

A Host State Human Rights Counterclaim in Investment Arbitration

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Proposal

This proposal recommends the establishment of a host State human rights counterclaim (HSHR Counterclaim) in investment arbitration.¹ A host State would be able to invoke the HSHR Counterclaim (following the commencement of a foreign investor's claim) when the foreign investor has committed human rights violations within the scope of the investment project. The HSHR Counterclaim operates by relying on existing counterclaim procedures in investment arbitration in conjunction with newly created provisions in international investment agreements (IIAs) that generate binding human rights obligations for foreign investors. The foreign investor's human rights obligations in the IIA provide the legal foundation of the HSHR Counterclaim. Hence, the HSHR Counterclaim addresses the asymmetry of obligations in IIAs and increases the systemic consistency between international investment law (IIL) and international human rights law (IHRL). The HSHR Counterclaim only applies to investment disputes that proceed to investment arbitration. It is therefore intended to complement other mechanisms that support the fulfilment of Article 9 of the [UNGPs](#).

Foreign Investor Obligations

The HSHR Counterclaim establishes international responsibility for a foreign investor's human rights violation(s) by creating legally binding human rights obligations for foreign investors in IIAs (unlike Corporate Social Responsibility (CSR) initiatives). The creation of human rights provisions draws upon recent investment treaty drafting practice, as found in Article 15.1 of the [2012 Southern African Development Community Model BIT](#), Article 12 of the [March 2015 Indian Model BIT](#) (removed in the [December 2015 Indian Model BIT](#)), Article 7.1 of the [October 2018 Netherlands Model BIT](#) and Article 14 of the [Morocco-Nigeria BIT](#) (not yet in force). Each of these IIAs has used different drafting techniques to create human rights provisions. To establish the HSHR Counterclaim, the foreign investor's human rights obligations in the IIA need to possess specific attributes.

The obligations in the IIA form the legal basis of the HSHR Counterclaim. Thus, the HSHR Counterclaim requires that foreign investors owe human rights obligations to the host State. Reference can be made in the IIA to IHRL instruments and/or to host State domestic law human rights provisions implementing IHRL obligations. The source of the human rights obligations should be explicitly stated in the IIA.

The content of the human rights provisions in the IIA should be based on the findings of a human rights impact assessment (e.g. using [The Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements](#)), which can assist host States to identify what IHRL obligations are threatened by the IIA. The obligations required will vary from host State to host State.

¹ This proposal draws on the author's Doctoral Thesis, 'The "De-Fragmentation" of International Investment Law and International Human Rights Law: A Procedural Basis for a Host State Human Rights Defence in ICSID Arbitration' (available at <https://bura.brunel.ac.uk/bitstream/2438/13855/1/FulltextThesis.pdf>); E de Brabandere 'Human Rights Counterclaims in Investment Treaty Arbitration' Grotius Centre Working Paper Series No 2018/078-IEL 8 October 2018 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264167); JP Bohoslavsky and E Guntrip, 'Unanticipated Consequences: The Human Rights Implications of Bringing Sovereign Debt Disputes within Investment Treaty Arbitration' in L Sachs, L Johnson and J Coleman (eds.) *Yearbook of International Investment Law and Policy 2017* (forthcoming) and UNCTAD, UNCTAD's Reform Package for the International Investment Regime (available at http://investmentpolicyhub.unctad.org/Upload/UNCTADs%20Reform%20Package_web_09-03-2018.pdf).

To ensure that the legally binding obligations are widely accepted, the human rights provisions should be based on hard law, rather than soft law (see [Abel](#) section 4.3.2). Foreign investors may be required to comply with procedural or substantive obligations. Procedural obligations must specify clear methodologies. When substantive obligations are imposed on foreign investors, the scope of the obligation must be made clear. The provisions can address the pre-establishment, post-establishment and post-operation phases of the investment project (see UNCTAD's [Reform Package for the International Investment Regime](#) p. 61). Whilst foreign investors should respect human rights, isolating this attribute of the respect/protect/fulfil human rights framework is potentially problematic when creating and apportioning international responsibility (see [Guntrip](#) section 4). Therefore, the precise scope of the foreign investor's obligations should be made explicit.

A foreign investor's human rights obligations can be adopted in new IIAs. They could also be added to existing IIAs, should States be willing to use these with transition clauses. Any alterations to IIAs must be co-ordinated, taking into account survival clauses, to ensure that the temporal application of IIAs is clear (see UNCTAD's [Reform Package for the International Investment Regime](#) pp. 83-4).

The inclusion of human rights obligations in IIAs is likely to be resisted given that the aim of IIAs is to protect investment rather than generate human rights obligations for foreign investors. However, if sustainable investment is to occur, the elements that make it sustainable must be upheld. CSR has not proven to be sufficient in this regard, so a binding legal obligation is suggested.

