forests and had promulgated domestic laws to that effect.<sup>82</sup> *Erga omnes* obligations under the treaty concern general public international law as much as bilateral relations in the FTA. The Claimants did not challenge the

<sup>71</sup> This is used by the 2004 and 2012 US Model BITs, Australia-Chile Free Trade Agreement (opened for signature 30 July 2008, entered into force 6 March 2009) and North American Free Trade Agreement (concluded 17 December 1992, entered into force 1 January 1994) 32 I.L.M. 289; see Kathryn Gordon and Joachim Pohl, 'Environmental Concerns in International Investment Agreements: A Survey' OECD Working Papers on International Investment, 2011/01, OECD Publishing 12 <<http://dx.doi.org/10.1787/5kg9mq7scrjh-en>> accessed 31 March 2019.

<sup>72</sup> This is used in the Argentina-New Zealand Bilateral Investment Treaty (signed 27 August 1999), art. 5, in most Canadian BITs, eg Canada-Egypt Bilateral Investment Treaty (opened for signature 13 November 1996, entered into force 3 November 1997), art. 17, Canada-Armenia Bilateral Investment Treaty (opened for signature 8 May 1997, entered into force 29 March 1999), art. 17 and Canada-Thailand Bilateral Investment Treaty (opened for signature 17 January 1997, entered into force 24 September 1998), art. 17, Finland-Zambia Bilateral Investment Treaty (signed 7 September 2005), art. 14(2) etc. For a comprehensive list, see Gordon and Pohl (n 71) pp 14–22.

<sup>73</sup> This is used in the 2018 Netherlands Model BIT along with references to the OECD Guidelines for multinational enterprises (MNEs) and UN Guiding Principles on Business and Human Rights. It is also used in the Canada-Benin Bilateral Investment Agreement (opened for signature 9 January 2013, entered into force 12 May 2014), art. 16 and the Brazil-Mozambique Bilateral Investment Agreement (signed 30 March 2015), art. 10 and annex II.

<sup>74</sup> The 2004 and 2012 US Model BITs have a separate provision on 'Investment and the Environment' in their art 12, with almost the same language as that of the FTA in this case. This is also present in the United States of America-Georgia Bilateral Investment Treaty (opened for signature 7 March 1994, entered into force 10 August 1999), the United States of America-Trinidad and Tobago Bilateral Investment Treaty (opened for signature 26 September 1994, entered into force 26 December 1996); arts 11.04, 13–15. BITs with the Belgium-Luxembourg Economic Union contain provisions identical to the ones in the US Model BITs. See Herbert Smith Freehills, 'Inside Arbitration: David Aven v Costa Rica: Key takeaways for foreign investors to consider when resorting to investor-state arbitration in environmental disputes' <<https://www.herbertsmithfreehills.com/latest-thinking/inside-arbitration-david-aven-v-costa-rica-key-takeaways-for-foreign-investors-to>> accessed 31 March 2019.

<sup>75</sup> *Aven* (n 1) para 392.

<sup>76</sup> FTA (n 18) art 10.11 (emphasis supplied).

<sup>77</sup> *Aven* (n 1) paras 360–1.

<sup>78</sup> *ibid* para 386.

<sup>79</sup> *ibid* para 389.

<sup>80</sup> *ibid* para 412.

<sup>81</sup> *ibid* para 413.

<sup>82</sup> *ibid* para 439.



validity of the laws, but rather their application in a manner commensurate with investor protections under the FTA.<sup>83</sup>

Based on the available evidence, the Tribunal determined that both wetlands and forests were adversely impacted by the proposed project.<sup>84</sup> Costa Rica had a strong environmental protection regime, and there was a high probability that two or more agencies moved forward in parallel for the same cause of action.<sup>85</sup> It was noted by the Tribunal that, under Costa Rican law, the burden of proof lay on the applicants for the environmental permit (the Claimants) to disclose adverse impacts relating to their project.<sup>86</sup> Actions taken by the authorities were found to be conducted fairly.<sup>87</sup> The law operated in a fair and non-discriminatory manner following due process of law. It was therefore held that Costa Rica had not breached international law and none of the actions of the State were arbitrary.<sup>88</sup>

