

## Host States' Counterclaims on Human Rights in Practical Investment Arbitration

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### ABSTRACT

This paper analyzes the potential hindrance to the positive results of counterclaims on human rights protection in the practical investment arbitration, then evaluates whether ASEAN Comprehensive Investment Agreement and other treaties with investment provisions would be acceptable legal grounds to enable such counterclaims. This paper argues that to ensure more sustainable investment, future investment treaties should directly provide explicit states' rights to make counterclaims on human rights protection. As such, these explicit provisions will create better legal grounds for host state to defend their legitimate rights on protecting human right, guarantee the predictability, and avoid the inconsistent interpretation or the reluctance of tribunals. This paper will delve in four substantial issues, including: (i) overview on counterclaims in international investment disputes; (ii) international and municipal regulations on human right protection in investment activities; (iii) host states' counterclaims on protection of human rights in practical investment arbitration; (iv) control future commitments on states' counterclaims on human rights.

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## 1. Introduction

Investment treaties have been long criticized for their procedural and substantive provisions which confer only foreign investors the claimants' role.<sup>1</sup> In order to achieve more balanced treaties, besides the existing procedural rules, such as the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules or the 1964 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), States have initially tried to include counterclaims in their investment treaties to enable host states' rights to defend.<sup>2</sup> A review of practice of international investment disputes reflects that the counterclaims on the ground of human rights violations have been rarely employed by the respondents as possible escape door.<sup>3</sup>

Investment arbitration practice worldwide shows a reluctance of the tribunals to entertain such arguments in the absence of explicit provisions on foreign investor's human rights obligations.<sup>4</sup> This Article, would therefore analyze the potential hindrances to achieve positive results in counterclaims for human rights violation in the investment arbitration practice, and then evaluate whether the ASEAN Comprehensive Investment Agreement (ACIA) and other treaties with investment provisions would provide acceptable legal ground to enable such counterclaims. This Article argues that to ensure more sustainable investment, future investment treaties should provide explicit rights to the host States to make counterclaims for the violation of human rights. As such, these explicit provisions will create a better legal ground for the host States to defend their legitimate rights for the protection of human rights, guarantee predictability, and avoid inconsistent interpretation or reluctance of the tribunals.

This Article is divided into six main parts, namely (i) overview of the counterclaims in international investment disputes; (ii) international and municipal regulations on human rights protection in investment activities; (iii) examination of consent; (iv) examination of the cause of action for counterclaims related to human rights; (v) host States' counterclaims on the grounds of violation of human rights in investment arbitration practice; (vi) control of future commitments on States' counterclaims for human rights violations.

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<sup>1</sup> Gabrielle Kaufmann-Kohler and Michele Potestà, *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (Springer Nature 2020) 7.

<sup>2</sup> For example, in *Saluka Investments BV v Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim (UNCITRAL, 7 May 2004), the tribunal initially considered respondent's counterclaim carefully.

<sup>3</sup> Pierre Lalive and Laura Halonen, 'On the Availability of Counterclaims in Investment Treaty Arbitration' in Alexander J Bělohlávek and Naděžda Rozehnalová (eds), *Czech Yearbook of International Law* (2011) 141.

<sup>4</sup> Yarik Kryvoi, 'Counterclaims in Investor-State Arbitration' (2012) 21 *Minnesota Journal of International Law* 216, 252.

## **2. Overview of the Counterclaims in International Investment Disputes**

Investment treaties traditionally provide an asymmetrical system of investment rules in which foreign investors enjoy rights without fulfilling any obligations.<sup>5</sup> The best outcome of an investment arbitration for a State, therefore would be a circumstance in which the host State does not lose. An issue must be highlighted that whether the States should have the rights to protect themselves in case of answering to investors' bad faith or illegal actions.<sup>6</sup> In international investment arbitration, the issue of counterclaims needs to be envisaged.

The State's right to file counterclaims, first must be built on a competent ground. Since an arbitral tribunal has no ex-officio or statutory authority over counterclaims, the arbitral tribunal should delve into the wordings of arbitration agreements or investment treaties to decide whether the contracting parties would have allowed the counterclaims. Unlike an investment contract that clearly defines the obligations of two parties, an investment treaty usually does not provide any obligations on the investor. If an investor sues the government of the host country on the ground under a treaty, the respondent's counterclaim is unlikely to be admissible. Second, the arbitral tribunal should decide which law will be applied to such a counterclaim. This Article, therefore, focuses on analyzing the State's counterclaim in international investment arbitration based on breach of treaty obligations.

The next sections analyze the requirements for a counterclaim for violation of human rights, to be entertained, specifically (i) the first and foremost requirement is, the consent provided in the investment treaties or procedural rules; (ii) the second requirement, is that investment treaties should include legal grounds for the counterclaim, enforceable by the arbitral tribunals.

## **3. Examination of the Consent**

Counterclaims have been provided in existing procedural rules under the framework of UNCITRAL Arbitration Rules or ICSID Convention. Recently, States have tried to include grounds for the counterclaims in their investment treaties with the purpose of enabling the host States' rights to defend themselves.

