

# UNPRIVILEGING TRANSNATIONAL CAPITALIST CLASS: A SUGGESTIVE RESET TOWARDS HUMAN RIGHTS ACCOUNTABILITY IN THE GLOBAL SOUTH VIA COUNTERCLAIMS

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*International Investment Law ('IIL') has long faced criticism for privileging the transnational capitalist class while restricting the regulatory autonomy of host States. International Investment Agreements ('IIAs'), particularly through Investor-State Dispute Settlement ('ISDS') mechanisms, offer broad protections to investors but often impede States from enacting regulations in the public interest, including those aimed at upholding human rights. This structural imbalance, rooted in the neoliberal design of IIL, instrumentalises law to facilitate investment flows at the expense of human and social rights. Tribunal practice further reinforces this asymmetry, as illustrated in *Glencore v. Bolivia*, where Bolivia's human rights-based defences were dismissed due to the narrow scope of the applicable Bilateral Investment Treaty ('BIT'). Within this constrained regulatory space, human rights challenges like the exploitation of labour have emerged as urgent yet under-addressed concerns. As global supply chains expand and transnational corporations grow in influence, the current IIL framework seems to lack an effective mechanism to hold investors accountable. Recent reform efforts, such as those by UNCITRAL Working Group III, propose counterclaim mechanisms within ISDS, enabling host States to assert claims against investors for human rights violations. However, activating these counterclaims could be difficult due to narrowly worded dispute resolution clauses, questions of admissibility, and the absence of explicit investor obligations in most IIAs. This paper explores the structural faults within IIAs and the possibility of human rights counterclaims as a mechanism to address investor complicity in human rights violations. This paper, cognisant of the challenges existing within BITs in the Global South, proposes human rights counterclaims as a methodology toward ensuring the accountability of the transnational capitalist class. Focusing specifically on post-2008 South Asian IIAs, which increasingly include provisions affirming States' regulatory autonomy, this research investigates whether these agreements allow counterclaims toward achieving investor accountability. Through doctrinal analysis of tribunal decisions and treaty language, this research assesses the possibility of deploying counterclaims to ensure investor accountability in the context of human rights.*

## TABLE OF CONTENTS

I. INTRODUCTION.....	2
II. THE INVISIBILITY OF THE 'CARRIER OF INVESTMENT' AND STRUCTURAL ASYMMETRY IN THE INVESTMENT FRAMEWORK.....	5
A. INVESTMENT ARBITRATION TRIBUNALS – THE SILENCE ON ACCOUNTABILITY.....	6
B. THE SCOPE OF STATES' REGULATORY AUTHORITY IN THE PUBLIC INTEREST UNDER IIL .....	9

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C. *REGULATORY CHILL AND ITS IMPACT ON STATES' PUBLIC INTEREST POWERS*..... 12

D. *COUNTERCLAIMS AS A MECHANISM TO ENFORCE INVESTORS' OBLIGATIONS*..... 12

III. *LEGAL FRAMEWORK OF COUNTERCLAIMS IN INTERNATIONAL LAW*..... 16

A. *THE JURISDICTIONAL REQUIREMENT FOR ADMISSIBILITY OF COUNTERCLAIM*..... 18

1. *GENERAL CONSENT AS A BASIS FOR JURISDICTION OVER COUNTERCLAIMS: EVOLVING TRIBUNAL PRACTICE*..... 19

2. *THE NEED FOR SPECIFIC CONSENT: INSIGHTS FROM EVOLVING TRIBUNAL PRACTICE*..... 20

A. *THE RESTRICTIVE APPROACH*..... 20

B. *LIBERAL APPROACH*..... 22

B. *THE ADMISSIBILITY REQUIREMENT: CONNECTEDNESS*..... 24

C. *EXPLORING HUMAN RIGHTS COUNTERCLAIMS IN MODERN BITS AS A TOOL TO ADDRESS HUMAN RIGHTS ACCOUNTABILITY OF INVESTORS*..... 26

