Chapter 34

ICSID Treaty Counterclaims: Case Law and Treaty Evolution

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1 Introduction

Virtually all ICSID cases invoking a treaty as a basis of consent (314) have been initiated by investors.\(^1\) Less than 3% of those cases have involved counterclaims submitted by the disputing host State. Curiously, most of the ICSID treaty cases involving counterclaims have been decided within the last five years.\(^2\) Counterclaims are also gaining traction as a topic of interest for investment negotiators. Though references to counterclaims in international investment agreements (IIAs or investment treaties) are not new to treaties of North American and European countries, in recent years a small number of IIAs and model IIAs of countries in Africa, the Caribbean and Latin America have included comprehensive provisions on counterclaims. IIA negotiators are also considering incorporating language on counterclaims and obligations of investors in their treaties. These developments suggest that the system seems to be waking up to the issue of investment treaty counterclaims (or at least it appears to be more aware), even though the ICSID Convention (the Convention) has provided the possibility for counterclaims in Article 46 since it was first adopted almost half a century ago.

ICSID treaty cases involving counterclaims are distinct from ICSID contract cases. In treaty cases, the consent to international arbitration would

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2 Genin v. Estonia, ICSID Case No ARB/99/2, Award (25 June 2001); Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/3, Excerpts of Award (9 Feb. 2004); Desert Line v. Yemen, ICSID Case No. ARB/05/17 (6 Feb. 2008); Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (18 June 2010); Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, 7 December 2011; Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine, ICSID Case No. ARB/08/8, Excerpts of Award (1 Mar. 2012); Goetz v. Republic of Burundi [II], ICSID Case No. ARB/01/2, Award (21 June 2012) [French].
be reflected in a treaty and in the investor’s request for arbitration, not in a contract. Importantly, the obligations of an investor in a contract case should be recognized easily in the contract, whereas the challenge of a counterclaim in a treaty case and its effectiveness will depend on identifying the obligations binding the investor under the applicable investment treaty, which might reflect (as investment treaties typically do) obligations largely for the host State.

Future jurisprudential and investment treaty developments may shape the option of counterclaims in ICSID treaty cases for host States, which until now have not seen the first successful counterclaim in an ICSID treaty case. There may be voices of concern discouraging the practical use of counterclaims and any development that would render them operative because an increased use of counterclaims might create a disincentive to launching claims in the first place. Yet a considerable part of making counterclaims a viable alternative involves realizing that under a certain line of cases and existing investment arbitration instruments—including the Convention, the ICSID Rules of Arbitration (the Rules of Arbitration) and certain investment treaties—the tools for effective submission of counterclaims already exist. Those in favor of making counterclaims viable in investment treaty cases may perceive them as an option for creating a more balanced system—one where both the host State, and the investor, are accountable under the investment treaty and international law.

This chapter analyzes the ICSID case law on investment treaty counterclaims, exploring how tribunals have interpreted the requirements for submission of counterclaims under the Convention and the Rules of Arbitration. It also considers treaty and model investment treaty developments in an attempt to explore the evolution of investment arbitration case law and new treaties that could transform the system into one where counterclaims are practically possible. In addressing this question, this chapter first sets out the provisions of the Convention and the Rules of Arbitration and explains how a State can submit treaty counterclaims at ICSID. Second, it analyzes ICSID case law on counterclaims, with particular emphasis on recent awards and decisions involving investment treaty counterclaims that do not reflect a consistent line of cases. Third, it reviews language of existing investment treaties that include references to counterclaims and interprets them in light of certain lines of ICSID cases on counterclaims. Recognizing that international investment law is an evolving system, this chapter also explores the direction that case law and investment treaties could eventually take for counterclaims to be heard by tribunals and to be substantially effective in cases involving violations of obligations by the investor. It also analyzes investors’ violations of investment treaty