Prerequisites

1. IIAs must expressly set out legally binding foreign investor obligations based on hard IHRL, the content of which is to be identified by host States conducting a human rights impact assessment.
2. The nature of the foreign investor's obligation must be made clear. For procedural obligations, the methodologies to be used must be made explicit. For substantive obligations, the extent of the foreign investor's duties should be specified in precise terms.
3. Human rights provisions should be introduced into new IIAs. If introduced into existing IIAs, transitional arrangements must be clearly spelt out to avoid ambiguity regarding the IIA's temporal scope of application.

Procedural Requirements

The HSHR Counterclaim relies on existing counterclaim procedures in investment arbitration. The HSHR Counterclaim draws upon Rule 40(1) [ICSID Arbitration Rules](#) (together with Article 46 [ICSID Convention](#)) and Article 21(3) [UNCITRAL Arbitration Rules](#) (as revised in 2010),² together with the findings of the *Urbaser v Argentina (Urbaser)* [award](#), which considered a host State counterclaim based on the right to water in accordance with the ICSID Arbitration Rules. To establish the HSHR Counterclaim, certain procedural requirements must be met.

Both the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules require party consent to bring counterclaims. Therefore, a host State's standing offer to arbitrate must enable the host State to commence the counterclaim. Host State consent should be given in terms that enable all types of disputes to be heard, or alternatively, that encompass all disputes that relate to an IIA that contains a foreign investor's human rights obligations (see Z Douglas, *The International Law of Investment Claims* (CUP 2009) p. 257).

Prior arbitral practice has required a legal connection between the originating claim and the counterclaim (e.g. *Saluka v Czech Republic*). The UNCITRAL Arbitration Rules (as revised in 2010) no longer require a contractual connection between a claim and a counterclaim (c.f. Article 19(3) [UNCITRAL Arbitration Rules](#) (1976)). Based on the ICSID Arbitration Rules, the tribunal in *Urbaser*

² This proposal focuses on these Arbitration Rules as they are the most commonly used in investment arbitration.

accepted that if the foreign investor's human rights violation is linked to the operation of the investment project that is the subject of the originating claim, the required connection is established (at [1151]). Therefore, a factual connection should be sufficient.

Both the UNCITRAL Arbitration Rules and the ICSID Arbitration Rules require the counterclaim to fall within the jurisdiction of the arbitral tribunal. In accordance with the UNCITRAL Arbitration Rules, jurisdiction is limited by the terms of party consent, the governing law and the IIA (see Caron and Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (OUP 2013) pp. 426-8). For ICSID arbitrations, there is also a requirement that the dispute must be within the jurisdiction of ICSID. This requires compliance with Article 25 [ICSID Convention](#), which only permits an investment tribunal to hear a 'legal dispute arising directly out of an investment'. The *Urbaser* tribunal did not consider IIL and IHRL to be mutually exclusive for the purposes of this provision (at [1154]).

For ICSID arbitrations, the HSHR Counterclaim relies on the interpretation of the ICSID Arbitration Rules set out in *Urbaser*. It remains a matter of arbitrator discretion as to whether this approach will be followed in future decisions. It is not possible to alter the ICSID Arbitration Rules governing counterclaims without altering the mirroring provision in the ICSID Convention. Therefore, amendments to this legal framework are not a feasible option. However, provisions can be included in IIAs that permit host States to commence counterclaims (see e.g. Article 28.9 of the [COMESA Agreement](#) (not yet in force)). The introduction of a counterclaims provision delimits the scope of arbitrator discretion and applies to both sets of arbitration rules.

Prerequisites

4. Host State standing offers to arbitrate must provide consent in terms that permit counterclaims.
5. Host States must ensure that the applicable law includes international law and the IIA. If host States rely on domestic laws sourced from IHRL, the applicable law should also include the host State's domestic law.
6. Host States must assert that the nexus between claims and counterclaims can be factual (rather than legal) and host State arguments to establish this point should focus on how the foreign investor's human rights violations are related to the investment project.
7. IIAs should contain express provisions permitting host States to commence counterclaims to resolve ambiguities in the arbitration rules. If not, for ICSID arbitrations, host States must argue that the *Urbaser* tribunal's interpretation of the ICSID Arbitration Rules and the ICSID Convention should be applied.

Implementation of the Counterclaim

The HSHR Counterclaim acts as a disincentive to foreign investors to violate human rights and as a means of redress for the host State should violations occur. The HSHR Counterclaim does not remove host State responsibility for human rights violations committed by the foreign investor because it does not operate as a defence in international law. Further, the HSHR Counterclaim is not a set-off as it is an independent claim, the value of which can exceed the originating claim (see Caron and Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (OUP 2013) p. 424), however, its practical effect is similar.

The HSHR Counterclaim is subject to arbitrator expertise in IHRL (which few arbitrators possess). Unorthodox and inconsistent interpretations of IHRL could be detrimental to the legitimacy of both regimes (see [Guntrip](#) and [Guntrip](#) section 3.2). Therefore, there must be co-ordination between investment tribunals and IHRL bodies to ensure consistent interpretations of human rights obligations.

Recommendation

8. Arbitrators should refer to a party approved panel of human rights experts that can provide guidance on how the applicable IHRL obligations have been interpreted within IHRL.