IV. *SCOPE FOR HUMAN RIGHTS COUNTERCLAIMS IN SOUTH ASIAN IIAS*..... 29

V. *CONCLUSION*..... 33

VI. *ANNEXURE-I*..... 35

I. INTRODUCTION

In the contemporary globalised economy, the Transnational Capitalist Class<sup>1</sup> wield unprecedented economic and political power.<sup>2</sup> With operations spanning multiple jurisdictions and vast access to capital, Transnational Corporations (‘TNCs’) like Walmart, Volkswagen, and Apple are akin to sovereign economies, ranking amongst the top fifty nations by Gross Domestic Product (‘GDP’).<sup>3</sup> The impact of this concentration of economic power on the subalterns, like the workforce therein and local communities, contributing, directly and indirectly, to the wealth of these TNCs, is particularly stark in South Asia, a region comprised of eight countries (Bangladesh, Bhutan, India, Nepal, Pakistan, Sri Lanka, Afghanistan and the Maldives) marked by social and economic challenges, including four of Asia’s Least Developed Countries (‘LDCs’).<sup>4</sup> South Asia continues to bear a disproportionate burden of multidimensional poverty. Home to approximately one-quarter of the global population

<sup>1</sup> For the purpose of this paper, the terms *transnational corporations*, *transnational capitalist class*, and *foreign investors* are used interchangeably to denote entities engaged in cross-border investment and therefore, possessing significant influence within the global investment regime.

<sup>2</sup> Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, Vol. 19(1), CONN. J. INT’L L., (2003).

<sup>3</sup> GLOBAL JUSTICE NOW, *69 of the Richest 100 Entities on the Planet are Corporations, not Governments – Figures Show*, October 17, 2018, available at <https://www.globaljustice.org.uk/news/69-richest-100-entities-planet-are-corporations-not-governments-figures-show/> (Last visited on June 25, 2023).

<sup>4</sup> UNITED NATIONS TRADE AND DEVELOPMENT, *UN List of Least Developed Countries*, available at <https://unctad.org/topic/least-developed-countries/list> (Last visited on June 8, 2024) (Afghanistan, Bangladesh, Bhutan and Nepal are Least Developed Countries).

(around 25 percent in 2025), the region accounts for a significant share of the world’s multidimensionally poor.<sup>5</sup> According to the 2025 Global Multidimensional Poverty Index, of the 1.1 billion people globally living in acute multidimensional poverty (18.3 percent of the population covered), around 380–390 million reside in South Asia, positioning the region as a major global hotspot of multidimensional deprivation alongside Sub-Saharan Africa.<sup>6</sup> TNCs’ growing presence in these developing economies has often been accompanied by widespread allegations of human rights violations and regulatory failures. From exploitative labour conditions in factories supplying global brands to catastrophic industrial disasters like the Bhopal gas tragedy in India<sup>7</sup> and the Rana Plaza collapse in Bangladesh,<sup>8</sup> these incidents underscore significant gaps in the accountability of the TNCs to their workforce, often subjected to the language of the freedom of contract, and limited regulatory structure with regard to their accountability towards the community, as such.<sup>9</sup> Thus, these sections of the population, a participant in the economic activity, are otherwise reduced to the position of subalterns, often beyond the regulatory interest of the State addressing their welfare.

International efforts such as the United Nations Guiding Principles on Business and Human Rights (‘UNGPs’),<sup>10</sup> and national legislations like the UK Modern Slavery Act, 2015,<sup>11</sup> have sought to address these abuses, yet their limited binding force and lack of extraterritorial applicability hinder meaningful enforcement.<sup>12</sup> Compounding these challenges, the international economic governance regime, particularly International Investment Law (‘IIL’), prioritises investor protection often at the expense of human rights and State regulatory autonomy.<sup>13</sup> Investor-State Dispute Settlement (‘ISDS’) mechanisms grant foreign investors expansive procedural and substantive rights, enabling them to challenge public interest regulations through expensive procedures like arbitration.<sup>14</sup>

<sup>5</sup> U. N. Development Programme, *2025 Global Multidimensional Poverty Index (MPI): Overlapping Hardships: Poverty and Climate Hazards*, October 17, 2025, available at <https://hdr.undp.org/content/2025-global-multidimensional-poverty-index-mpi#/indicies/MPI> (Last visited on December 24, 2025).