### III. WAY FORWARD FROM *AVEN*

#### *A. Corporations as Subjects of International Law*

*Aven*, following *Urbaser*, aligns international investment law with the position of corporations in (general) international law, namely that there is an increased interest in treating them as subjects.<sup>89</sup> However, the focus on subjectivity is misconstrued in the quest to impose obligations on corporations.<sup>90</sup> Viewed through an international investment law lens, the subjectivity of corporations is not much in dispute in cases in which corporations are rights holders.<sup>91</sup> However, obligations (and rights) can exist irrespective of whether corporations are subjects of international law.<sup>92</sup> Without going into a detailed determination of subjectivity, the *Aven* case is therefore able to establish investor obligations, nonetheless. This is also evident from business and human rights negotiations and instruments in which the subjectivity of corporations seldom dictates their capacity to bear obligations.<sup>93</sup>

<sup>83</sup> *ibid* para 415.

<sup>84</sup> *ibid* para 708.

<sup>85</sup> *ibid* para 440.

<sup>86</sup> *ibid* para 553.

<sup>87</sup> *ibid* para 636.

<sup>88</sup> *ibid* para 688.

<sup>89</sup> Lowe argues that corporations are *sui generis* entities in international law, not comparable to a State or to individuals while Alvarez says corporations are yet to become subjects of international law, but can nonetheless possess rights and responsibilities without any reference to the nature of their personality or subjectivity: Vaughan Lowe, 'Corporations as International Actors and International Law Makers' (2004) 14 *The Italian Yearbook of International Law Online* 23; Jose E Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9 *Santa Clara J Intl L* 1.

<sup>90</sup> Eric De Brabandere, 'Non-State Actors, State-Centrism and Human Rights Obligations' (2009) 22 *Leiden J Intl L* 191, 196.

<sup>91</sup> Patrick Dumberry and Erik Labelle-Eastaugh, 'Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration' in Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (1st edn, Routledge 2011) 364–5.

<sup>92</sup> Markos Karavias, 'Shared Responsibility and Multinational Enterprises' (2015) 62(1) *Neth Intl L Rev* 99, 102; Alvarez (n 89).

<sup>93</sup> UNHRC, 'Report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (9 January 2020) UN Doc A/HRC/43/55; UNHRC, 'Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (2 January 2019) UN Doc A/HRC/40/48.

### B. *Investors and the Environment*

*Aven* results in increased regulatory space regarding environmental protection, where investor protections are subsidiary to environmental considerations. This position serves as an important reminder of the balance between the duty of States under general public international law (environmental obligations in *Aven* and human rights in *Urbaser*) and the duty of States under international investment law. It is also an affirmation that responsibility for respecting human rights and protecting the environment is a joint responsibility of corporations and States, with the primary duty resting on the State, in line with the UN Guiding Principles on Business and Human Rights.<sup>94</sup> Even though the Tribunal draws this distinction from the FTA, rather than general public international law,<sup>95</sup> *Aven* implicitly converges international investment law with business and human rights law.

### C. *What Follows Aven?*

This case can be described as an ‘*Urbaser plus*’ case, which develops the key pronouncements of *Urbaser* further, albeit by a marginal amount. However, the significance of this case lies in the establishment of a trend that investors are not immune from counterclaims based on human rights or environmental concerns. Such is also the case for the question of investors as subjects of international law, which has been explicitly dealt with in both *Urbaser* and *Aven*. The emphasis is on the fact that the lack of explicit mention of investor obligations in a BIT/international investment agreement cannot be sufficient to conclude that investors are immune from international legal obligations. *Aven* is among a series of cases in which counterclaims against an investor were admitted as having a legal basis. The opening of doors for a counterclaim, rejected only on procedural grounds, sets a precedent that may invoke a slew of cases dealing with limits of investment vis-à-vis human rights. The Tribunal themselves concede that ‘this trend is likely to continue’.<sup>96</sup>

<sup>94</sup> UNHRC ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (21 March 2011) UN Doc A/HRC/17/31, endorsed in UNHRC ‘Human rights and transnational corporations and other business enterprises’ (6 July 2011) UN Doc A/HRC/RES/17/4. The first two pillars (out of three) of the UN Guiding Principles on Business and Human Rights emphasise the State duty to protect against human rights violations and the corporate responsibility to respect human rights, respectively.

<sup>95</sup> For a similar analysis to that in *Urbaser*, see Patrick Abel, ‘Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration: Fallacies and Potentials of the 2016 ICSID *Urbaser v. Argentina Award*’ (2018) 1 Brill Open Law 61, 83.

<sup>96</sup> *Aven* (n 1) para 697.