### **3.1 Existing Procedural Rules**

The respondent's right to counterclaim is recognized as a procedural right in a number of arbitration rules, including the UNCITRAL Arbitration Rules and ICSID Convention. ICSID Convention states;

“Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising

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<sup>5</sup> Kaufmann-Kohler and Potesta (n 1).

<sup>6</sup> For example, in *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* (ICSID Case No ARB/03/25, 2007).

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.”<sup>7</sup>

This provision can be interpreted to imply that a counterclaim is acceptable if both parties mutually approve. It is argued that the investors have tendencies of choosing to consent to the host States' counterclaims to prevent host States from taking up new proceedings.<sup>8</sup> If the new proceeding occurs, the host State may have to apply other methods instead of arbitration. The investors hardly consent to counterclaims, or seldom accept an arbitration agreement on counterclaims. Such situations will be like situation where the host State rather decline the arbitration agreement in the absence of ISDS clauses in Bilateral Investment Treaties (BITs). The required consent may avoid any uncertainties, opposition, and arguments on the matter of consent but is rarely useful to the host States.

### 3.2 Investment Treaties

Practices reveal that investment treaties also take diversified approaches to counterclaims provision.<sup>9</sup> The first and foremost requirement for a counterclaim to be accepted is that there must be consent provided in the investment treaties.<sup>10</sup> While States can control the consent in the treaty negotiation, they can hardly gain it in the arbitration proceedings. This results in different types of consents.

#### 3.2.1 Explicit Consent

Explicit consent is not common in investment treaties. Historically, investment treaties have enabled investors to obtain remedies; therefore these instruments do not expressly include consent to the States' counterclaims.<sup>11</sup> More recently, this tendency is changing, although at minimal pace and scope. For example, China-Mauritius Free Trade Agreement (FTA) provides that:

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<sup>7</sup> International Centre for Settlement of Investment Disputes Convention, (entered into force on 14 October 1966) (ICSID Convention) art 46.

<sup>8</sup> Hege Elisabeth Veenstrat-Kjos, 'Counterclaims by Host States in Investment Treaty Arbitration' (2007) 4 Transnational Dispute Management 4.

<sup>9</sup> For example, two ICSID tribunals' decisions, taking entirely different perspectives on their jurisdictions to decide States' counterclaims *Spyridon Roussalis v Romania* (ICSID Case No ARB/06/1, 7 Dec. 2011) and *Antoine Goetz & Others and SA Affinage des Metaux v Republic of Burundi* (ICSID Case No ARB/01/2, 21 June 2012).

<sup>10</sup> See Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International BV 2004) 35; Jan Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Review-Foreign Investment Law Journal 232.

<sup>11</sup> Yasmine Lahlou, Rainbow Willard, Meredith Craven and Chaffetz Lindsey, 'The Rise of Environmental Counterclaims in Mining Arbitration' (31 July 2019) Lexology <<https://www.lexology.com/library/detail.aspx?g=bbc29b22-4e33-4d55-810f-296765e218d2>>.

“When the claimant submits a claim..., the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant.”<sup>12</sup>

Nevertheless, this agreement only limits the State’s counterclaims to the extent of investment contract breach.<sup>13</sup> While this can be interpreted that a treaty obligation breach is excluded, one might argue another possible interpretation of this clause. Indeed, a treaty obligation breach is not mentioned, that does not mean the treaty prohibits counterclaims of that kind. Thus, it is unclear whether a counterclaim is allowed for an original treaty-based claim. Ironically, though this FTA provides explicit consent, it might not be helpful for the State in the treaty-based claim.

Some treaties construct a more limited scope of counterclaims. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) provides expressly that:

“When the claimant submits a claim pursuant to investment authorization or investment agreement, the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set-off against the claimant.”<sup>14</sup>

Despite allowing counterclaims, this Article explicitly excludes the counterclaim for treaty obligation breach. This may reflect exactly the spirit of traditional investment treaties which only provide for obligations on the States.

### **3.2.2 Implicit Consent**

Under most investment treaties, consent to counterclaims is not expressly contemplated. Popularly, many treaties do exclude some counterclaims in specific circumstances. In ACIA, counterclaims are constructed in an implicit manner:

“A disputing Member State shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the disputing investor in relation to the covered investment has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.”<sup>15</sup>

Such exclusion of some counterclaims would be interpreted as the allowance of other types of counterclaims if the interpretation is based on a basic principle of treaty construction.<sup>16</sup> This type of clause can be found in quite a number of other trade and

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<sup>12</sup> Free Trade Agreement between The Government of The People’s Republic of China and The Government of the Republic of Mauritius, art 8.24(4).

<sup>13</sup> *ibid*, subparas 1(a)(i)(B)–1(b)(i)(B).

<sup>14</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed on 8 March 2018) (CPTPP) art 19.9.2.

<sup>15</sup> ASEAN Comprehensive Investment Agreement (entered into force on 29 March 2012) (ACIA) art 34.4.

investment treaties,<sup>17</sup> which sounds almost similar.<sup>18</sup> Counterclaims grounded in the claimant's entitlement to gain compensation<sup>19</sup> are not allowed, but with a condition.