<sup>6</sup> *Id.*

<sup>7</sup> Leila Choukroune, *Corporate Social Responsibility and Foreign Direct Investment: The Indian Investment Treaty Approach and Beyond*, Vol. 15(2), TRANSNATIONAL DISPUTE MANAGEMENT 2, (2018).

<sup>8</sup> John West, *Bangladesh’s Industrial Disasters a Blight on Strong Development Gains*, UNRAVEL, July 27, 2021, available at <https://unravel.ink/bangladeshs-industrial-disasters-a-blight-on-strong-development-gains/#:~:text=Bangladesh’s%20industrial%20disasters%20a%20blight%20on%20strong%20development%20gains,-John%20West%202020.07&text=More%20than%2050%20people%20were,workers%20as%20young%20as%201>

1 (Last visited on June 2, 2023).

<sup>9</sup> Ninia Reza & Jean Jacques Du Plessis, *The Garment Industry in Bangladesh, Corporate Social Responsibility of Multinational Corporations, and the Impact of COVID-19*, Vol. 9(2), ASIAN J. L. & SOC’Y 255, (2022).

<sup>10</sup> U. N. Human Rights Council, *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises*, ¶6, H.R.C. Res. 17/4, U. N. Doc. A/HRC/17/31 (21 March 2011) (‘UNHRC Report of the Special Representative’).

<sup>11</sup> Several countries have enacted modern slavery legislation aimed at combating forced labour, human trafficking, and related abuses. These laws vary in scope but commonly require businesses to increase transparency and take steps to address modern slavery risks in their operations and supply chains. See the Modern Slavery Act, 2015 (U.K.); the Modern Slavery Act, 2018 (Australia); the California Transparency in Supply Chains Act, 2010 (U.S.A.); the Duty of Vigilance Law, 2017 (France); and the Child Labour Due Diligence Law, 2019 (Netherlands).

<sup>12</sup> UNHRC Report of the Special Representative, *supra* note 10 (‘Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights’).

<sup>13</sup> M. Sornarajah, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT*, 130–133 (Cambridge University Press, 5th edn., 2021) (Sornarajah highlighted tensions between investor protection, sustainable development, and the state’s right to regulate) (‘Sornarajah’).

<sup>14</sup> Gus Van Harten, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW*, 3–5 (Oxford University Press, 2007).

The IIL framework fails to acknowledge the concept of the ‘carrier of investment’. The term ‘carrier of investment’ refers to entities that are either directly involved in, have a potential stake in, or are likely to be affected by a particular investment.<sup>15</sup> This includes, but is not limited to, workers engaged in employer-employee relationships with investors often vulnerable to various forms of labour and human rights abuses — as well as local communities in the areas where investments are undertaken (e.g., mining operations or industrial setups). Such communities may face significant threats to their human rights, social rights, and environmental integrity due to investment-related activities. Seeing through the lens of regulatory capacity, the State’s efforts to protect the rights of the carrier of investment reflect its responsibility to uphold these broader public interest concerns. However, the exclusion of such carriers from the legal framework contributes to its structural asymmetry. Investor claims frequently marginalise States’ public interest justifications, thereby undermining their ability to regulate effectively.<sup>16</sup> This results in a regulatory chill, where States, especially those in the Global South, hesitate to introduce or enforce vital protections due to the looming threat of international arbitration and high costs/compensation liabilities.<sup>17</sup> Such cost-related orders, related to legal and arbitral costs, on the host-states could perform a deterrence and force them towards a regulatory chill.

