



Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

REFORM OPTION:

COUNTERCLAIMS

One identified concern about investor-state dispute settlement is its near complete asymmetry. Under nearly all existing treaties states have obligations and investors are granted protections. Thus, investors can initiate treaty-based claims against states, but states do not have treaty-based claims against investors. One proposed solution for addressing that is clarifying the rules around counterclaims to better address whether, when and under what circumstances states may or shall be permitted to raise them.

What is meant by “counterclaims”?

- Counterclaims are claims by the respondent against the claimant that arise out of the subject matter of the dispute.
- When a treaty does not include investor obligations, counterclaims are based in contract, domestic law, or other legal regime (e.g., international human rights).
 - **Note that if the treaty or dispute settlement mechanism precludes interpretation or application of domestic law, then this might impact the ability of states to bring counterclaims, as such claims may be based upon and require interpretation and application of that law.**
- If a treaty includes investor obligations, counterclaims can also be treaty-based.

What is the current role for counterclaims?

- The scope for counterclaims is uncertain, arguably narrow. Tribunals differ on precise interpretations of legal and/or factual nexus required to the initial claim.
 - E.g. ICSID Art 46: “...counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.”
 - E.g. UNCITRAL (1976) Art 19(3): “... the respondent may make a counter-claim arising out of the same contract...”
 - E.g. UNCITRAL (2010) Art 21(3): “...the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it...”
- Relevant factors:
 - Direct or indirect references to counterclaims in the treaty and/or rules
 - Scope of tribunal’s jurisdiction *ratione materiae* and applicable law provisions
 - Whether the state has standing to initiate arbitration proceedings/claims
 - Whether the investor has consented/will consent
 - Whether the investor claimant is the right defendant
 - Whether there is privity of contract, which would require that the party to the arbitration be the same legal entity that has a contract or domestic law right or obligation

Advantages to States of Counterclaims:

- Procedural efficiency – the two parties can address claims and counterclaims in one proceeding
- Enforceability – enforcement benefits from ICSID and New York Conventions (although comparative benefit potentially lessened by Hague Convention on Enforcement of Foreign Judgments in Civil and Commercial Matters)
- Asymmetry – the claimant now is also a “defendant” and asymmetry is lessened

Disadvantages for States and Related Policy Implications of Counterclaims:

- Domestic legal claims and domestic law will be interpreted and applied by ISDS arbitrators who do not have specialized knowledge of applicable law and policy. Domestic courts have specialized knowledge of domestic legal issues and may be better placed to apply domestic law (in particular laws surrounding environmental or social issues). (Note – this problem is not limited to issues of counterclaims).
- Under the current system, the state wouldn't be able to appeal rulings that are deemed to incorrectly interpret or apply facts or domestic law
- This may give tribunals the opportunity to pronounce on novel issues of first impression under domestic law, reducing that role for courts
- Actual costs of litigating the claim may be higher if it is arbitrated rather than litigated domestically
- Parties to the dispute would likely be different (e.g., the state entity (or citizens) entitled to bring the case under domestic law may be different from the state entity handling the ISDS case, potentially raising practical, legal and policy issues) (See *Paushok v. Mongolia*)
- Counterclaims (particularly environmental) may be highly interrelated with rights of non-parties to the treaty dispute (e.g. communities impacted by environmental damage), who cannot participate in ISDS proceedings, although may be available as witnesses. Care must be given to ensure that the outcome of the ISDS claim does not negatively impact the rights or obligations of these parties vis-à-vis the investor or the State.
- If a counterclaim forms part of a settlement agreement with the investor, how can governments ensure that the settlement is consistent with domestic law, including transparency requirements and the rights and interests of non-parties? What if a court later determines that the settlement agreement is not valid?

New Approaches:

- Some states are including treaty-based investor obligations (e.g. Morocco-Nigeria). Note that in many cases even treaty-based obligations will still be based in the domestic law of the host-state, meaning that arbitrators will still be interpreting and applying domestic law (e.g. obligations to comply with the law of the host state).
 - If countries seek to carve out domestic law from applicable law to be interpreted and applied by tribunals (e.g., the EU approach), what will this mean for the ability to bring counterclaims?
- Some states are requiring consent of the investor to counterclaims as a condition to State consent to jurisdiction to arbitrate.
 - Will consent of the investor also provide consent for relevant affiliates – e.g., will consent by a claimant intermediate firm also constitute consent by the investment in the host country that actually caused the harm, or the parent company that holds the assets?

Interaction with ISDS reform proposals:

- **Status quo (ISDS – do nothing):** Counterclaims will continue to be narrowly/inconsistently interpreted, with variation depending on relevant rules and treaties. States could include the ability to bring counterclaims in treaties themselves or in contractual provisions with investors.
- **ISDS with appellate mechanism:** Tribunals' differing interpretations on the required legal and factual nexus of when and under what circumstances counterclaims are permitted may become more consistent.
- **Reform ISDS:** Reforms to ISDS could include new provisions clarifying rules on counterclaims (e.g., specifying that consent to bring an ISDS claim constitutes consent to counterclaims).
- **Multilateral Investment Court (MIC):**
 - If a MIC is based on existing treaties, same result as in ISDS with an appellate mechanism – ie., approach on counterclaims may become more consistent over time, though there would likely remain different approaches due to different underlying treaties.
 - The instrument that creates the MIC could address when and under what circumstances parties to the MIC wish to permit counterclaims. It could also include provisions indicating that consent to bring a claim constitutes consent to (certain) counterclaims.
 - There is a question about what applicable law would be if the MIC is not permitted to interpret and apply domestic law
- **Eliminate ISDS (use, e.g., State-State):** To the extent states are resolving treaty claims on a state-state level, counterclaims would not arise because the investor would not be party to the dispute. Claims against investors would proceed per contract or domestic law provisions.