In investment arbitration practice, the tribunals can only rely on the wordings of procedural provisions in investment treaties to deduce the investor's consent from it. The clear interpretation of counterclaims in BITs, for instance, as in *Saluka v Czech Republic*,<sup>20</sup> is rarely provided in the investment dispute resolution. Practical decisions of investment arbitrations reveal that some tribunals have made a broad interpretation of BITs provisions, allowing counterclaims from the States.<sup>21</sup> Whether the ISDS clause is likely to create a path for the counterclaims depends on the tribunal.

### 3.2.3 Required Consent

The required consent can be found both in ICSID Convention and some BITs. The Slovakia-Iran BIT requires the claimant to consent to State counterclaims expressly in writing when

<sup>16</sup> Michael Waibel, 'The Origins of Interpretive Canons in Domestic Legal Systems' in Joseph Klingler, Yuri Parkhomenko and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2018).

<sup>17</sup> United States-Mexico-Canada Agreement (signed 30 November 2018) (USMCA) art 14.D.7(8); Investment Agreement for the COMESA Common Investment Area (signed 23 May 2007) (COMESA Investment Agreement) art 7(6); Georgia-Japan Bilateral Investment Treaty (signed 29 January 2021) (Georgia-Japan BIT) art 23(15); Argentina-Japan Bilateral Investment Treaty (signed 1 December 2018) (Argentina-Japan BIT) art 25(14); Peru-Australia Free Trade Agreement (entered into force 11 February 2020) (PAFTA) art 8.24(8); Mexico-United Arab Emirates Bilateral Investment Treaty (entered into force 25 January 2018) (Mexico-UAE BIT) art 16; Chile-Hong Kong, China SAR Bilateral Investment Treaty (signed 18 November 2016) (Chile-Hong Kong BIT) art 26(7).

<sup>18</sup> For example, European Union-Vietnam Investment Protection Agreement (signed 30 June 2019) (EUVIPA) art 3.56 stipulates that: "The Tribunal shall not accept as a valid defence, counterclaim, set-off or similar claim the fact that the investor has received or will receive indemnification or other compensation pursuant to an insurance or a guarantee contract in respect of all or part of the compensation sought in a dispute initiated pursuant to this Section." Another example may be found in Belgium-Luxembourg Economic Union (BLEU)-Mozambique Bilateral Investment Treaty, art 10(6), which says that, "In any proceeding involving an investment dispute, a Contracting Party shall not assert, as a defence, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received pursuant to an insurance or guarantee contract, but the Contracting Party may require evidence that the compensating party agrees to that the investor exercises the right to claim compensation."

<sup>19</sup> Yasmine Lahlou, Rainbow Willard and Meredith Craven, 'The Rise of Environmental Counterclaims in Mining Arbitration' (18 June 2019) Global Arbitration Review <<https://globalarbitrationreview.com/guide/the-guide-mining-arbitrations/1st-edition/article/the-rise-of-environmental-counterclaims-in-mining-arbitration>>.

<sup>20</sup> Czech Republic-Netherlands Bilateral Investment Treaty (entered into force 1 October 1992) (CR-Netherlands BIT), art 8 provides the jurisdictional basis for the *Saluka v Czech Republic* case: "... Each Contracting Party hereby consents to submit a dispute ... to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement". This broad clause enables the arbitrators to interpret their jurisdictions on counterclaims.

<sup>21</sup> The tribunal in *Saluka v Czech Republic* assumed that the wordings of Article 8 in the BITs can be interpreted broadly to enable counterclaims, see *Saluka v Czech Republic*, para 39. The tribunal in *Aven v Costa Rica* allowed all counterclaims except for ones grounded in the state's right to claim compensation for the alleged damages, see *David R Aven v Republic of Costa Rica* (ICSID Case No UNCT/15/3, Award 2018) para 693.

submitting a dispute to arbitration. This BIT makes sure that State's counterclaims are guaranteed by the both parties. As analyzed in section 2.1, this requirement is hardly satisfied. Professor Schreuer has supported a counterclaim, which is proximately connected to the investor's claim, contending that it will be counted as a mutual consent.<sup>22</sup>

### **3.2.4 Close Connection**

The counterclaims should connect to the original claims of the foreign investor. Some investment treaties require that the counterclaims should be connected to the material facts and legal grounds.<sup>23</sup> In *Urbaser v Argentina*, the tribunal concluded that the counterclaim was closely connected with the original complaint,<sup>24</sup> after examining its factual and legal links to the claimant's claim.<sup>25</sup> The connection between the counterclaim and the original claim is what tribunals seek to clarify while establishing a counterclaim's direct relation with the dispute.

