

# Countering ISDS Claims: Old Tensions and New Defences

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Investor-State dispute settlement (ISDS) is increasingly being shaped by forces that extend beyond the traditional paradigm of investment protection. Questions arising out of economic sanctions and geopolitical conflict, for instance, are becoming more central to investment treaty disputes, placing pressure on assumptions that have long underpinned the system. Against this backdrop, States are deploying a growing range of substantive and procedural tools to resist investor claims, raising broader questions about the future direction, coherence and legitimacy of ISDS.

These themes formed the focus of a recent roundtable hosted on 30 April 2026 by the [Investment Treaty Forum](#), Leuphana University of Lüneburg and Friedrich-Alexander University Erlangen-Nürnberg at the British Institute of International and Comparative Law, *Countering ISDS Claims: Old Tensions and New Defences*, on which this blog post reflects. The roundtable brought together leading academics and practitioners to examine how States are responding to investor-State claims in an increasingly complex geopolitical and legal environment.

The roundtable discussion featured contributions from Nicolas Angelet (Université Libre de Bruxelles), Yarik Kryvoi (British Institute of International and Comparative Law), Oonagh Sands (Fietta), Iris Sauvagnac (Hogan Lovells), Christian J. Tams (King's College London, Leuphana University and 11 King's Bench Walk) and Patricia Wiater (University of Erlangen-Nuremberg), who explored three interrelated developments that are reshaping the contours of ISDS: (i) the recent trend of invocation of essential security interest clauses, (ii) the expanding role of sanctions in investment disputes, and (iii) the strategic use of counter-claims by respondent States.

This post reflects the content and themes emerging from the roundtable discussions, and examines each of these strands in turn. It first considers the doctrinal and institutional challenges raised by essential security interest clauses, before turning to the increasingly complex interaction between sanctions regimes and investment arbitration. It then explores the growing prominence of counter-claims, particularly in the light of ongoing reform discussions within WG III. Across these areas, a common theme emerged during the discussions: the gradual reconfiguration of ISDS from a system primarily concerned with investor protection toward one in which questions of public interest, regulatory autonomy and systemic balance play a more central role.

## Essential security interest clauses

Essential security interest clauses (ESCs) occupy an increasingly prominent, yet conceptually unsettled position within international investment law. While they are available only in some international investment agreements, their growing invocation in ISDS, as well as in other regimes such as trade law, underscores their rising practical significance. At the same time, ESCs resist easy generalisation. Their drafting varies considerably across treaties, both in scope and discretion afforded to host States, requiring careful, treaty-specific interpretation, rather than reliance on a unified doctrinal approach.

For instance, Article 2102 of the [North American Free Trade Agreement](#) provides that nothing in the Agreement shall be construed to require a Party to disclose information contrary to its essential security interests, or to prevent it from taking "any actions that it considers necessary for the protection of its essential security interests", including measures relating to arms traffic, those taken "in time of war or other emergency in international relations", or actions pursuant to obligations under the United Nations (UN) Charter.

Similarly, Article 24(3) of the [Energy Charter Treaty](#) (ECT) states that the Treaty shall not preclude a Contracting Party from taking any measure "which it considers necessary for the protection of its essential security interests", including those relating to military supply or taken during armed conflict or other emergencies in international relations. Both provisions can be classified as "self-judging", given the words "it considers necessary".

By contrast, Article XI of the Argentina-US bilateral investment treaty - a provision that has been extensively litigated in the

investment arbitrations arising out of the Argentine financial crisis in the early 2000s - adopts a more concise and more objective formulation, providing that the Treaty shall not preclude the application of measures "necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests". These differences in drafting - particularly the presence or absence of phrases such as "it considers necessary" - illustrate why ESCs cannot be treated as a uniform category and why their interpretation remains highly context-dependent.

