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CHANGING CONTOURS OF HOST STATE COUNTERCLAIMS IN INVESTOR-STATE ARBITRATION: WITH SPECIAL REFERENCE TO THE INDIAN POSITION

Palada Dharma Teja & Shashwat Bhaskar[*]

Abstract

This paper seeks to expound the legal conundrum regarding host state counterclaims in investment arbitration. Host state counterclaims exemplify the complex nature of the system of investor-state arbitration. Unlike commercial arbitration, states do not have an automatic right to bring counterclaims against investors in investment arbitration. This paper attempts to make a comprehensive analysis of the law on host state counterclaims in investor-state dispute settlement ('ISDS') mechanism. The paper highlights the need to allow host state counterclaims. It shall critically analyse the requirements for admissibility of host state counterclaims, which include consent, connectedness, arbitration rules and procedural requirements and attempts to assimilate the same. Further, this paper analyses several international investment agreements ('IIAs') and underlines the divergent approaches to host state counterclaims in investment arbitration. Thereafter, it delineates the Indian approach to counterclaims in investment treaty practice. In doing so, it shall specifically analyse the Draft India Model and the India Model Bilateral Investment Treaties of 2015 and 2016 respectively. Thereafter, the paper shall examine the recent arbitral awards dealing with counterclaims and their interpretation of the dispute resolution provisions of the underlying IIAs. Finally, the authors propose a model clause corresponding to Article 28(9) of the Common Market for Eastern and Southern Africa Investment Agreement ('COMESA') and Article 14.11 of the Draft India Model

[*] The authors are students at the National University of Advanced Legal Studies (NUALS), Kochi.

Bilateral Investment Treaty expressly permitting host states counterclaims in investor-state arbitration. Thus, the paper seeks to suggest a shift from the existing paradigm of admissibility of host state counterclaims in investment arbitration.

I. Introduction

It is widely acknowledged that investor state arbitration suffers from a lack of balance.[1] Dispute settlement under IIAs allows investors to seek remedy for breach of obligations imposed upon the host state. On the other hand, it ensures that the host state abides by its obligations, and reduces political risk of foreign investment.[2] Nonetheless, a pertinent issue that arises is the uncertainty regarding the rights of the host state. In general, no rights are conferred upon host states vis-à-vis investors under IIAs,[3] preventing states from seeking a remedy under the ISDS mechanism. As a result, states make recourse to counterclaims when investors initiate arbitral proceedings against them.

By virtue of a counterclaim, the host state opposes the claim advanced by the investor. It is not an exercise of right of defence, but rather of a right to bring an action.[4] However, there are two fundamental impediments to advancement of counterclaims under IIAs. Firstly, obligations of the host state towards the investor under the IIA are unilateral; and secondly, the investor is

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1 *See* Andrea Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17 LEWIS & CLARK L. REV. 461 (2013).

2 *See* 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 *See* 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).

not a contracting party to the IIA.[5] Consequently, it is not feasible for a host state to bring counterclaims, let alone a primary claim.[6] In essence, states practically compromise upon their rights in investor-state arbitration. In light of this, the authors highlight the significance of counterclaims, and seek to suggest a shift from the existing paradigm of host state counterclaims in investment treaty arbitration.

II. The need to permit Host State counterclaims

Since most IIAs impose obligations only on states and not on investors,[7] investors are unaccountable for negligent or *mala fide* actions, thus creating a disequilibrium. The procedure in investor-state arbitration usually being one-sided, the disequilibrium can be redressed by allowing counterclaims brought by the host states.[8] This is one of the important benefits of permitting host state counterclaims in investor-state arbitration.

Permitting counterclaims would also increase efficiency[9] and ensure economy[10] of the ISDS mechanism. The system will be more consistent and definite when all aspects of a dispute are considered by one tribunal.[11] The redressal of counterclaims by different tribunals (such as domestic courts) only leads to

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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).