## **4. Examination of the Cause of Action for Counterclaims in Human Rights**

Once the arbitral tribunals have found jurisdiction over the counterclaims as analyzed in section 3, they will decide whether there are causes of action for such counterclaims.<sup>26</sup> In the process of investing and operating the investment, the investor may violate human rights. However, these violations are often governed by national laws. In terms of investment treaty obligations-based disputes, the State would find it difficult to file counterclaims related to such violations, because the investors' obligations to respect human rights are almost not specified in such instruments. ICSID Convention allows the arbitral tribunal to settle disputes according to the applicable law, mutually consented by the disputants; without such agreement, the arbitral tribunal shall apply the host State's national law and the rules of international law.<sup>27</sup>

In this section, the Article studies the counterclaims grounded in the obligations of protecting human rights in accordance with the host State law, and explores the supporting rules in the international treaties. Also, the Article explores how international obligations to protect human rights are incurred upon investors, and how such obligations are codified in the investment instruments.

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<sup>22</sup> Christoph H Schreuer, *The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, Cambridge University Press 2009) 756.

<sup>23</sup> For example, Argentina-United Arab Emirates Bilateral Investment Treaty, art 28(4).

<sup>24</sup> ICSID Convention, art 46.

<sup>25</sup> *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, (ICSID Case No ARB/07/26, Award 2016) para 1151.

<sup>26</sup> Lahlou (n 11).

<sup>27</sup> ICSID Convention, art 42(1).

#### **4.1 A Link to Domestic Law**

Investment treaties can contain provisions supporting counterclaims based on a violation of national laws. As provided in ACIA, 'covered investment' is required to be established, acquired or expanded and admitted according to members' laws, regulations, and national policies.<sup>28</sup> Although this provision does not provide specific responsibilities for the investors, the requirement of investors' legitimate investment in accordance with domestic law would be a reasonable cause of action. This provision can be interpreted to incorporate the host States' domestic law on human rights into the treaty. Pursuant to ACIA, the tribunal settles the dispute in accordance with the national law of the disputants, if applicable.<sup>29</sup> As a result, the tribunal may find that any investors who ignore the State's human rights violate both domestic law and international law. Such ACIA provisions can affirm the implied obligations of investors to protect the host States' law on human rights, enabling a cause of action for the counterclaim.

To date, there have not been many treaties that specifically impose obligations to obey the host State's national law on investors. The new investment treaties may be construed differently. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), for example, does not explicitly require the investors to obey the host States' domestic laws. The tribunal shall consider the host State's law, if it is connected to the complaint, under the treaty obligations, as a matter of fact.<sup>30</sup>

This Article argues that the explicit inclusion of foreign investors' obligations to obey domestic law in investment treaties is more favorable to the State to raise counterclaims for violation of human rights. Also, the host States should be granted the regulatory space in which they would better protect human rights.

#### **4.2 International Obligations to Protect Human Rights**

International human rights law includes a system of treaties developed by countries and international organizations, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), and the United Nations Convention on the Rights of the Children (UNCRC). States are the main actors participating and exercising rights and obligations in international treaties on human rights. Like domestic law, such international treaties on human rights cannot provide causes of action, if they are not incorporated into the investment treaties or the investment treaties do not refer to them. It will be tough for the arbitral tribunals to cite international law as reasonable grounds for allowing counterclaims on human rights unless the relevant investment treaties themselves directly mention the foreign investors' obligations to comply.

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<sup>28</sup> ACIA, art 4(a).

<sup>29</sup> ACIA, art 40.1.

<sup>30</sup> CPTPP, art 9.25.

One tribunal may reject the host States' counterclaims in the absence of foreign investors' obligations contained in the treaty.<sup>31</sup> Another tribunal has uncovered the existence of the legal grounds for counterclaims under an investment treaty.<sup>32</sup> Responding to the investors' adverse actions and empirical diversified interpretations of investment arbitrations, States have modified investment treaties. Significantly, unlike traditional investment treaties, recent investment treaties have innovated, incorporating or referring to domestic and international law obligations or even including investors' obligations.<sup>33</sup> These legal grounds will provide causes of action for counterclaims.

The number of such investment treaties is nonetheless limited. Recent investment treaties have initially provided incentives to investors to comply with international laws and standards on human rights. Some investment treaties require the investors to voluntarily protect human rights within the scope of the host States' commitments. For example, the Brazil-Malawi BIT, Art 9 provides that:

"The investors and their investment shall develop their best efforts to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the host party receiving the investment: b) Respect the human rights of those involved in the companies' activities, consistent with the international obligations and commitments of the Host Party."

Other treaties expand the causes of action as they require investors to respect not only human rights within commitments of the host States, but also internationally recognized human rights. However, the majority of requirements are in the non-binding form. For example, the India-Kyrgyzstan BIT explicitly imposes corporate social responsibility on investors:

"Investors and their enterprises shall endeavor to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labor, the environment, human rights, community relations and anti-corruption."<sup>34</sup>

Other treaties may differ slightly but share the same language, for example, CPTPP, encouraging:

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<sup>31</sup> *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic* (ICSID Case No ARB/09/1, Award 21 July 2017) para 1066.

<sup>32</sup> *Maritime International Nominees Establishment v Republic of Guinea* (ICSID Case No ARB/84/4, Decision of the Ad hoc Annulment Committee 1989) para 8.01.