In response to these challenges, there is an increasing recognition that counterclaims allowing States to bring claims against investors for unlawful conduct, including human rights violations, could be a promising mechanism to ensure compliance and to contribute towards correcting the asymmetry in the investor-State power dynamics.<sup>18</sup> Counterclaims, directly connected to the original claim,<sup>19</sup> have been perceived as independent from the original claim and therefore, possessing an autonomous character.<sup>20</sup> Unlike the traditional investor-centric ISDS model, counterclaims enable States to hold investors accountable within the same arbitration, addressing the legal asymmetry that has historically favoured investors. United Nations Commission on International Trade Law (‘UNCITRAL’) Working Group III (Investor-State Dispute Settlement Reform) (‘UNCITRAL Working Group III’) has acknowledged the potential of counterclaims but stressed that their effectiveness depends on substantive reforms related to investor obligations for human rights.<sup>21</sup> Recent

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<sup>15</sup> The use of the term “*carrier of investment*” in this work is inspired by and conceptually grounded in the analyses advanced in U. N. G. A. Sixth Committee (76<sup>th</sup> Session), *Human Rights-Compatible International Investment Agreements: Note by the Secretary-General (Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises)*, U.N. Doc. A/76/238 (July 27, 2021); see also Nicolas Marcelo Perrone, *The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?*, Vol. 7(3), *TRANSNAT’L LEGAL THEORY*, (2016).

<sup>16</sup> Jonathan Bonnitcha et al., *THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME*, 145–150 (Oxford University Press, 2017) (‘Bonnitcha’).

<sup>17</sup> See *Vodafone International Holdings BV v. Republic of India*, Award, September 25, 2020, P.C.A. Case No. 2016-35 (wherein the tribunal awarded costs of the amount of approximately INR 850 million to the investor while there was no treaty violation found against the host-state, *i.e.*, the Government of India); Sornarajah, *supra* note 13, 130–133.

<sup>18</sup> Arnaud de Nanteuil, *Counterclaims in Investment Arbitration: Old Questions, New Answers?*, Vol. 17(2), *THE L. & PRAC. INT’L CTS. & TRIB.* 374, (2018).

<sup>19</sup> Shabtai Rosenne, *Counter-Claims in the International Court of Justice Revisited* in *LIBER AMICORUM ‘IN MEMORIAM’ OF JUDGE JOSE MARIA RUDA*, 457–458 (Calixto A. Armas Barea et al. eds., Kluwer Law International, 2000).

<sup>20</sup> See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Dissenting Opinion of Justice Trindade, February 3, 2012 I.C.J. Rep. 99 ¶94.

<sup>21</sup> U. N. Commission on International Trade Law, *Multiple proceedings and counterclaims*, ¶35, U.N. Doc. A/CN.9/WG.III/WP.193 (January 22, 2020) (‘Counterclaims’).

arbitral jurisprudence, including *Urbaser v. Argentina* ('Urbaser'),<sup>22</sup> underscores the importance of incorporating human rights obligations into the IIL framework.

This research, via an analysis of the International Investment Agreements ('IIAs') in South Asia, attempts to contribute to the broader effort to construct a more equitable, balanced, and socially responsible international investment regime — one that upholds the regulatory autonomy of host States while advancing the protection of fundamental human rights in the face of powerful transnational capital.

Part II of the paper examines how the invisibility of the investment carrier within the IIL framework has exacerbated the structural asymmetry inherent in the ISDS system. It further considers how counterclaims may function as a corrective mechanism to restore balance. Part III explores the legal framework governing counterclaims, with particular emphasis on their admissibility within ISDS proceedings. Finally, Part IV evaluates all South Asian Bilateral Investment Treaties ('BITs') concluded after 2008 to determine the extent to which they provide space for human rights and social rights-based counterclaims before concluding in Part V.

## II. THE INVISIBILITY OF THE 'CARRIER OF INVESTMENT' AND STRUCTURAL ASYMMETRY IN THE INVESTMENT FRAMEWORK

The ISDS, ensconced within the IIAs, is not only a fundamental element but also a uniquely distinguishing feature of the international investment legal framework.<sup>23</sup> It emerged in the twentieth century as a mechanism allowing foreign investors to bring claims directly against host States before an independent international tribunal, departing from the traditional reliance on diplomatic protection to enhance legal certainty and investor confidence.<sup>24</sup> The framework extends a bundle of protections, including guarantees of fair and equitable treatment, safeguards against expropriation, national and most-favoured-nation treatment ('FET'), full protection and security ('FPS'), and access to procedural mechanisms to investors. This ensures the protection of their rights within host States and fosters a sense of security concerning their foreign investments. The ISDS system empowers investors to initiate claims before an independent international arbitral tribunal in response to regulatory actions by host States that allegedly violate any of these protections guaranteed under the relevant IIA.<sup>25</sup> The core objective of ISDS has been to safeguard foreign investors and their investments from arbitrary, discriminatory, or unfair treatment by host governments.<sup>26</sup>