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).

duplication and inefficiency, which is contrary to the objectives of international investment law.[12] Additionally, since arbitral awards are more readily enforceable than judgments of domestic courts, it will increase the possibility of states actually obtaining awards against investors.[13]

While trade and investment have their benefits, they can also cause significant negative externalities, such as interference with cultural and indigenous rights, environmental degradation and resource misallocation.[14] States often find it difficult to impose liability on investors for violation of such negative externalities. Hence, with the increasing threat to environment and human rights, a favourable counterclaim-friendly legal framework can have a significant deterrent effect on the investor.

Lastly, as articulated by South Africa in UNCITRAL Working Group sessions on states' concerns about investor-state dispute settlement:

It may actually also contribute to some of the concerns that we've raised in terms of probably discouraging frivolous claims and it may also have an effect on third party funding decisions as funders would have to assess the likelihood of affirmative liability in addition to the likelihood of success on the merits in the case against the opposing party.[15]

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12 *See* 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).

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/.

Hence, admission of counterclaims has several benefits, which ultimately contributes to the strengthening of the ISDS mechanism.

III. Requirements for Admission of Host State Counterclaims

A counterclaim is admissible even if it is not expressly mentioned in the Bilateral Investment Treaty ('BIT').[16] As established in *Amto*,[17] two essential requirements need to be satisfied for the admissibility of counterclaims: Firstly, the parties must have consented to the jurisdiction of the tribunal over the counterclaims; and secondly, there must be a connection between the principal claim and the counterclaim. In addition, other requirements might also govern the admissibility of counterclaims such as arbitration rules and procedural requirements such as limited *locus standi* provisions.

IV. Consent

In the *Corfu Channel* case, the International Court of Justice established that consent is central to exercise of jurisdiction by a tribunal under international law.[18] It follows that a tribunal cannot adjudicate on a matter without the parties accepting its jurisdiction. Likewise, in international arbitration, the consent of both parties is necessary in order to initiate arbitral proceedings.[19] Investor-state arbitration, however, unlike commercial arbitration, is quite complex in this regard.

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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 *See* ANDREA M. STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION (Oxford University Press 2012).

IIAs are triangular in nature.[20] States act as contracting parties, while the beneficiary of such agreements is a third party i.e. an investor. By virtue of entering into IIAs, states impose obligations upon one another. In turn, rights are created in favour of the investor. Consequently, the investor can initiate arbitral proceedings against the state if the state does not honour its obligations.[21] It is in this context that the requirement of consent must be examined.

It is well established in a number of arbitral decisions[22] that the scope of consent emanates from the text of the IIA in investor-state arbitration.[23] Under the ISDS mechanism, consent is perpetually present on part of the state. Through the dispute resolution provision of the IIA, the state, consents to arbitration at the time of entering into such IIA itself. On the other hand, by accepting the offer of the state in the dispute resolution provision of the IIA, an investor conveys its consent.[24] States have occasionally initiated arbitration against an investor based on contract,[25] but fail to do so under investment treaties.[26] This is because of two factors – (i) no rights are created in favour of the state under an IIA; and (ii) the lack of consent on part of the

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

21 *Id*. at 354.

22 Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, ¶39 (May 7, 2004) [hereinafter *Saluka*]; 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) [hereinafter *Paushok*]; Spyridon Roussalis, ICSID Case No. ARB/06/1, Award, ¶865-9 (Dec. 7, 2011) [hereinafter *Roussalis*]; Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶353-4 (June 18, 2010) [hereinafter *Gustav*].

23 Atanasova et al., *supra* note 4, at 13.

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 *See* 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).

investor. Even if an investor were to consent, the state cannot claim a breach of rights that are non-existent under the IIA. As a result, it is only when an investor seeks a remedy that an arbitral proceeding begins between the investor and the state.