<sup>33</sup> For example, Brazil-Malawi Bilateral Investment Treaty (signed on 25 June 2015) (Brazil-Malawi BIT) art 9 provides an enclosed list of the investors' obligations.

<sup>34</sup> India-Kyrgyzstan Bilateral Investment Treaty (signed 14 June 2019) (India-Kyrgyzstan BIT) art 12.

“Enterprises to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.”<sup>35</sup>

In ACIA, a provision on corporate social responsibility is not provided. Also, the treaty’s language is relatively vague as it ensures the State’s right to impose necessary measures to protect human life or health as long as they are not inconsistent with this Agreement.<sup>36</sup> Neither this treaty specifically aims to protect human rights nor does it provide the investors’ obligations to respect human rights. Instead, the host States are ensured their rights to have regulatory spaces in exceptional circumstances. A review of Vietnam’s BITs also turns out the same result.<sup>37</sup> The most important hindrance to the positive results for counterclaims is how the host State’s right can be enforced on investors. This will make the State hardly challenge the investor’s original claims, especially in terms of human rights violations.

As a result, the inclusion of a direct, clear, and binding corporate social responsibility provision into investment treaties should be considered in the coming treaties to create better legal grounds for host States to defend human rights on their counterclaims.

## 5. Host States’ Counterclaims for Violation of Human Rights in Investment Arbitration Practice

As analyzed in section 3 and section 4, the investment treaties prefer to provide non-binding or voluntary corporate responsibility, if such provision is included. Investment arbitration practice has reflected a few cases relating to counterclaims against human rights violations, which are based on voluntary instruments. Out of these cases, *Urbaser v Argentina*<sup>38</sup> stands out. The tribunal experienced a difficult circumstance in deciding its jurisdiction over counterclaims related to human rights.

In the case of *Urbaser v Argentina*,<sup>39</sup> Urbaser SA, Consorcio de Aguas Bilbao Bizkaia and Bilbao Biskaia Ur Partzuergoa are shareholders of AGBA. This company supplied water and drainage services based on a franchising agreement with the Buenos Aires province, Argentina in the Regulatory Framework. As had experienced the economic crisis in 2001, Argentina promulgated some emergency measures in 2002, resulting in AGBA’s loss. Consequently, AGBA demanded a review of the franchise over and over again but received no reply. As of 2006, the Buenos Aires provincial government declared its intention of

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<sup>35</sup> CPTPP, art 9.17.

<sup>36</sup> ACIA, art 17.1(b),(c).

<sup>37</sup> Vietnam has signed 67 Bilateral Investment Treaties, 27 Treaties with Investment Provisions, and 21 Investment Related Instruments, see ‘Country Navigator’ (UNCTAD Investment Policy Hub) <<https://investmentpolicy.unctad.org/country-navigator/237/viet-nam>>.

<sup>38</sup> *Urbaser* (n 25).

<sup>39</sup> *ibid* paras 27–39.

terminating its contract with AGBA. Urbaser then went bankrupt. Subsequently, Urbaser sued Argentina to ICSID, accusing that Argentina breached the Bilateral Investment Treaty between Argentina and Spain. As mentioned by Urbaser, Argentina was accused of its non-compliance with its obligation provided in Article III.1 to protect foreign investment and did issue unfair or discriminatory measures; Article IV.1 to accord fair and equitable treatment; and Article V to prohibit unlawful and discriminatory expropriation of investments.<sup>40</sup> Argentina then filed a counterclaim alleging that AGBA did not provide sufficient investment to deliver services, violating people's right to access water.

Firstly, the tribunal assented to its jurisdiction on the State's counterclaims, grounded in a broad arbitration provision. In particular, this tribunal permitted Argentina to file any counterclaims against a claimant as long as they are relating to the investment.<sup>41</sup> Secondly, the tribunal recognized the procedural right of the host State to file counterclaims, and the possibility of adopting different legal regimes besides the treaties, including the State's law and investment contract - to serve as the legal grounds for the counterclaims.<sup>42</sup>

### **5.1. Decision on the Jurisdiction on the Counterclaims**

The tribunal decided on its jurisdiction over the counterclaims, based on the BIT and the connection between counterclaims and original claims. Firstly, the tribunal cited the BIT between Argentina and Spain<sup>43</sup> to confirm that: "this provision is completely neutral as to the identity of the claimant or respondent in an investment dispute arising between the parties"<sup>44</sup> This provision did not assume that the State could not file a counterclaim.

The host State could not initiate an investment-related dispute directly against an investor.<sup>45</sup> The tribunal mentioned Article X(3), stating that both the Claimant and the Respondent could be a party, in certain circumstances, submitting its claims to an international forum.<sup>46</sup> The tribunal then took a broad approach on the approved arbitration tribunal instituted by the BIT, confirming the non-restriction of "a future counterclaim or any other limitation relating to Article X of the BIT."<sup>47</sup> As a result, the tribunal concluded that the Respondent's counterclaim is possibly allowed in this case.<sup>48</sup>

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<sup>40</sup> *ibid* para 35.