A key issue is thus whether ESCs are self-judging. Clauses containing language such as "measures it considers necessary" (see [Article 24\(3\) of the ECT](#) for instance) suggest a degree of deference to the State's own assessment of its security interests. However, arbitral practice indicates that even ostensibly self-judging clauses are not immune from review: tribunals have typically subjected such invocations to at least a good faith or reasonableness standard. Conversely, where such language is absent, tribunals may still afford a measure of deference, given the sensitive nature of security determinations and the State's familiarity with the interests concerned. This results in a spectrum of review, rather than a binary distinction.

Also, where ESCs are framed as carve-outs to the treaty's substantive obligations, they may be characterised as precluding jurisdiction *ratione materiae*. Yet, some tribunals have treated them functionally as merits defences raised by the respondent State, blurring the line between jurisdiction and merits. Ultimately, much will depend on the interpretation of the specific wording of the clause itself and its relationship with other parts of the treaty (such as the dispute resolution clause). Furthermore, arbitral tribunals have diverged on the consequences of States successfully invoking ESCs, blurring the line between primary and secondary rules.

Finally, ESCs raise institutional concerns about the role of arbitral tribunals. Determinations of what constitutes an "essential security interest" may involve sensitive political and economic judgments. This feeds into broader debates about the legitimacy of ISDS, including whether tribunals should be tasked with adjudicating matters so closely tied to national security. As cases continue to develop, ESCs are likely to remain a key site of doctrinal evolution and contestation within international investment law.

## **The impact of sanctions on arbitration**

Sanctions are emerging as one of the most consequential developments in ISDS. Traditionally, sanctions targeted relatively isolated economies, limiting their interaction with international investment law. However, the shift toward large-scale sanctions against economically integrated States - most notably in the context of the Russia-Ukraine conflict - has significantly increased their impact on the global economy, as well as relevance in ISDS.

Various sanctions regimes may apply concurrently in geopolitical crises. For instance, Russia's annexation of Crimea in 2014 and invasion of Ukraine in 2022 have given rise to sanctions in multiple legal orders, including [sanctions adopted by the EU](#), as well as individual States, such as the [United States](#). The growing use of sanctions raises difficult questions about the interaction between overlapping legal regimes. Investment obligations, sanctions legislation and general international law may pull in different directions, with no clear prescribed legal hierarchy (outside specific contexts such as obligations under the UN Charter). As a result, tribunals are increasingly confronted with situations in which compliance with one legal regime entails the breach of another.

In this context, it bears emphasis that, under general international law, States are not permitted to rely on domestic law - including national sanctions regimes - to justify non-compliance with international obligations. This creates tension where compliance with sanctions law results in interference with investor rights protected under investment treaties.

Recent developments and pending investment treaty cases illustrate how measures such as asset freezes - widely adopted in response to geopolitical crises - directly affect foreign investments, and may give rise to claims. From a doctrinal perspective, sanctions may be invoked by States as measures taken legitimately under the police powers doctrine in the context of claims based on expropriation and fair and equitable treatment clauses in investment treaties. States may also seek to raise circumstances precluding wrongfulness under the [Articles on Responsibility of States for Internationally Wrongful Acts](#) (such as countermeasures (Article 22) and necessity (Article 25)) to justify sanctions.

Sanctions-related investment arbitrations also present unresolved questions about arbitrability and the proper scope of arbitral powers. If tribunals are required to assess the legality of sanctions regimes or interpret complex regulatory frameworks, they may be drawn into issues traditionally reserved for domestic or regional courts. Where multiple legal orders are implicated, divergent approaches by domestic courts and arbitral tribunals may result in inconsistent findings, particularly at the award enforcement stage, contributing to broader patterns of fragmentation across the ISDS system.

Perhaps most significantly, sanctions-related investment arbitrations are reigniting debates as to the role of ISDS itself. Originally conceived as a mechanism to depoliticise investment disputes, ISDS increasingly appears to also function as a forum for

geopolitical contestation, with sanctions-related investment arbitrations illustrating this trend. As pending investment arbitrations develop in this space, their long-term impact on the coherence and legitimacy of the international investment law regime is yet to be determined.