In recent times, given their inability to commence arbitration against the investor, states have resorted to raising counterclaims.[27] For a counterclaim to subsist, there has to be an ongoing dispute between the investor and the host state. In the absence of a claim brought by the investor, the state cannot bring a corresponding counterclaim. In such a scenario, the state's ability to file a counterclaim depends upon the investor's decision to put forth a claim. Hence, the consent requirement remains asymmetrical in nature.

V. Connectedness

It was as early as the *Chorzow Factory* case when the necessity for a counterclaim to be connected with the principal claim was recognised.[28] It is thus required under every legal system that a counterclaim has a close connection with the subject matter of the primary claim.[29] In investor-state arbitration, the connection test comprises of two aspects – factual connection, and subject-matter (legal) connection.

In *Urbaser*, the tribunal opined that a factual connection is enough for it to exercise jurisdiction over counterclaims.[30] The test in order to determine if there exists a factual nexus is *firstly*, the claim and the counterclaim should be part of the same factual complex

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[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).

[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*].

and *secondly*, the respondent should rely on identical facts in order to refute allegations of the claimant and to establish counterclaims against it.[31]

In *Saluka*, along with the factual nexus test, the legal symmetry test i.e. that the main claim and the counterclaim should arise from the same legal source, was propounded for satisfaction of the 'connection' requirement.[32] The said requirement was subsequently affirmed in *Paushok*.[33] However, the legal connection requirement is an extremely stringent standard, which has been widely criticised.[34] Moreover, in recent times, it is observed that arbitral tribunals are taking a less restrictive approach towards the connection requirement.[35]

As stated earlier, IIAs are triangular in nature, and generally confer rights solely on the investors. Hence, host states do not derive any rights from IIAs, but only have obligations imposed upon them. Accordingly, the source of a counterclaim cannot be the BIT as no obligations are imposed on the investor under the BIT.[36] It is opined that such a stringent connection requirement makes the admissibility of any counterclaim near impossible.[37] Hence, the tribunals must not adopt a stringent approach of the legal symmetry test.

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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).

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).

VI. Arbitration Rules

When an investor and a host state proceed to arbitration, they are bound by a certain set of arbitration rules. Investors most commonly seek arbitration pursuant to the ICSID Convention[38] and its accompanying arbitral rules or pursuant to the UNCITRAL Arbitration Rules[39]. Thus, one possible source of a tribunal's authority to hear counterclaims is the arbitration's procedural rules.[40] In general, these rules can be categorised into two kinds – (i) those that provide for certain criteria for admission of counterclaims such as the ICSID Convention; and (ii) those that do not provide for any such criteria such as the SCC Arbitration Rules.

Article 46 of the ICSID Convention allows for "[…] counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre".[41] Similarly, Article II of the Algiers Accords, which governed the Iran-United States Claims Tribunal, allowed for counterclaims which arose out of "the same contract, transaction or occurrence that constitutes the subject matter of that national's claim".[42]

The UNCITRAL Arbitration Rules are not as restrictive as the ICSID Convention. Article 21(3) of the UNCITRAL Arbitration Rules provides that "[…] the respondent may make a

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38 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

39 G.A. Res. 65/22, UNCITRAL Arbitration Rules as revised in 2010 (Jan. 10, 2011) [hereinafter UNCITRAL Arbitration Rules 2010].

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.

counterclaim […] provided that the arbitral tribunal has jurisdiction over it".[43] The 2010 Rules brought about a shift from the 1976 UNCITRAL Rules[44], which required that the counterclaim arose out of the same contract.[45] The present rules enables the tribunal to assert jurisdiction over counterclaims, considering the circumstances relevant to each case. [46]

Unlike the ICSID or Iran-United States Claims Tribunal, no requirements need to be fulfilled for counterclaims to be brought under the SCC Arbitration Rules.[47] The SCC Arbitration Rules provide that the Answer to Request for Arbitration shall include a preliminary statement of any counterclaims or set offs.[48] If the dispute resolution provision is broad enough to include counterclaims within its ambit, the SCC Arbitration Rules allow for their admission.

