THE TRANSFORMATIVE CHARACTERISTICS OF BENEFICIARY STATE CONFUTATIONS IN INVESTOR-STATE ARBITRATION WITH PARTICULAR INNUENDO TO THE INDIAN SCENARIO

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ABSTRACT

The purpose of this paper is to explain the legal problem that exists in the context of host state counterclaims in investment arbitration. The complexity of the system of investor-state arbitration is shown by the host state's counterclaims against the investor. State governments do not automatically have the authority to launch counterclaims against investors in investment arbitration, in contrast to commercial arbitration. It is the goal of this article to provide a complete examination of the law governing host state counterclaims in the context of the Investor-State Dispute Settlement system. The report emphasises the need of allowing counterclaims by the host state. As part of this process, it will critically examine the conditions for admission of host state counterclaims, which include the requirements for consent, connectivity, arbitration rules, and procedural requirements, as well as efforts to integrate these requirements. In addition, this study examines a number of International Investment Agreements and highlights the disparate methods taken by different countries to host state counterclaims in investment arbitration. Following that, it outlines the Indian approach to counterclaims in the context of investment treaty practise. The Draft India Model Bilateral Investment Treaty of 2015 and the India Model Bilateral Investment Treaty of 2016 will be particularly scrutinised as part of this process. Following that, the presentation will explore recent arbitral rulings dealing with counterclaims, as well as their interpretation of the dispute resolution clauses of the underlying International Investment Agreements. At the end of the paper, the author offers a model clause that corresponds to Article 28(9) of the Common Market for Eastern and Southern Africa Investment Agreement and Article 14.11 of the Draft India Model Contract.

INTRODUCTION:

In general, it is agreed that investor-state arbitration suffers from a lack of proportionality.[1] Dispute resolution under International Investment Agreements permits investors to seek restitution when the host country fails to meet its commitments to them.[2] On the other side, it guarantees that the host country complies with its responsibilities and decreases the political risk associated with foreign investment in the country. Nonetheless, there is some doubt surrounding the rights of the host state, which is a significant concern. In general, host countries do not have any rights in relation to investors under International Investment Agreements,[3] which prevents them from seeking redress via the Investor-State Dispute Settlement system. As a consequence, when investors file arbitral procedures against a state, the state resorts to filing counterclaims against the investor.

The host state raises a counterclaim against the investor's claim, which is supported by the investor. It is not the exercise of a right of defence, but rather the exercise of a right to file a lawsuit.[4] In the case of counterclaims under International Investment Agreements, however, there are two major obstacles that must be overcome before they may be brought forward. Due to two factors: first, obligations of the host state towards the investor under the International Investment Agreements are unilateral; second, the investor does not participate in the International Investment Agreements because he is not a contracting party to the International Investment Agreements.[5] As a result, bringing counterclaims, much alone a principal claim, is not possible for a host state.[6] In the end, when it comes to investor-state arbitration, governments are essentially compromising on their rights. Due to the importance of counterclaims in investment treaty arbitration, the author has attempted to advocate a move away from the current paradigm of host state counterclaims in investment treaty arbitration.

ESSENTIAL TO LICENSE BENEFICIARY STATE CONFUTATIONS:

[1] Andrea Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17 LEWIS & CLARK L. REV. 461 (2013).
[2] Charles N. Brower and Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 477 (2009).
[3] Yaraslau Kryvoi, *Counterclaims in Investor-State Arbitration*, 21 MINN. J. INT'L L. 216, 218 (2012).
[4] DAFINA ATANASOVA, CARLOS ADRIAN MARTINEZ BENOIT AND JOSEF OSTŘANSKÝ, COUNTERCLAIMS IN INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) UNDER INTERNATIONAL INVESTMENT AGREEMENTS (IIAS) (The Graduate Institute Centre for Trade and Economic Integration 2012).
[5] James Crawford, *Treaty and Contract in Investment Arbitration*, 24 ARB. INT'L 351, 364 (2008).
[6] Mehmet Toral and Thomas Schultz, *The State, A Perpetual Respondent in Investment Arbitration?* Some Unorthodox Considerations, in THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 577, 579 (Michael Waibel et al. eds., Kluwer Law International 2010).

Due to the fact that most International Investment Agreements place duties exclusively on nations, rather than on investors, investors[7] are not held liable for careless or malicious conduct, resulting in a condition of disequilibrium in the market. Despite the fact that the process in investor-state arbitration is often one-sided, the imbalance may be alleviated by allowing counterclaims submitted by the host countries.[8] This is one of the most significant advantages of allowing host state counterclaims in investor-state arbitration, and it should not be overlooked.