## The strategic use of counter-claims in ISDS

Counter-claims in ISDS are progressively viewed as a mechanism to address long-standing asymmetries in the system, and their treatment is currently a notable topic within the [work of WG III](#). Traditionally, ISDS has been structured as a one-directional mechanism: investors bring claims against States, while States rely on domestic courts to pursue claims against investors. This division arguably creates both inefficiencies and risks of fragmentation.

If a host State brings a claim domestically, it may trigger parallel ISDS proceedings in which the investor challenges the handling of that claim, leading to duplication of analysis and potentially contradictory outcomes. Allowing counter-claims within ISDS offers a way to consolidate disputes into a single forum. Counter-claims are also viewed as a mechanism to mitigate structural asymmetries within ISDS, particularly given the relative ease with which investors may enforce arbitral awards internationally compared to States seeking to enforce domestic judgments against foreign investors.

However, the availability of counter-claims is not straightforward. It depends on several conditions, including the existence of consent, a sufficient connection to the investor's claim, and a valid legal basis. A key debate concerns whether the investor's consent to arbitration implicitly includes consent to counter-claims, or whether an affirmative consent, for instance, through express treaty language, is required to this effect.

It is in this context that the work of WG III becomes particularly significant. WG III is actively considering [reforms](#) that would facilitate the use of counter-claims, including the [formulation](#) of a [draft provision](#) covering counter-claims for inclusion in future investment treaties (or as treaty provisions in a protocol to a multilateral instrument on ISDS reform). The overall direction of travel in discussions within WG III points toward greater acceptance of counter-claims, reflecting a broader effort to recalibrate the balance of rights and obligations in ISDS. Notably, the most recent draft provisions represent meaningful progress on the consent requirement, while the substantive sources of investor obligations that could form the basis of counter-claims remain imprecisely defined.

At the same time, concerns remain that such provisions could become overly State-centric, especially given the limited room for compromise in ongoing negotiations within WG III. Some commentators therefore caution that poorly designed reforms may prove detrimental to the general process of ISDS compared to leaving the issue of counter-claims to investment treaty-specific negotiation.

Beyond procedural considerations, counter-claims may have broader normative implications. They could support the development of investor obligations in areas such as environmental protection or human rights, aligning ISDS with developments in other regimes. In this context, some participants suggested that, rather than expanding ISDS beyond its proper scope, this development may be understood as embedding investment protection within a broader framework of investor obligations - one that does not displace the jurisdictional boundaries of arbitral tribunals, but recognises that investment activity does not occur in isolation from other legal regimes.

## Conclusion

A number of overarching themes emerge from the roundtable discussions. Across ESCs, sanctions and counter-claims, ISDS appears to be undergoing a gradual, but notable transformation. What were once viewed as exceptional or peripheral defences are increasingly becoming central features of arbitral practice, exposing persistent tensions between investor protection and regulatory autonomy, coherence and fragmentation, and depoliticisation and geopolitical conflict.

In particular, the growing reliance on sanctions and security-based arguments suggests that ISDS can no longer be understood in isolation from broader public international law concerns. Tribunals are increasingly required to navigate overlapping legal regimes and politically sensitive subject matter, raising questions not only about doctrinal consistency, but also about institutional competence.

Against this backdrop, debates within WG III concerning counter-claims take on added significance. Efforts to facilitate counter-claims reflect broader attempts to rebalance rights and obligations within ISDS, while also prompting broader discussion regarding the future direction and scope of the system.

Ultimately, the discussions at the roundtable illustrated a system in flux, increasingly shaped by pressures extending beyond the

original design of ISDS and requiring tribunals, States and investors to operate within a more complex legal and geopolitical landscape.

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