<sup>41</sup> *ibid* para 1150.

<sup>42</sup> *ibid* para 1192.

<sup>43</sup> Argentina-Spain Bilateral Investment Treaty (entered into force 28 September 1992) (Argentina-Spain BIT) art 10 provides that "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".

<sup>44</sup> *Urbaser* (n 25) para 1143.

<sup>45</sup> *ibid*.

<sup>46</sup> *ibid*.

<sup>47</sup> *ibid* para 1148.

<sup>48</sup> *ibid* para 1150.

Secondly, in terms of the relation to the original claim, the tribunal observed the manifestly close connection to the counterclaim. Such claims concerned the same investment covered by the BIT.<sup>49</sup> As the tribunal found a link between the principal and counterclaim, this counterclaim had a reasonable basis.

## **5.2. Decision on the Cause of Action**

In the counterclaim, the claimant was alleged to have failed to provide adequate drinking water and drainage services, constituting a violation of the obligations provided in international human rights law.<sup>50</sup> Upon investigating the cause of action, the tribunal found the applicable law under not only the BIT between Argentina and Spain, but also under other sources of law. Applying Article 31(1) of the Vienna Convention to interpret the BIT, the tribunal contended that the wordings of BIT expressly enabled an external source of law outside the BIT,<sup>51</sup> namely 'international law and human rights',<sup>52</sup> and 'the human right to water in the framework of AGBA's Concession'.<sup>53</sup> Though finding its jurisdiction on the respondent's counterclaim, the Tribunal eventually decided in favor of the claimant at the merit stage.

In dealing with the respondent's counterclaim alleging that the claimant denied the right to water to Argentine nationals, the tribunal referred to various external sources of law, namely the 1948 Universal Declaration of Human Rights (UDHR)<sup>54</sup> and the 1966 ICESCR.<sup>55</sup> The tribunal also mentioned the statement of the UN Committee on Economic, Social, and Cultural Rights relating to the right to water.<sup>56</sup> The above instruments recognize the human rights to safe drinking water and sanitation.<sup>57</sup> Unfortunately, while these sources of law provide specific human rights, they do not grant peremptory obligations on investors to be bound by those obligations in international law.<sup>58</sup> The tribunal, therefore, concluded that while a State Party is imposed an obligation to enforce human rights to water, that does not mean a private party—the foreign investor also owed such obligation in the absence of a contract or legal relationship.<sup>59</sup>

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<sup>49</sup> *ibid* para 1153.

<sup>50</sup> *ibid* para 1159.

<sup>51</sup> *ibid* para 1192.

<sup>52</sup> *ibid* paras 1192–1210.

<sup>53</sup> *ibid* paras 1211–1221.

<sup>54</sup> *ibid* para 1196, the Tribunal cited arts 1, 21, 25 and 30 of the 1948 Universal Declaration of Human Rights.

<sup>55</sup> *ibid* para 1197, in this paragraph the Tribunal cited arts 11(1) and 12 on the right of people to an adequate life, and art 5(1) of the 1966 International Covenant on Cultural and Social Rights 1966.

<sup>56</sup> *ibid* para 1197.

<sup>57</sup> *ibid* paras 1196–1198.

<sup>58</sup> *ibid* para 1206.

<sup>59</sup> *ibid* para 1210.

With all being said, granting the host State a right to file a counterclaim is insufficient. Such rights must be accompanied by the cause of actions. There should be explicit provisions on investors' obligations to protect human rights. The cause of action may be in the form of a contractual provision, a regulation in domestic law, or a provision in an investment treaty.

## **6. Control of Future Commitments on States' Counterclaims for Human Rights Violation**

To allow for human rights counterclaims in investment arbitration, legislators are supposed to balance between protecting investors' rights and leaving regulatory space for the State to protect human rights. Investors who perform in breach of human rights should be not allowed. Scholars also raise their strong voices, emphasizing the necessity for maintaining the sustainable development of States.<sup>60</sup>

### **6.1. Inclusion of Explicit Provisions on the Counterclaim in Investment Treaty**

Providing counterclaims in investment treaties contributes important implications for the tribunal's jurisdiction over counterclaims in a dispute. States can draft provisions that either contain the consent to counterclaims and the connection requirement or only the consent. Based on the existing clauses, the Article suggests that there are following factors that should be taken into account to make counterclaim related provisions work in the proceedings: (i) the inclusion of express treaty language to address counterclaim jurisdiction (as implicit consent is largely dependent on the tribunal's views and interpretations);<sup>61</sup> (ii) the optional inclusion of connection requirement (as cases show that regardless of whether this requirement exists in the treaties or not, tribunals always examine the connection between counterclaims and original claims to the requirement of the arbitration rules).<sup>62</sup>

As analyzed in section 5.2, The tribunal in this case has taken a broad interpretation in terms of the eligibility of the respondent's counterclaim. Generally, the counterclaim in *Urbaser v Argentina* should be taken into consideration from a broader perspective. Under the auspice of ACIA, counterclaims are constructed in an implicit manner (mentioned in section 3.2.2). It would be better if the consent to counterclaims in ACIA appears in a more explicit form. The ACIA's member may consult the broadest scope of counterclaims found in other treaties, which explicitly allow counterclaims with no limitation. For example, Argentina-United Arab Emirates Bilateral Investment Treaty (BIT) provides that:

“Upon submission of its counter-memorial, or at a later stage of the proceedings, if the Arbitral Tribunal decides that, under the circumstances, the delay is justified, the respondent may submit a counter-claim directly

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<sup>60</sup> Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 *International and Comparative Law Quarterly* 577.