Counterclaims would also improve the efficiency[9] and economy[10] of the Investor-State Dispute Settlement process if they were allowed to be brought. When all facets of a dispute are evaluated by a single tribunal, the system will be more consistent and definite in its results.[11] The resolution of counterclaims by multiple tribunals (such as local courts) simply results in duplication and inefficiency, which is in direct opposition to the goals of international investment law and international investment treaties.[12] Additionally, since arbitral decisions are more easily enforced than judgements of domestic courts, the likelihood of governments actually securing awards against investors will grow as a result of this.[13]

While trade and investment have their advantages, they may also have major negative externalities, such as interference with cultural and indigenous rights, environmental damage, and misallocation of natural resources, among other things.[14] For states to hold investors accountable for violations of such negative externalities is typically a challenging proposition to achieve. A favourable counterclaim-friendly legal system, especially in light of the growing danger to the environment and human rights, may have a considerable deterring impact for investors.

South Africa expressed its concerns about Investor-State Dispute Settlement at sessions of the United Nations Commission on International Trade Law's Working Group on States Concerns about Investor-State Dispute Settlement.

It may actually contribute to some of the concerns that we've raised, such as the possibility of discouraging frivolous claims, and it may also have an impact on third-party funding decisions, as funders would be required to consider the likelihood of

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[7] JESWALD W. SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT: NATIONAL, CONTRACTUAL, AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL 383–4 (Oxford University Press 2013); Jason Webb Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States?,* 52 VA. J. INT'L L. 723, 742 (2012).
[8] Bjorklund, *supra note 1*, at 463-4.
[9] *Id.* at 475.
[10] Kryvoi, *supra note 3*, at 221.
[11] Hegel Elizabeth Kjos, *Counterclaims by Host States in Investment Dispute Arbitration "Without Privity",* in THE NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW (Philippe Kahn et al. eds., Brill 2007).
[12] *Spyridon Roussalis v. Romania,* ICSID Case No. ARB/06/1, Declaration of W. Michael Reisman (Nov. 28, 2011).
[13] Bjorklund, *supra note 1*, at 476.
[14] Jeffrey Waincymer, *Investor-State Arbitration: Finding the Elusive Balance between Investor Protection and State Police Powers*, 17 INT'L TRADE & BUS. L. REV. 261, 261 (2014).

affirmative liability in addition to the likelihood of success on the merits in the case against the opposing party when determining whether to provide funding.[15]

There are a variety of advantages to accepting counterclaims. This eventually adds to the strengthening of the Investor-State Dispute Settlement System.

NECESSITY FOR THE ACKNOWLEDGEMENT OF BENEFICIARY STATE CONFUTATIONS:

Even though a counterclaim is not specifically stated in the Bilateral Investment Treaty, it is permissible under the law.[16] It has been established by the Amto decision[17] that there are two basic elements that must be met in order for counterclaims to be admissible. It is necessary for two things to happen; first, the parties must have agreed to the tribunal's jurisdiction over the counterclaims; and second, there must be a relationship between the major claim and the counterclaim. Apart from that, additional conditions, such as arbitration rules and procedural requirements, such as restricted locus standi regulations, may also apply to determine whether or not counterclaims are admissible in court.

ASSENT:

The International Court of Justice recognized in the Corfu Channel[18] decision that permission is essential to the exercise of jurisdiction by a tribunal under international law. As a result, a tribunal cannot decide on an issue unless both parties agree that the tribunal has jurisdiction over the case. In the same way, in international arbitration, both parties must agree before arbitral procedures may be initiated.[19] Investor-state arbitration, on the other hand, differs significantly from commercial arbitration in that it is far more complicated.

It is the nature of international investment agreements to be triangular in shape.[20] Governments participate in such agreements as contractual parties, with the beneficiary of such arrangements being a third party, in this case an investor. States impose duties

[15] Anthea Roberts and Zeineb Bouraoui, UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims, BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (June 6, 2018), https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/.

[16] HARNESSING FOREIGN INVESTMENT TO PROMOTE ENVIRONMENTAL PROTECTION: INCENTIVES AND SAFEGUARDS 427 (Pierre-Marie Dupuy and Jorge E. Vinuales eds., Cambridge University Press 2013).

[17] Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005, Final Award, ¶118 (Mar. 26, 2008) [hereinafter Amto].

[18] Michael Waibel, Corfu Channel Case, in 2 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 792, 795, ¶21 (Wolfrum Rüdiger ed., Oxford University Press 2010).

[19] ANDREA M. STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION (Oxford University Press 2012).

[20] Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56(2) HARV. INT'L L. J. 353 (2015).

on one another as a result of engaging into International Investment Agreements. As a result, the investor gains legal rights. As a result, if the state fails to fulfil its duties, the investor may bring an arbitration action against the state.[21] The necessity of permission must be considered in this situation.