It could be argued that SCC and ICC Arbitration Rules are generic for commercial arbitrations because in them, both the parties may submit disputes. However, this argument does not merit consideration, since arbitration rules play a subsidiary role regarding admission of host state counterclaims. Jurisdiction over counterclaims is determined primarily by the dispute resolution provision of the IIA.[49] Consequently, instead of the stringent requirements laid down under the ICSID Convention, the admission of counterclaims should be facilitated in a manner similar to the SCC or ICC Arbitration Rules. As long as the IIA provides for counterclaims, and the Respondent state satisfies the

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) [hereinafter UNCITRAL Arbitration Rules 1976].
45 UNCITRAL Arbitration Rules 1976, art. 19(3).
46 Atanasova et al., *supra* note 4, at 10.
47 *See also* ICC Rules of Arbitration 2012, art. 5(5).
48 SCC Arbitration Rules 2017, art. 9(1)(iii).
49 *Amto*, ¶117-8.

necessary requirements under the IIA, the Arbitration Rules should not prescribe any additional requirements.

VII. Limited Locus Standi and Procedural Requirements

Numerous IIAs provide the investor with limited *locus standi* to initiate arbitration.[50] This limited *locus standi* is relevant when determining whether a tribunal has jurisdiction over counterclaims or not. As per Professor Kjos, limited *locus standi* in favour of the Claimant cannot act as a bar to the admissibility of the counterclaims as long as there is a broad *ratione materiae* provision which allows it.[51] This was the case in *Metal-Tech*,[52] where, in the presence of a limited *locus standi* but a broad *ratione materiae* provision, the tribunal allowed counterclaims. On the other hand, in *Rusoro*,[53] where the *rationae materiae* provision was not as broad, the counterclaims were rejected.

In addition to limited *locus standi*, some IIAs also lay down preliminary procedural prerequisites.[54] These may include, *inter alia*, attempts at negotiation, submission of dispute to domestic courts, and completion of a cooling-off period before a dispute is submitted to arbitration. However, to expect the Respondent to

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[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 [hereinafter Canada-Venezuela BIT]; Model Text for the Indian Bilateral Investment Treaty (2016), art. 16, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560 [hereinafter India Model BIT].

[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) [hereinafter *Metal-Tech*].

[53] Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award, ¶627 (Aug. 22, 2016) [hereinafter *Rusoro*].

[54] Canada-Venezuela BIT, art. 12; India Model BIT, art. 16.

comply with all these requirements is unreasonable. Terming such a provision absurd in *Urbaser vs. Argentina*,[55] the tribunal stated thus:

> *Claimants also advance that Respondent failed to comply with the preliminary steps for negotiation and submission to the jurisdiction of local courts as provided in Article X (1) and (2) of the BIT. The position needs not to be explained in all parts of its absurdity. When Claimants had chosen to submit to ICSID arbitration, what would be the reason for requesting Respondent to suggest, and to submit to, a prior attempt for settlement, deferring the submission of any of its claim until after the six months' term had elapsed? What would have been the purpose of requiring submission of the Argentine Republic to domestic jurisdiction under Article X(2) when Claimants had failed to do so and did successfully argue before this Tribunal that this provision was not pertinent? How should the Tribunal understand Claimants' complaint that Respondent had not submitted to the procedure provided for in Article X (1) and (2) of the BIT, thus waiting a cumulative period of two years before being permitted to start arbitration, when in the same move, Claimants criticize Respondent heavily for not having raised its claims as soon as Claimants submitted to arbitration?*

A limited *locus standi* provision, coupled with unreasonable procedural requirements for the Respondents discourage the advancement of counterclaims. Hence, it is the authors assertion that these requirements should not be an impediment to the admission of counterclaims. Generally, it is only the investor who can initiate claims. It seems unfair to make the standard for counterclaims as stringent as it stands today.

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55 *Urbaser*, ¶1149.