<sup>61</sup> For example, *Spyridon Roussalis v Romania* (ICSID Case No ARB/06/1, Award 7 December 2011) paras 859–877, the Tribunal rejected the jurisdiction on counterclaims.

<sup>62</sup> For example, see the tribunal's opinions in *Urbaser* (n 25).

related with the dispute, provided that the disputing party shall specify precisely the basis for the counter-claim.”<sup>63</sup>

The language of this clause is similar to the current UNCITRAL Arbitration Rules. The only noticeable difference is the condition that ‘the disputing party shall specify precisely the basis for the counterclaim’.<sup>64</sup> In the Rules, the counterpart is ‘provided that the arbitral tribunal has jurisdiction over it’.<sup>65</sup>

## 6.2. Inclusion of Explicit Provision on the Cause of Action

### 6.2.1. Inclusion of the Investors' Responsibility in Investment Treaties

Upon receiving the claimants' consent to the host states' counterclaims, the tribunal may recognize its jurisdiction. The inquiry, however, does not come to a full stop there. Some tribunals have rejected the host States' counterclaims in the absence of investors' obligations provided in the investment treaty.<sup>66</sup> In light of the lack of explicit provisions in a BIT as an indication that parties impose obligations for investors like the *Urbaser v Argentina* case, it is not apparently convincing to import such an obligation into a BIT merely because this obligation is provided under treaties on human rights. Counterclaims have to be built on the grounds of obligations imposed on the investors that are founded in investment treaties. To prevent the current uncertainty and reluctance of arbitral tribunals in previous disputes,<sup>67</sup> explicit provisions allowing counterclaims are necessarily included in the treaty. The negotiators of investment treaties, in the future negotiation, can peruse the Brazil-Malawi BIT<sup>68</sup> as follows:

“The investors and their investment shall develop their best efforts to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the host party receiving the investment: b) Respect the human rights of those involved in the companies' activities, consistent with the international obligations and commitments of the Host Party.”

Such BIT provides a direct corporate social responsibility (CSR) clause in a strong language. CSR can be envisaged under an enclosed list, detailing specific responsibilities of investors.<sup>69</sup> CSR and the investors' obligations to obey the host States' domestic law are also

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<sup>63</sup> Argentina-UAE BIT, art 28(4).

<sup>64</sup> Arbitration Rules (United Nations Commission on International Trade Law) UN Doc A/31/98, 31st Session Supp No 17 (UNCITRAL Arbitration Rules) art 21(3).

<sup>65</sup> *ibid.*

<sup>66</sup> *Teinver SA* (n 31) para 1066; *Urbaser* (n 25) paras 1209–1210.

<sup>67</sup> *ibid.*

<sup>68</sup> Brazil-Malawi BIT, art 9.

<sup>69</sup> *ibid.*, art 9 provides an enclosed list of the investors' obligations.

combined in a unique clause. Significantly, this clause also requires the investors to respect the State's human rights concerns, obligations and commitments. Such a clause can be a good solution for the debatable issue arising in future cases which resemble the material facts of *Urbaser v Argentina*.<sup>70</sup> Scholars have supported the approach in which individuals can be subjects of international obligations and commitments, especially in investment disputes.<sup>71</sup> The review of a line of cases shows the same convergence of support, recognizing this approach.<sup>72</sup>

A recent development reflects that States have been including clauses referring to the investors' obligations to protect human rights, shifting from a mostly passive role in investment dispute international human rights to a new version with a more active role. The 2012 Model BIT of the Southern African Development Community imposes on investors duties "to respect human rights in the workplace and in the community and State in which they are located .... investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights."<sup>73</sup> The explicit language in this instrument means an obligatory responsibility rather than a voluntary recommendation. Recently, the Draft Pan-African Investment Code (Draft PAIC) has been viewed as the investment treaty providing the most obligations on investors so far.<sup>74</sup> Provisions on protecting human rights are also included in the Draft PAIC.<sup>75</sup> Although investment experts have harshly criticized Draft PAIC for its "too protectionist" instrument,<sup>76</sup> it can be seen as an awakening of developing States after responding to tough investment disputes.

For the future revision of ACIA, the negotiators should provide more express provisions on corporate social responsibilities on the investors, more specific obligations to respect human rights, instead of a general provision on legitimate investment as analyzed in section 4.1. These clauses can be useful tools for the host State to consolidate the

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<sup>70</sup> *Urbaser* (n 25) paras 1209–1210, the tribunal assumed that "even when a State party assumes an obligation under international law to protect and promote environmental or human rights, that obligation is not transferred to foreign investors operating in that State by virtue of an investment treaty".