In investor-state arbitration[22], it has been well established in a number of arbitral judgments[23] that the extent of consent is determined by the wording of the International Investment Agreements. In accordance with the Investor-State Dispute Settlement Mechanism, the state's consent remains permanently present on its end of the bargain. The state, via the dispute resolution clause of the International Investment Agreements, expresses its willingness to submit to arbitration at the time of entering into the respective International Investment Agreements. The acceptance of the state's offer under the International Investment Agreements dispute resolution clause, on the other hand, is an expression of agreement on the part of the investor.[24] States have on occasion brought an arbitration action against an investor based on a contract,[25] but they have failed to do so under investment treaties in most cases.[26] This is due to two factors: first, there are no rights established in favor of the state under International Investment Agreements; and second, the investor has not given his or her approval to the agreement's terms. It is impossible for a state to claim a violation of rights that do not exist under the International Investment Agreements, even if an investor gives his or her agreement. Therefore, it is only when an investor seeks redress that a formal arbitration action between the investor and the state is formally launched.

States have resorted to filing counterclaims against investors in recent years, due to their incapacity to initiate arbitration proceedings against the investor.[27] There must be an ongoing disagreement between the investor and the host state in order for a counterclaim to be valid. Due to the lack of a claim made by the investor, the state is unable to pursue an equivalent counterclaim against the investor. It is the choice of the investor whether or not to bring a claim that determines the state's power to pursue a counterclaim. So, the permission requirement continues to be unbalanced in its structure.

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[21] *Id.* at 354.

[22] Atanasova et al., *supra note 4*, at 13.

[23] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Decision on Jurisdiction over Id. at 354.the Czech Republic's Counterclaim, ¶39 (May 7, 2004); Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UCITRAL, Award on Jurisdiction and Liability, ¶689 (Apr. 28, 2011); Spyridon Roussalis, ICSID Case No. ARB/06/1, Award, ¶865-9 (Dec. 7, 2011); Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶353-4 (June 18, 2010).

[24] Abhimanyu George Jain, *Consent to counterclaims in Investor-State Arbitration: A Post-Roussalis Analysis*, 16(5) INT. A.L.R. 135, 140 (2013).

[25] Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited, ICSID Case No. ARB/98/8, Award (July 12, 2001).

[26] Gustavo Laborde, *The Case for Host State Claims in Investment Arbitration*, 1(1) J.I.D.S. 97, 102 (2010).

[27] Ana Vohryzek-Griest, *State Counterclaims in Investor–State Disputes: A History of 30 Years of Failure*, 15 INT. LAW: REV. COLOMB. DERECHO INT. 83, 86 (2009).

AFFINITY AND COMPATIBILITY:

Recognizing the requirement of a counterclaim in connection with the primary claim dates back to the Chorzow Factory decision.[28] The requirement that a counterclaim be related to the subject matter of the original claim is therefore imposed by every legal system across the world.[29] Generally speaking, the connection test in investor-state arbitration has two components; a factual connection component and a subject-matter component (legal connection component).

When it came to counterclaims in Urbaser, the tribunal determined that a mere factual relationship was sufficient for it to exercise jurisdiction.[30] For a factual link to exist, the claim and the counterclaim must both be part of the same factual complex, and the respondent must depend on similar facts in order to contradict the claimant's accusations and establish counterclaims against the claimant, as determined by the test described above.[31]

Moreover, in Saluka, in addition to the factual linkage test, a new legal symmetry test, which stipulates that the primary claim and counterclaim must both come from the same legal source, was proposed for the purpose of satisfying the "connection" criterion.[32] Paushok later confirmed the need of the aforementioned condition.[33] While important, the legal link criterion is an exceptionally demanding threshold that has been severely criticised for its strictness.[34] Furthermore, it has been noticed in recent years that arbitral tribunals are adopting a less stringent view to the necessity for a link to be made.[35]

As previously noted, International Investment Agreements are triangular in form and often bestow rights entirely on the investors that enter into the agreement. Host governments are not granted any rights under International Investment Agreements, but rather are subject to responsibilities placed on them by the agreements in question. Therefore, the Bilateral Investment Treaty cannot be the basis of a counterclaim since no responsibilities are placed on the investor under the Bilateral Investment Treaty.[36]

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[28] The Factory at Chorzow (Claim for Indemnity) (Ger. v. Pol.), Merits Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 38 (Sept. 13).
[29] Dafina Atanasova et al., *The Legal Framework for Counterclaims in Investment Treaty Arbitration*, 31(3) J. INT'L. ARB. 357, 379 (2014).
[30] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶1151 (Dec. 8, 2016) [hereinafter Urbaser].
[31] Armed Activities on the Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶267 (Dec. 19).
[32] Saluka, ¶76
[33] Paushok, ¶693.
[34] ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 260 (Cambridge University Press 2009).
[35] Urbaser, ¶1151.
[36] Kelsey Brooke Farmer, *The Best Defence is a Good Offense - State Counterclaims in Investment Treaty Arbitration* 42 (2016) (unpublished LLM Research Paper, Victoria University of Wellington) (on file with authors).

Some argue that such a strict linkage criterion renders the admission of any counterclaim very hard to achieve in the first place.[37] As a result, the tribunals should refrain from using a rigid interpretation of the legal symmetry test.