VIII. Contemporary Approach to Host State Counterclaims in Investment Treaty Arbitration

The scope of investor's consent to counterclaims depends upon the language of the dispute settlement provision in the IIA.[56] An analysis of the various BITs and IIAs on the issue of counterclaims demonstrates the divergent approaches to the possibility of assertion of host state counterclaims in investor-state arbitration. Broadly speaking, there are three different approaches to this issue.

First, few treaties explicitly address counterclaims. For example, Article 28(9) of the COMESA provides thus:

> *A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages.*[57]

Article 13 of the COMESA obliges COMESA investors and their investments to comply with all applicable measures of the Member State in which their investment is made.[58] Further, Article 1(11) defines 'measures' to mean any legal, administrative, judicial or policy decision that is taken by a Member State, directly relating to and affecting an investment in its territory, after the Agreement has come into effect.[59] Thus, COMESA affords the host state an opportunity to bring a counterclaim against the

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[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 [hereinafter COMESA].

[58] *Id.* art. 13.

[59] *Id*. art. 1(10).

foreign investor for any alleged breach of its obligation under the agreement.

Second, some treaties do not expressly provide for the admission of host state counterclaims but impliedly allow it. Generally, in such treaties, the language of the dispute settlement provision is quite broad enough to include counterclaims within its ambit. For instance, the tribunals are conferred with the authority to hear "any dispute between an investor of one Contracting Party and the other Contracting Party relating to the investment"[60] or simply "any dispute". [61] Furthermore, other treaties exclude a particular type of counterclaims[62] giving rise to *a contrario* conclusion in favour of admissibility of other types of counterclaims.[63]

Third, some treaties do not provide for the admission of host state counterclaims, either implicitly or explicitly. Some IIAs uses restrictive language in the offer to arbitrate under their dispute settlement provision to limit the tribunals' jurisdiction to only hear disputes regarding the obligations of the Contracting Party under the IIA.[64] For example, in *Roussalis vs. Romania*, the tribunal

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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 *See* 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.

dealt with a restrictive provision in Article 9(1) of the Greece-Romania BIT[65] which limited the scope of the 'dispute' to obligations of the host state.[66] Consequently, the tribunal refused to hear counterclaims against the foreign investor.[67] In such similarly drafted treaties, host states are not allowed to bring counterclaims against foreign investors.

In general, counterclaims in investment arbitrations usually fail.[68] Despite the reference to counterclaims in various arbitration rules,[69] often neither the substantive provisions nor the arbitration clauses in IIAs contain a valid basis for host states to bring claims against investors.[70] Hence, there is a need to provide a suitable legal framework for admissibility of host state counterclaims in investment treaty arbitration.

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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 *See e.g.*, 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).

70 *See Roussalis*, ¶864-72.

IX. Indian Approach to Counterclaims in Investment Treaty Practice

Since until very recently, India's approach towards IIAs was based upon incentivisation and protection of foreign investment.[71] However, post *White Industries*,[72] India has changed its position vis-à-vis investment treaties. In the said case, the tribunal held that the judicial delays in the enforcement of an ICC Award between White Industries Australia Limited ('WIAL') and Coal India, an Indian government company, by the Indian courts constituted a breach of India's obligation to provide "effective means of asserting claims and enforcing rights" regarding WIAL's investment pursuant to Article 4(2)[73] of the Australia-India BIT.[74]

Over the past few years, a number of foreign companies have commenced arbitration proceedings under different BITs against the Indian Government.[75] In response, India brought in a new Model BIT[76] ('India Model BIT'), replacing the earlier 2003 Model BIT[77], which would serve as the basis for re-negotiation of existing BITs, negotiation of future BITs and formulation of

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71 *See* 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) [hereinafter *White Industries*].

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*, ¶16.1.1.

