

Abstract

Host-State Counterclaims in Investment Arbitration: Holding Investors Accountable for Human Rights Violations

International investment arbitration has been long criticized for its structural bias against host states in favour of the defence of the interests of investors. The one-way character of this dispute settlement mechanism has been, however, recently challenged in the light of numerous cases in which arbitrators were confronted with counterclaims of host states, requesting damages for investors' illegal conduct.

To successfully assert counterclaims in arbitral proceedings, host states have to deal with a series of difficulties. The submission of a dispute to an arbitral tribunal first requires consent both on the part of an investor and a host state. Its scope is determined by the language of dispute settlement provisions in international investment agreements. While these instruments generally accept a wide range of investors' claims related to their investments, counterclaims of host states fall within the jurisdiction of tribunals only if the international investment agreements contain a dispute settlement clause with broad wording.

The second condition which concerns the admissibility of host states' counterclaims is their close connection with the primary claims advanced by investors. This requirement has been in various forms applied not only by national but also international courts or tribunals to ensure efficiency and procedural economy at the same time. While some investment tribunals heavily drew upon the case law related to contract-based disputes, this approach does not reflect the specific nature of treaty-based investment arbitration where investors and host states do not have to enter into any direct contractual relationship. For these reasons, the tribunals should adopt a modified test to find the requisite factual and legal connection between host states' counterclaims and investors' primary claims.

Finally, since international investment agreements themselves rarely provide for obligations of investors, host states must often refer to other sources, such as their domestic law or contracts concluded between an investor and a host state. In their analyses, arbitral tribunals frequently dismissed counterclaims due to their inability to apply these alternative sources of obligations for investors. While there are little doubts that broad dispute settlement provisions may provide tribunals with such competence, recent case law of investment tribunals has pointed out that some substantive provisions in international investment agreements may have the same effect.