RULES OF ARBITRATION:

The arbitration regulations that apply when an investor and a host state decide to go to arbitration must be followed by both parties. The International Centre for Settlement of Investment Disputes Convention[38] and its supporting arbitral rules, as well as the Arbitration Rules of the United Nations Commission on International Trade Law,[39] are the most often used by investors to resolve disputes. Consequently, the arbitration's procedural rules[40] may be a source of authority for a tribunal when it comes to hearing counterclaims. In general, these rules can be divided into two categories; one, those that specify specific criteria for the admission of counterclaims, such as the International Centre for Settlement of Investment Disputes Convention; and two, those that do not specify any specific criteria for the admission of counterclaims, such as the Arbitration Rules adopted by the Stockholm Chamber of Commerce.

In accordance with Article 46[41] of the Convention on the Settlement of Investment Disputes, "counterclaims arising directly out of the subject-matter of the dispute are permitted, provided that they fall within the scope of the parties consent and are otherwise subject to the jurisdiction of the center". Counterclaims were also permitted under Article II of the Algiers Agreement, which supervised the Iran-United States Claims Tribunal, if they stemmed from the 'same contract, transaction, or incident that comprises the subject matter of that national's claim'.[42]

The Arbitration Rules of the United Nations Commission on International Trade Law are less stringent than those of the International Centre for Settlement of Investment Disputes Convention, which is more restrictive. According to Article 21(3) of the Arbitration Rules of the United Nations Commission on International Trade Law, 'the respondent may bring a counterclaim provided that the arbitral tribunal has jurisdiction over it'.[43] The 2010 Rules marked a departure from the 1976 Rules[44] of the United

[37] Pierre Lalive and Laura Halonen, On the Availability of Counterclaims in Investment Treaty Arbitration, in 2 CZECH YEARBOOK OF INTERNATIONAL LAW 2011: RIGHTS OF THE HOST STATES WITHIN THE SYSTEM OF INTERNATIONAL INVESTMENT PROTECTION 143 (Alexander J. Belohlável and Nadežda Rozehnalová eds., Juris Publishing Inc. 2011).
[38] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.
[39] G.A. Res. 65/22, UNCITRAL Arbitration Rules as revised in 2010 (Jan. 10, 2011).
[40] Bjorklund, *supra note 1*, at 471.
[41] ICSID Convention, art. 46.
[42] Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, U.S.- Iran, art. II, Jan. 19, 1981.
[43] UNCITRAL Arbitration Rules 2010, art. 21(3).
[44] G.A. Res. 31/98, Arbitration Rules of the United Nations Commission on International Trade Law (Dec. 15, 1976).

Nations Commission on International Trade Law, which required that the counterclaim arise from the same contract as the original claim.[45] The current guidelines allow the tribunal to assert jurisdiction over counterclaims while taking into account the specific facts and circumstances of each case.[46]

In contrast to the International Centre for Settlement of Investment Disputes or the Iran-United States Claims Tribunal, there are no prerequisites to be met in order for counterclaims to be made under the Stockholm Chamber of Commerce's Arbitration Rules.[47] According to the Arbitration Rules of the Stockholm Chamber of Commerce, the Answer to a Request for Arbitration must contain a preliminary description of any counterclaims or set-offs that may be asserted.[48] In cases when the dispute resolution clause is sufficiently wide to include counterclaims within its scope, the Arbitration Rules of the Stockholm Chamber of Commerce allow for the admission of counterclaims.

It might be claimed that the Arbitration Rules of the Stockholm Chamber of Commerce and the International Chamber of Commerce are general for commercial arbitrations since they allow both parties to file issues to the arbitration tribunal. This argument, on the other hand, is unworthy of consideration since arbitration rules only play a secondary role in the acceptance of host state counterclaims. The International Investment Agreements dispute resolution provisions play a significant role in determining who has jurisdiction over counterclaims and who does not.[49] As a result, rather than the stringent requirements set forth in the International Centre for Settlement of Investment Disputes Convention, the admission of counterclaims should be made more convenient in a manner similar to the Arbitration Rules of the Stockholm Chamber of Commerce or the International Chamber of Commerce. As long as the International Investment Agreements allow for counterclaims and the Respondent state meets the requisite conditions under the International Investment Agreements, the Arbitration Rules should not impose any extra restrictions on the parties to the arbitration.

JURISDICTIONAL REQUISITE AND LOCUS STANDI RESTRICTION:

A large number of International Investment Agreements provide the investor limited locus standi in the event of a dispute that requires arbitration.[50] When assessing whether or whether a tribunal has jurisdiction over counterclaims, the restricted locus standi of the parties is taken into consideration. If the counterclaims are allowed to be brought

[45] UNCITRAL Arbitration Rules 1976, art. 19(3).
[46] Atanasova et al., *supra note 4*, at 10.
[47] ICC Rules of Arbitration 2012, art. 5(5).
[48] SCC Arbitration Rules 2017, art. 9(1)(iii).
[49] Amto, ¶117-8.
[50] Agreement between the Government of the State of Israel and the Government of the Republic of Uzbekistan for the Promotion and Reciprocal Protection of Investments, Isr.-Uzb., art. 8, July 7, 1994; Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, Can.-Venez., art. 12, July 1, 1996

under a wide *ratione materiae* rule, Professor Kjos believes that the Claimant's restricted locus standi cannot be used to prevent the counterclaims from being brought under the same provision.[51] This was the situation in Metal-Tech,[52] where the tribunal accepted counterclaims despite the fact that the plaintiff had a restricted locus standi and the defendant had a large *ratione materiae* provision. In Rusoro,[53] on the other hand, where the *rationae materiae* provision was not as wide, the counterclaims were found to be unfounded.

