

Thirty Years of Counterclaims in Investor-State  
Disputes: A Study of ICSID, UNCITRAL and Iran-US  
Claims Tribunal Jurisprudence

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# Context

- 2,500 bilateral investment treaties and numerous multilateral agreements to facilitate foreign investment
- Nearly all investment treaties provide for arbitration to resolve disputes
- Private persons—either individuals or corporations—can submit a claim against a State without the intervention of their respective national governments.

# Key Legal Issues

- Nearly all arbitration rules provide for the right to assert counterclaims in investor-state disputes
- States rarely bring counterclaims because of their counsels' failure to advise them on this matter (Pierre Lalive)
- Many tribunals are reluctant to allow such counterclaims
- Investor consent to counterclaims
- Determination of investor obligations towards the host State

# Procedural Rules

- The Iran-U.S. Claims Tribunal (IUSCT)
- International Center for Settlement of Investment Disputes (ICSID) tribunals
- United Nations Commission on International Trade Law (UNCITRAL) tribunals

# Asymmetry

- Because investment treaties are primarily intended to encourage foreign investment
- They are silent on  
the rights of States vis-à-vis investors  
obligations of investors vis-à-vis States
- An apparent asymmetry between the rights of investors and the obligations of States

# Why Counterclaims

- Rejection of jurisdiction over counterclaims may direct the State to its domestic courts and if the judgment would be adverse to the investor, another bilateral investment treaty claim may follow (*Roussalis v. Romania*, dissenting opinion of Michael Reisman):
- Duplication of proceedings, inefficiency, and increased transaction costs
- Counterclaims make investor-state dispute resolution more efficient and less costly

# Interests of States

- International arbitration offers superior international enforcement prospects compared to domestic court judgments.
- The fairness argument by (*SGS v Pakistan*):

*It would be inequitable if, by reason of the invocation of ICSID jurisdiction, the [foreign investor] could on the one hand elevate its side of the dispute to international adjudication and, on the other, preclude the [host State] from pursuing its own claim for damages [ . . . ]*

# Investor Consent to Counterclaims

- An offer of jurisdiction only in relation to disputes arising out of State obligations -> tribunals are reluctant to extend their jurisdiction over counterclaims
- An offer of jurisdiction is broad or the parties subsequently alter the jurisdictional offer either explicitly or implicitly -> tribunals are more likely to allow counterclaims.



# Two clauses

- “Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under [the ECT].”  
(*AMTO v. Ukraine*)
- “[a]ll disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter.” (*Saluka v Czech Republic*)

# Purpose of Investment Treaties

- To moderate the exercise of sovereign power by host States, to protect investors and facilitate foreign investments
- Investment treaties are supposed to be interpreted in light of their object and purpose
- In the absence of any specific language providing for a possibility of counterclaims against foreign investors, allowing such counterclaims may seem problematic
- Consent remains a cornerstone of the system of international adjudication in general and investor-state arbitration in particular

# Investor Consent

- If the investor limited its acceptance of jurisdiction to claims based on the treaty, should only the treaty be the source of rights and obligations in a particular dispute?
- Investors are not parties to international treaties, and therefore, cannot consent to arbitration *in* such treaties
- Important to understand that the investment treaty itself is not the basis for the tribunal's jurisdiction

# Mechanism of Consent

- Investment treaty contains an offer to eligible investors to arbitrate any relevant investment disputes through international arbitration
- If the investor chooses to accept the offer, it usually does so by initiating arbitration proceedings, thereby perfecting the parties' agreement to arbitrate the investment dispute or in a separate agreement with the State to arbitrate a claim under the investment treaty.
- Such consent incorporates by reference a certain set of arbitration rules, and counterclaims are not mentioned

# Piercing the Corporate Veil

- Undercapitalized local subsidiary as claimant
- Counterclaims against it would be meaningless because it may have nearly no assets
- Piercing the corporate veil is nearly impossible because the parent company has not consented to arbitration in the arbitration agreement
- Subsequent difficulties with enforcement

# Where Do Investor Obligations Come From?

- Not from the express language of treaties because investors are not parties to them
- But out of applicable law, stipulated either in the investment treaty, arbitration agreement or determined by the investor-state tribunal
- Need to consider: contracts, domestic and international law as sources of investor obligations

# Counterclaims Arising Out of Contracts

- First, the contract should relate to an investment rather than being an ordinary contract for the supply of goods or services.
- Second, the contract should be with the State itself and not with a separate legal entity controlled by the State or a third party
- Third, the contract with the State should not have its own dispute resolution clause

# Domestic Law

- Investors are bound to follow domestic law – are disputes arising out of it fall within jurisdiction of investor-state tribunals?
- For example, counterclaims for allegedly unpaid taxes and social security contributions arise not out of the contracts that were the subject matter of the investor's claim, but out of the generally applicable domestic law (IUSCT)



# Saluka v Czech Republic

[I]t is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State's jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host State.

Legal disputes relating to the latter will fall under [the tribunal's jurisdiction]. Legal disputes concerning the former, in principle, are to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention.

# Domestic Law Obligations

- Counterclaims can be based on domestic law obligations of investors only if those same obligations were specifically mentioned in the relevant investment treaty or otherwise committed to by the parties
- Violation of purely domestic law obligations is usually insufficient for an investor-state tribunal to extend its jurisdiction over counterclaims

# Sources of Public International Law (Article 38(1), ICJ Statute)

- International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- International custom, as evidence of a general practice accepted as law;
- The general principles of law recognized by civilized nations;
- [. . .] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

# Relevance of International Law Sources

- Investors are not traditional subjects of international law and not parties to international treaties
- Treaties usually do not provide for specific investor obligations
- Customary international law develops as a result of interaction between States and is meant to create obligations for States, not private investors.
- Customary international law can affect interpretations of treaties and obligations of one State *vis-à-vis* another but does not directly create obligations of investors

# General Principles of Law

- Unlike international treaties or international customary law, general principles of law can provide for obligations of private parties
- These principles of law serve as an appropriate source of law to determine obligations of investors in investor-state arbitration
- Examples: unjust enrichment, general principles of contract law, *pacta sunt servanda*, estoppel, etc.

# Investor Obligations

- Absence of provisions setting out investor obligations in international treaties
- General principles of law appear to be an appropriate source of international law to determine such obligations
- The State may also assert counterclaims if the investor breached its obligations under the investment contract concluded with the State
- The State, however, cannot assert counterclaims in investor-state arbitration based on purely domestic law obligations of investors

# Read more

**Y. Kryvoi, ‘Counterclaims in Investor-State Disputes’**, Minnesota Journal of International Law, Volume 21, pp. 216-252 (2012), London School of Economics Legal Studies Working Paper No. 8/2011 (2011). [Download](#)