<sup>71</sup> Marek St Korowicz, 'The Problem of the International Personality of Individuals' (1956) 50 *The American Journal of International Law* 533–562; Ted Gleason, 'Examining Host-State Counterclaims for Environmental Damage in Investor-State Dispute Settlement from Human Rights and Transnational Public Policy Perspectives' (1 September 2021) 21 *International Environmental Agreements: Politics, Law and Economics* 427–444.

<sup>72</sup> *Texaco Overseas Petroleum Co/Cal Asiatic Oil Co v Government of the Libyan Arab Republic* (Award 19 January 1977) para 47, a sole arbitrator opined that "for the purposes of interpretation and performance of the contract, it should be recognized that a private contracting party has specific international capacities".

<sup>73</sup> The Southern African Development Community Model Bilateral Investment Treaty, art 15.

<sup>74</sup> African Union Commission's Draft Pan-African Investment Code includes no less than provisions on investor obligations, see ch 4, arts 19–24.

<sup>75</sup> African Union Commission's Draft Pan-African Investment Code, ch 4, arts 19–24.

<sup>76</sup> R Rameau, 'The Pan-African Investment Code as a Model for Negotiation on the Investment Protocol to the Agreement Establishing the African Continental Free Trade Area' (2021) 4 *Transnational Dispute Settlement Management* <<https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1874>>.

establishment of counterclaims on corporate responsibilities. Also, a detailed list of such responsibilities would prevent the circumstances in which the tribunals interpret provisions differently from the host States' ideas.

### **6.2.2. Inclusion of the Investors' Responsibility in Domestic Law**

The inclusion of clauses on the responsibilities of foreign investors under domestic law is convincing, especially providing the causes of action to enable States' counterclaims. Such clauses actually prevent tribunals from refusing the close link between the host State's counterclaims for human rights violations and the foreign investor's original treaty-based claims.

Voluntary regulatory mechanisms can also be a good choice for the States. The first legalistic approach must be the category in which the home State and host States issue CSR in their own competence. For instance, the Chinese government adopts directives, containing provisions on CSR. These provisions pave a path to a 'harmonious society'.<sup>77</sup> Indian competent authorities stimulate the application of CSR to improve and promote the public interest and prevent the risky impacts of globalization.<sup>78</sup> The Article argues that other countries should take this approach as a lesson.

All ASEAN countries' constitutions mention human rights. For example, in Thailand, while the 1997 Constitution of the Kingdom of Thailand is assumed to support CSR initiatives, it does not distinguish whether this Constitution requires the responsibilities of the State to protect human rights or the responsibilities of individuals. A developing country like Myanmar has made a movement in promulgating an Anti-corruption Code of Ethics for Companies and Body Corporates.<sup>79</sup> Also, Vietnam has taken initial steps in preparing to build effective mechanisms to improve the responsibilities of business.<sup>80</sup> A Code of Ethics for Companies or specific regulations on CSR, including the provisions on protecting human rights, is a highly recommended solution to prevent unfaithful investors and frivolous cases, if any. Should there be disputes, the States may refer to national law or code of conduct as legal arguments that illegitimate investments should not be protected.

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<sup>77</sup> M Douchin, 'Corporate Social Responsibility: Private Self-Regulation is Not Enough' [2002] 24 Private Sector Opinion <<https://www.ifc.org/wps/wcm/connect/6078df23-a976-4c1d-abb7-a71c3bcbe678/PSO24.pdf?MOD=AJPERES&CVID=jtCxiKA>>.

<sup>78</sup> *ibid.*

<sup>79</sup> Myanmar's Anti-corruption Code of Ethics for Companies and Body Corporates (entered into force 1 August 2018).

<sup>80</sup> Within the framework of a project sponsored by the United Nation Development Programme, The Vietnamese Ministry of Justice has operated a training and consultation workshop on 'Recommendations to Advance Responsible Business Practice in Vietnam', 29 October 2021.

## **7. Conclusion**

The languages of investment treaties may provide States' rights to make counterclaims for violation of human rights in implicit or explicit manners. Implicitly, such right appears under an implied consent to counterclaims clause and a clause recognizing exemptions for the State to protect the public interest in investment treaties. At least, this indirect clause can create a reasonable ground for the tribunal to interpret the host State's rights to make counterclaims. Notwithstanding, such right still depends on the interpretation of the tribunal in a certain case. Explicitly, it appears in a direct consent to counterclaims and corporate responsibility clauses in investment treaties or even in domestic law. Such inclusion of counterclaims and investors' responsibilities, especially the duty to respect human rights, in the investment treaties helps balance the rights and obligations of the host States and investors. As such, these explicit provisions will create better legal grounds for the host State to defend their legitimate rights on protecting human rights, guarantee predictability, and avoid the inconsistent interpretation or the reluctance of tribunals. Also, the States increasingly perceive regulations or codes of conduct for companies as essential ways for promoting social responsibilities and sustainable investments.

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