On top of restricted locus standi, several International Investment Agreements additionally have procedural conditions that must be met before the agreement may be implemented.[54] There are a variety of options available, including efforts at settlement, filing of a dispute to domestic courts, and the fulfilment of a cooling-off period before a dispute is filed to arbitration. However, it is impractical to expect the Respondent to comply with all of the aforementioned conditions. In Urbaser vs. Argentina,[55] the tribunal declared such a provision absurd, writing as; 'Claimants also assert that Respondent failed to comply with the preliminary steps for negotiation and submission to the jurisdiction of local courts as provided in Article X (i) and (ii) of the Bilateral Investment Treaty'. It is not necessary to describe the folly of the stance in all of its facets. What would be the justification for requesting Respondent to suggest and submit to a prior attempt for settlement, deferring the submission of any of its claims until after the six-month period had elapsed, if Claimants had chosen to submit to the International Centre for Settlement of Investment Disputes arbitration? What would have been the point of forcing submission of the Argentine Republic to local jurisdiction under Article X (ii) when the Claimants had failed to do so and had successfully argued before this Tribunal that this provision was not applicable in the first place. The Tribunal must determine how to interpret Claimant's complaint that Respondent had not submitted to the procedure provided for in Article X (i) and (ii) of the Bilateral Investment Treaty, thus forcing Claimants to wait an aggregate of two years before being permitted to commence arbitration, when in the same motion, Claimants criticize Respondent heavily for not having raised its claims immediately after Claimants submitted to arbitration.

Anti-counterclaim provisions that are too narrow in scope, combined with excessive procedural requirements for the Respondents, make it difficult to bring counterclaims forward. The author contend that these prerequisites should not be a barrier to the admission of counterclaims, and they support this position. In most cases, only the

[51] HEGEL ELIZABETH KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW 201 (Oxford University Press 2013).
[52] Metal-Tech Limited v. The Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, ¶410 (Oct. 4, 2013).
[53] Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award, ¶627 (Aug. 22, 2016)
[54] Canada-Venezuela BIT, art. 12; India Model BIT, art. 16.
[55] Urbaser, ¶1149.

investor has the authority to file claims against the company. It seems to be unjust to hold the threshold for counterclaims to the high standards that it already is.

BENEFICIAL STATE CONFUTATION IN INVESTMENT TREATY ARBITRATION: A COEVAL POINT OF VIEW:

The breadth of an investor's assent to counterclaims is determined by the wording used in the International Investment Agreements dispute resolution clause, which may be found here.[56] An examination of the different Bilateral Investment Treaty's and International Investment Agreements on the subject of counterclaims illustrates the diverse approaches taken by the various parties to the question of the possibility of asserting host state counterclaims in investor-state arbitration. In general, there are three main techniques to dealing with this problem.

For starters, only a few treaties specifically cover counterclaims. To provide an example, the Common Market for Eastern and Southern Africa stipulates that a Member State against whom an investor from the Common Market for Eastern and Southern Africa brings a claim under this Article may make a counterclaim as a defense, right of setoff or other similar claim that the if the claimant investor in the Common Market for Eastern and Southern Africa does not demonstrate that it has fulfilled its obligations under this Agreement, including the obligation to comply with all applicable domestic measures, or that it has taken all reasonable steps to mitigate possible damages, the claim will be dismissed.[57]

Specifically, according to Article 13 of the Common Market for Eastern and Southern Africa, each of its investors, as well as their investments, is required to comply with all applicable rules and regulations of the Member State in where their investment is made.[58] Article 1(11) define measures as any legal, administrative or judicial decision or policy decision made by a Member State that is directly related to and affects an investment in that Member State's territory after the Agreement has been effective.[59] Because of this, a counterclaim against a foreign investor for any claimed violation of the agreement's obligations is permitted under Common Market for Eastern and Southern Africa, allowing the host state to sue the foreign investor.

Another point to note is that although certain treaties do not directly provide for the inclusion of host state counterclaims, they do so in an inferred manner. In most cases, the wording of the dispute resolution clause in such treaties is sufficiently wide to include counterclaims within its reach, which is uncommon. For example, the tribunals are empowered to consider 'any disagreement between an investor of one Contracting

[56] ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 256 (Cambridge University Press 2009).
[57] Investment Agreement for the COMESA Common Investment Area, art. 28(9), May 23, 2007
[58] *Id.* art. 13.
[59] *Id.* art. 1(10).

