

## 投資人與地主國仲裁程序中的地主國反訴與投資人義務—— 以 *Urbaser* 案為中心

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### 摘要

地主國在 *Urbaser* 案中提起反訴，主張投資人未進行充分投資，違反保障當地居民用水權的國際法義務。本案係向國際投資爭端解決中心提交仲裁，依《解決國家與他國國民間投資爭端公約》第 46 條，反訴的程序要件包括：(1) 投資人與地主國是否達成反訴合意；(2) 反訴是否與本訴爭議標的有直接關聯。針對第 1 點，仲裁庭認為，系爭雙邊投保協定未將爭端限於地主國條約義務之違反，且任一方當事人均得提起仲裁，是以地主國的仲裁要約包括反訴，而投資人提交仲裁時未明示排除地主國反訴，故雙方達成反訴之仲裁合意；對於第 2 點，仲裁庭則認定，反訴與本訴均源自同一特許契約下的投資，構成事實上連結而滿足關聯性要求。實體方面，仲裁庭認為系爭投保協定容許援引外部法源作為當事人權利義務準據法，從而依聯合國 1948 年《世界人權宣言》與 1966 年《經濟、社會與文化人權國際公約》推論出投資人負有「不得妨害個人用水權」的國際法義務，惟此義務屬於消極不作為義務，而投資人未進行充分投資，屬於特許契約下作為義務之違反，故判定投資人未違反保障用水權的國際法義務。本案反訴雖在實體上敗訴，但仲裁庭放寬反訴程序要件認定標準，破除「投資人與地主國仲裁具有不對稱性」的誤解，地主國是否有權提起仲裁或反訴，應視個別投保協定具體規範而定。我國近年締結經貿協定，如台日投保協議、台紐經濟合作協定以及台星經濟夥伴協定，其投資人與地主國爭端解決條款均採限縮規範而排除地主國反訴。未來談判新約時，似可以 *Urbaser* 案為借鏡，考慮納入地主國提交仲裁或反訴之權利。

關鍵詞：反訴、用水權、國際投資爭端解決中心、雙邊投保協定、投資人與地主國仲裁

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## Abstract

The host state filed counterclaim in the *Urbaser* case, alleging that the investor, due to its insufficient investment, had violated the obligation to uphold people's right to water under international law. As the case was submitted to the ICSID, Article 46 of the ICSID Convention applied and requires the counterclaim to satisfy: (1) both parties' mutual consent to the counterclaim; and (2) direct connection between the original claim and the counterclaim. The tribunal considered that the BIT in question did not limit dispute to violation of treaty obligations by the host state; it also allows either party to submit dispute to arbitration. Accordingly, the host state's offer to arbitrate contains counterclaim, and the investor did not preclude host state's counterclaim when filing its own claims. As a result, the parties reached mutual consent as to the counterclaim. The tribunal also found both original claim and counterclaim to be based on the same investment under the same concession contract, such finding constituted a factual link which satisfied the connection requirement. The tribunal also considered legal sources external to the BIT to be applicable, and applied relevant provisions of the 1948 Universal Declaration on Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights to the merits. The investor was held capable to assume an international law obligation not to engage in acts hindering people's human right to water. Such obligation, however, is an obligation to abstain, but the investor's alleged insufficient investment involved an obligation to perform, so the tribunal found the investor not in breach of people's right to water. Although the host state's counterclaim failed, the *Urbaser* tribunal had nevertheless lowered the procedural requirement for counterclaim and corrected the misleading accusation of asymmetric nature of investor-state arbitration. Whether a host state is entitled to file counterclaim depends on the exact wordings of the dispute settlement provisions under specific BITs. Taiwan concluded several FTAs and BITs in recent years. These treaties do not allow the host state to file counterclaim. In the future the authorities might consider lessons from the *Urbaser* case and change their strategy of treaty negotiation.

Key words: counterclaim, right to water, International Centre for Settlement of Investment Disputes, bilateral investment treaty, Investor-state arbitration