75 *See* 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 *See* 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.

interpretations on the existing BITs. Further, India unilaterally terminated 58 of its BITs, including 22 countries of the European Union.[78]

The India Model BIT is a significant departure from the earlier 2003 Model BIT. While the latter gave primacy to protection of foreign investor rights and their investments vis-à-vis host state's regulatory powers, the former dilutes the protections commonly given to foreign investors and provides increased protections to the host state.[79] These changes reflect a drive in India's approach towards increasing symmetry between host state control and the interests of investors.[80]

However, the India Model BIT does not permit host state counterclaims. Chapter IV of the Model BIT deals with the Settlement of Disputes between an Investor and a Contracting Party. The jurisdiction of the tribunal is only limited to disputes arising out of an alleged breach of an obligation of a State Party under Chapter II of the Treaty, other than the obligation under Articles 9 and 10 of this Treaty.[81] Chapter II of the Model BIT imposes certain obligations on the State Parties in relation to protection of investments. Thus, the Model BIT does not provide for the admission of host state counterclaims, either explicitly or implicitly.

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78 DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, BILATERAL INVESTMENT TREATIES (2016), http://164.100.47.190/loksabhaquestions/annex/9/AU1290.pdf.

79 *See* 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.

This position is at variance with the earlier position taken by India in the Draft India Model BIT[82] released in April 2015. Article 14.2(i) of the Draft India Model BIT, which is the dispute settlement provision, stipulates that it applies to a counterclaim brought by a State Party against an investor or the investment in an investment dispute.[83] Article 14.11 deals with counterclaims by State Parties and clearly provides that a State Party may initiate a counterclaim against the Investor or Investment for a breach of the obligations set out under Articles 9, 10, 11 and 12 of Chapter III of this Treaty before a tribunal established under this Article and seek as a remedy suitable declaratory relief, enforcement action or monetary compensation. [84]

It is surprising to note that the provisions relating to counterclaims under the Draft India Model BIT have been completely excluded from the revised version of the India Model BIT. Chapter III of the India Model BIT lays down certain investor obligations in relation to compliance with laws, regulations, administrative guidelines and policies of a State Party concerning the establishment, acquisition, management, operation and disposition of investments[85] and corporate social responsibility[86]. But, in the light of absence of a provision permitting host state counterclaims and presence of limited *locus standi* provision and a narrow definition of the material scope of the dispute, the said investor obligations cannot be enforced in case of their breach. Thus, the Model BIT imposes certain obligations on the foreign investors and creates certain rights in favour of the host state as a corollary. But, the host state does not

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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 [hereinafter Draft India Model BIT].

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

84 Draft India Model BIT, art. 14.11.

85 India Model BIT, art. 11.

86 India Model BIT, art. 12.

have a remedy under the BIT to pursue their rights in case of their breach. This position frustrates the elementary principle of equity jurisprudence that there is no wrong without a remedy.[87]

X. Recent Decisions dealing with Counterclaims

The issue of whether or not an investor and a host state settle a dispute, and address counterclaims through arbitration, depends entirely on whether the investor consents to do so.[88] Hence, the scope of the dispute resolution provision of the IIA plays an important role in determining what can and what cannot be subject to arbitration between the parties. It is thus necessary to examine how arbitral tribunals have interpreted dispute resolution provisions of various IIAs in recent times. In the table below, we examine six recent decisions, which have diversely contributed to the growing jurisprudence of counterclaims in investor-state arbitration.

Arbitral Decision and Tribunal	**BIT and Article**	**Provision**	**Decision of the Tribunal**
Roussalis vs. Romania[89]	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	According to the tribunal, jurisdiction of the tribunal was limited to claims brought by an investor, concerning the obligations of the host state. Hence, counterclaims were not allowed.

[87] *See* 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] Hege Elisabeth Veenstra-Kjos, *Counterclaims by Host States in Investment Treaty Arbitration,* 4(4) TDM JOURNAL 9 (2007).

[89] *Roussalis*, ¶869.