Party and an investor of the other Contracting Party connected to the investment',[60] or simply 'any dispute',[61] brought before them. Other treaties specifically exclude a certain form of counterclaim,[62] leading to the conclusion that other types of counterclaims are admissible notwithstanding the fact that the specific type of counterclaim is excluded.[63]

Third, certain treaties do not allow for the acceptance of host state counterclaims, either tacitly or expressly, and as a result, some accords are unenforceable. A restricted wording clause in the offer to arbitrate under the dispute resolution provision of several International Investment Agreements is used to limit the tribunal's jurisdiction to only hearing matters relating to obligations of the Contracting Party under the International Investment Agreements.[64] A restrictive clause included in Article 9(1) of the Greece-Romania Bilateral Investment Treaty,[65] for example, was dealt with by the tribunal in Roussalis vs. Romania.[66] The restrictive provision confined the scope of the conflict to responsibilities of the host state. Because of this, the tribunal declined to consider counterclaims against the foreign investor before it.[67] Counterclaims against foreign investors are prohibited in such identically constructed treaties, as are counterclaims against domestic investors.

Counterclaims in investment arbitrations are often unsuccessful in the majority of cases.[68] Contrary to the references to counterclaims in different arbitration rules,[69] the substantive provisions of International Investment Agreements and the arbitration clauses in International Investment Agreements often do not provide any grounds for

[60] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic, Neth.-Czech, art. 8, Apr. 4, 1991.
[61] Agreement between the Government of New Zealand and the Government of the Republic of Chile the Promotion and Protection of Investment, N.Z.- Chile, art. 10, July 22, 1999.
[62] Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art. 24(7), Nov. 11, 2005.
[63] W Ben Hamida, *L'arbitrage Etat-investisseur cherche son équilibre perdu: Dans quelle mersure l'Etat peut introduire des demandes reconventionnelles contre l'investisseur privé?*, 7(4) INTERNATIONAL LAW FORUM DU DROIT INTERNATIONAL 261, 270 (2005); Helene Bubrowski, Balancing IIA Arbitration Through the Use of Counterclaims, in IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 212, 222 (Armand de Mestral and Céline Lévesque eds., Routledge 2013).
[64] Agreement between the Government of the Republic of France and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investments, Fr.-Mex., art. 9, Nov. 12, 1998.
[65] Agreement between the Government of Romania and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, Rom.-Greece, art. 9, May 23, 1997.
[66] *Roussalis*, ¶871-5.
[67] *Id*. ¶876.
[68] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, ¶378 (June 25, 2001); Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶358 (June 18, 2010); Roussalis, ¶876; See also Hege Elisabeth Veenstra-Kjos, Counterclaims by Host States in Investment Treaty Arbitration, 4(4) TDM JOURNAL 1 (2007); Pierre Lalive and Laura Halonen, On the Availability of Counterclaims in Investment Treaty Arbitration, in 2 CZECH YEARBOOK OF INTERNATIONAL LAW: RIGHTS OF THE HOST STATES WITHIN THE SYSTEM OF INTERNATIONAL INVESTMENT PROTECTION (Alexander J. Belohlável and Nadežda Rozehnalová eds., Juris Publishing Inc. 2011).
[69] ICSID Convention, art. 46; UNCITRAL Arbitration Rules 2010, art. 21(3); SCC Arbitration Rules 2017, art. 9(1)(iii).

host countries to pursue claims against investors.[70] As a result, it is necessary to establish an appropriate legal framework for the acceptance of host state counterclaims in investment treaty arbitration proceedings.

CONCERNING DISPUTES IN INVESTMENT TREATY PRACTICE, THE INDIAN PERSPECTIVE:

Since the early 1990s, India's policy to International Investment Agreements has been centered on the encouragement and protection of foreign investment.[71] However, since the White Industries decision,[72] India's stance on investment treaties has shifted significantly. According to the tribunal's findings in the aforementioned case, India's failure to provide 'effective means of asserting claims and enforcing rights' in relation to White Industries Australia Limited's investment, as required by Article 4(2)[73] of the Australia-India Bilateral Investment Treaty, constituted a breach of India's obligation to provide 'effective means of asserting claims and enforcing rights' in relation to White Industries Australia Limited's investment.[74]

Over the last several years, a number of foreign corporations have filed arbitration claims against the Indian government under various Bilateral Investment Treaties (BITs).[75] Following this response, India introduced a new Model Bilateral Investment Treaty,[76] which replaced the earlier 2003 Model BIT.[77] The new Indian Model BIT would serve as the basis for renegotiating existing BITs as well as for bargaining new ones and formulating interpretations for those already in force. Furthermore, India unilaterally cancelled 58 of its bilateral investment treaties (BITs), which included 22 nations from the European Union.[78]

Compared to the preceding 2003 Model BIT, the India Model BIT represents a major improvement. While the latter accorded precedence to the preservation of foreign investor rights and their investments in relation to the host state's regulatory authorities,

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[70] *Roussalis*, ¶864-72.
[71] Rashmi Banga, *Impact of Government Policies and Investment Agreements on FDI Inflows (Indian Council for Research on International Economic Relations*, Working Paper No. 116, 2003).
[72] White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award (Nov. 30, 2011)
[73] Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, Austl.- India, art. 4(2), Feb. 2, 1999.
[74] White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award (Nov. 30, 2011)
[75] Vodafone International Holdings BV v. Government of India [I], UNCITRAL, PCA Case No. 2016-35, Notice of Arbitration (Apr. 17, 2014); Cairn Energy PLC and Cairn UK Holdings Limited v. India, UNCITRAL, PCA Case No. 2016-7; Deutsche Telekom v. India, ICSID Additional Facility, Notice of Arbitration, (Sept. 2, 2013); Vedanta Resources PLC v. India, UNCITRAL, 2016; Nissan Motor v. India, UNCITRAL, 2017; Carissa Investments LLC v. India, UNCITRAL, 2017.
[76] India Model BIT.
[77] India Model Text of Bilateral Investment Promotion and Protection Agreement (2003), https://www.italaw.com/sites/default/files/archive/ita1026.pdf.
[78] DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, BILATERAL INVESTMENT TREATIES (2016), http://164.100.47.190/loksabhaquestions/annex/9/AU1290.pdf.

the former dilutes the safeguards traditionally afforded to international investors while providing enhanced protections to the host state.[79] It is clear from these reforms that the Indian government is attempting to achieve more balance between host-state authority and investment interests in the country.[80]

Counterclaims by the host state, on the other hand, are not permitted under the India Model BIT. Aspects of the Model BIT that are addressed in Chapter IV include the resolution of disputes between an investor and a contracting party. The tribunal's jurisdiction is confined to disputes arising out of an alleged violation of a duty by a State Party under Chapter II of the Treaty, other than an obligation originating under Articles 9 and 10 of this Treaty,[81] and is not extended to other matters. State Parties are bound by specific responsibilities under Chapter II of the Model BIT in respect to the safeguarding of their financial assets. For these reasons, neither officially nor implicitly, the Model BIT does not contemplate or allow for the inclusion of host state counterclaims.

Compared to the former stance adopted by India in the Draft India Model BIT,[82] which was presented in April 2015, this position is more favorable. When it comes to the dispute resolution clause in the Draft India Model BIT, it specifies that it will apply to a counterclaim made by a State Party against an investor or the investment in a dispute over an investment in the country.[83] Article 14.11 deals with counterclaims by State Parties and expressly provides that a State Party may bring a counterclaim against an Investor or Investment for a breach of the obligations set out in Articles 9, 10, 11 and 12 of Chapter III of this Treaty before a tribunal established under this Article and seek as a remedy appropriate declaratory relief, enforcement action, or monetary compensation from the tribunal established under this Article.[84]

Surprise of the year: the sections pertaining to counterclaims included within the draught Indian model bilateral investment treaty (BIT) have been fully removed from the updated version of the India model bilateral investment treaty. Chapter III of the India Model Bilateral Investment Treaty (BIT) establishes certain investor obligations in relation to compliance with laws, regulations, administrative guidelines, and policies of a State Party governing the establishment, acquisition, management, operation, and disposition of investments,[85] as well as compliance with corporate social

[79] NISHITH DESAI ASSOCIATES, BILATERAL INVESTMENT TREATY ARBITRATION AND INDIA: WITH SPECIAL FOCUS ON INDIA MODEL BIT, 2016 (2018), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_India-PRINT-2.pdf.

[80] Robert Volterra and Giorgio Francesco Mandelli, India and Brazil: Recent Steps Towards Host State Control in the Investment Treaty Dispute Resolution Paradigm, 6(1) I.J.A.L. 90, 90 (2017).

[81] India Model BIT, art. 13.2.

[82] Draft Model Text for the Indian Bilateral Investment Treaty (2015), https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf

[83] Draft India Model BIT, art. 14.2(i).

[84] Draft India Model BIT, art. 14.11.

[85] India Model BIT, art. 11.

responsibility[86] standards. However, due to the lack of a clause allowing for host state counterclaims, the inclusion of a restricted locus standi provision, and a restrictive description of the substantial scope of the dispute, the aforementioned investor responsibilities cannot be enforced in the event of a violation. As a result, the Model BIT imposes some duties on foreign investors while also creating certain rights in favor of the host state. When a party violates its obligations under the BIT, the host state does not have any recourse to enforce their rights. This stance runs counter to the fundamental concept of equity law, which states that there is no injustice unless there is a remedy.[87]

CONTEMPORARY JUDGMENTS ON CONFUTATIONS:

The decision on whether or not to arbitrate a dispute between an investor and a host state, as well as whether or not to consider counterclaims, is completely dependent on whether or not the investor agrees to do so. As a result, the scope of the International Investment Agreements dispute resolution clause is critical in defining what may and cannot be subjected to arbitration between the parties in the first place. The interpretation of dispute resolution clauses of numerous International Investment Agreements by arbitral courts in recent years is, thus, required. Following is a review of recent cases that have made significant contributions to the evolving jurisprudence of counterclaims in investor-state arbitration.