Arbitral Decision and Tribunal	BIT and Article	Provision	Decision of the Tribunal
		investment of the former.	
Inmaris Perestroika v. Ukraine[90]	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 […].	The Tribunal found that Article 11 conferred the tribunal with jurisdiction over counterclaims, as it concerned the claimant's investment, and the claimant had consented to arbitration. However, the counterclaims were rejected on merits.
Urbaser vs. Argentina[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.	The tribunal found that the BIT accepted a possibility for the Respondent to raise counterclaims. The tribunal's view was corroborated by Article X(3) of the BIT, which stipulates that in certain circumstances, the dispute may be submitted to an international arbitral tribunal "at the request of either party to the dispute".
Metal-Tech vs. Uzbekistan[92]	Article 8(1) of the Israel-Uzbekistan BIT	Each Contracting Party hereby consents to submit […] any legal dispute arising	The tribunal opined that Article 8(1) of the BIT was not restricted to disputes initiated by an investor against a Contracting Party.

90 Inmaris Perestroika Sailing Maritime Services GmbH v. Ukraine, ICSID Case No. ARB/08/8, Excerpts of Award, ¶432 (Mar. 1, 2012).

91 *Urbaser*, ¶1143.

92 *Metal-Tech*, ¶410.

Arbitral Decision and Tribunal	**BIT and Article**	**Provision**	**Decision of the Tribunal**
		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.	It covered any dispute concerning an investment. However, the tribunal found that since it did not have jurisdiction over the primary claims (the claimant's investment did not fulfil the legality requirement under the BIT), it did not have jurisdiction over counterclaims as well.
Rusoro Mining Ltd. vs. Venezuela[93]	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 […]	The tribunal held that it lacked jurisdiction over the counterclaims submitted by the Republic of Venezuela. The tribunal reiterated its position by asserting that Article XII (3) and (4) of the BIT provided limited locus standi to the investor.
Oxus Gold vs. Uzbekistan[94]	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	The tribunal decided that it lacked jurisdiction over the counterclaims submitted by Uzbekistan. The tribunal opined that the language of the BIT clearly indicated that only the investor could bring claims concerning

93 *Rusoro*, ¶623.

94 Oxus Gold v. The Republic of Uzbekistan, UNCITRAL, Final Award, ¶948 (Dec.17, 2015).

Arbitral Decision and Tribunal	BIT and Article	Provision	Decision of the Tribunal
		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.	obligations of the host state, and not vice-versa.

Two important recent decisions concerned with counterclaims were *Perenco*[95] and *Burlington Resources*.[96] However, they are not discussed under this table because the question of jurisdiction did not arise in either of those decisions.

XI. Suggestions and Conclusion

In conclusion, it is argued that host state counterclaims must be permitted in investment treaty arbitration for the various reasons mentioned in this paper. States must therefore endeavour to expressly include host state counterclaims within the ambit of the dispute settlement provisions of IIAs. A good example is Article 28(9) of the COMESA. Further, as provided in the paper, the criteria for admissibility of host state counterclaims must be liberally construed. In this context, the authors submit that the Draft India Model BIT of 2015 creates an equilibrium between the interests of the foreign investors and the host state by expressly permitting host state counterclaims for breach of the

95 *See Perenco.*
96 *See Burlington Resources.*

investor obligations provided under the treaty. The omission of the provision permitting counterclaims from the revised draft of India Model BIT is disappointing.

Hence, the authors would like to propose a model clause (similar to Article 28(9) of the COMESA and Article 14.11 of the Draft India model BIT) expressly permitting host state counterclaims in the context of investor-state arbitration:

> **Counterclaims by Parties:**
>
> A Party against whom a claim is brought by an investor under this Article may assert a counterclaim against the investor for a breach of its obligations set out under [provisions dealing with obligations of the investor 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 monetary compensation.

It is hoped that this paper encourages debate among the concerned stakeholders about the need to include counterclaims by the host state within the IIA.