Metal-Tech v. Uzbekistan:

In this case, a dispute launched by an investor against a Contracting Party, according to the tribunal, did not fall within the purview of Article 8(1) of the Bilateral Investment Treaty.[88] Essentially, it covered any investment-related disagreement. The tribunal, on the other hand, determined that since it lacked jurisdiction over the fundamental claims (the claimant's investment did not meet the legality criterion under the Bilateral Investment Treaty), it lacked jurisdiction over the counterclaims, as well.

Rusoro Mining Ltd. v. Venezuela:

In this case, the tribunal ruled that it lacked jurisdiction over the counterclaims filed by the Republic of Venezuela, which were dismissed. When the tribunal was asked to

[86] India Model BIT, art. 12.

[87] Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Concurring and Dissenting Opinion of Gary Born, ¶32 (July 18, 2008); See also Ashby v. White, (1703) 92 Eng. Rep. 126.

[88] Article 8(1) of the Israel - Uzbekistan Bilateral Investment Treaty: Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

restate its stance, it said that Article XII (3) and (4) of the BIT provided the investor with only limited locus standi.[89]

Oxus Gold v. Uzbekistan:

In this case, the tribunal ruled that it lacked jurisdiction over the counterclaims filed by Uzbekistan and dismissed the case. According to the tribunal, the text of the BIT made it plain that only the investor may make claims against the host state's obligations and that the reverse was also true for the investor.[90]

Urbaser v. Argentina:

In this case, the tribunal determined that the BIT acknowledged the possibility of the Respondent bringing counterclaims against the BIT. BIT Article X (3), which provides that, in certain situations, a disagreement may be presented to an international arbitration tribunal "at the request of any party to the dispute," backed up the panel's conclusions.[91]

Inmaris Perestroika v. Ukraine:

In this case, the tribunal determined that Article 11 gave the tribunal jurisdiction over counterclaims since the dispute impacted the claimant's investment and the claimant had agreed to arbitration, and that the claimant had consented to arbitration. The counterclaims, on the other hand, were found to be without merit.[92]

Roussalis v. Romania:

In this case, it was determined by the tribunal that the tribunal's authority was restricted to claims made by investors relating to the responsibilities of the host state. As a result, counterclaims were not permitted.[93]

Perenco and Burlington Resources were two recent judgements that dealt with counterclaims and were significant in their respective fields. In any case, they are not covered in this table since the issue of jurisdiction was never raised in any of those rulings.

[89] Article XII (1) of the Canada - Venezuela BIT: Any dispute between one Contracting Party and an investor of the other Contracting Party relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement.

[90] Article 8(1) of United the Kingdom - Uzbekistan BIT: Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former be submitted to international arbitration if the national or company concerned so wishes.

[91] Article X (1) of the Argentina - Spain BIT: Disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute.

[92] Article 11 of the Germany - Ukraine BIT: Disputes regarding investments between one of the Contracting Parties and a national or a company of the other Contracting parties.

[93] Article 9 of the Greece - Romania BIT: Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former.

CONCLUSION:

Final thoughts: For the numerous reasons discussed in this article, it is claimed that host state counterclaims in investment treaty arbitration should be authorized. The United States should make every effort to explicitly include host state counterclaims in the scope of international investment treaties dispute resolution clauses, if at all possible. Article 28(9) of the Common Market for Eastern and Southern Africa serves as an excellent illustration. As previously stated in the paper, the requirements for acceptance of host state counterclaims must be understood in a broad sense in order to be effective. In this context, the author argues that the Draft India Model Bilateral Investment Treaty of 2015 achieves a balance between the interests of foreign investors and those of the host state by explicitly allowing host state counterclaims for breaches of the investor obligations imposed by the treaty on foreign investors. The absence of a clause allowing for counterclaims from the amended draught of the India Model Bilateral Investment Treaty is a source of disappointment for many.

Because of this, the author would like to suggest that an expressly permitting host state counterclaims in the context of investor state arbitration be included in a model clause (equivalent to Article 28(9) of the Common Market for Eastern and Southern Africa and Article 14.11 of the Draft India model Bilateral Investment Treaty).

Confutations by the parties include; if a claim is brought by an investor against a Party under this Article, that Party may assert a counterclaim against the investor for a breach of its obligations set out under [provisions dealing with obligations of investors, including the obligation to comply with the domestic legal framework of the host state concerning the investment] of this Treaty before a tribunal established under this Article and seek as a remedy suitable declaratory relief, enforcement action, or monetization from the investor.

It is intended that this paper would stimulate discussion among the many interested parties concerning the need of include counterclaims by the host state in International Investment Agreements in the first place.