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<sup>22</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, Award, December 8, 2016, ICSID Case No. ARB/07/26 ('Urbaser').

<sup>23</sup> Won-Mog Choi, *The Present and Future of the Investor-State Dispute Settlement Paradigm*, Vol. 10(3) J. INT'L ECON. L. 725, (2007).

<sup>24</sup> Martin Jarrett et al., *Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals*, Vol. 14(2), J. INT'L DISP. SETTLEMENT, (2021).

<sup>25</sup> For a detailed discussion, see Sornarajah, *supra* note 13, 130–135, Kate Miles, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL, 280–285 (Cambridge University Press, 2013) ('Miles'), United Nations Conference on Trade and Development, *World Investment Report 2015: Reforming International Investment Governance*, 121–122 (June 25, 2015) ('UNCTAD Report') (These protections — particularly the Fair and Equitable Treatment standard and provisions against direct and indirect expropriation — have been interpreted expansively in arbitral practice, often limiting states' capacity to adopt human rights or public interest-oriented regulations).

<sup>26</sup> Rudolf Dolzer et al., *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, (Oxford University Press, 3rd edn., 2022) ('Dolzer').

The existing framework of IIAs, along with the ISDS mechanism, has been widely criticised for its asymmetric and investor-centric structure.<sup>27</sup> In most investment treaties, particularly those from the ‘old generation’ signed between 1990 and 2010, there is little to no recognition of investor obligations alongside their extensive rights.<sup>28</sup> This imbalance has led to the near-complete invisibility of the entities comprising the ‘carrier of investment’, such as local communities, workers, and affected individuals. This invisibility poses a serious threat when the rights of these entities are harmed by the conduct of investors, as the current framework provides no meaningful avenue for redress.

Investors, including TNCs, are increasingly being implicated in serious violations of human rights, social protections, and environmental standards.<sup>29</sup> Yet, such misconduct often goes unaddressed within the IIL framework, thereby perpetuating an imbalanced and inconsistent legal regime.<sup>30</sup> Crucially, while the investment framework lacks mechanisms to hold investors accountable when the carrier of investment suffers harm, it offers privileged access to remedies for investors. Investors, despite being third parties to the State-to-State investment treaties, are granted the exceptional right to bypass domestic legal systems and pursue fast-track remedies against States through binding international arbitration.<sup>31</sup> In contrast, the carrier of investment, as another category of third parties to such agreements, remains largely excluded from the treaty framework and the dispute resolution process. At best, they may be allowed to submit *amicus curiae* briefs, but this limited participation does not equate to access to justice or meaningful involvement in the process.<sup>32</sup>

#### A. INVESTMENT ARBITRATION TRIBUNALS – THE SILENCE ON ACCOUNTABILITY

Investment tribunals, when addressing the conduct of foreign investors in relation to the entities and communities affected by their investments, have often appeared to tilt in favour of the investors.<sup>33</sup> This pattern is visible in cases such as *Bear Creek Mining*

<sup>27</sup> Stephan W Schill, *Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework*, Vol. 20(3), J. INT’L ECON. L., 653 (2017) (‘Schill’).

<sup>28</sup> United Nations General Assembly, *Human Rights-Compatible International Investment Agreements: Note by the Secretary-General*, ¶¶14–19, U. N. Doc. A/76/238 (July 27, 2021).

<sup>29</sup> BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, *Boiling Point: Strengthening Corporate Accountability in the Tea Industry*, 2023, available at <https://www.business-humanrights.org/en/from-us/briefings/boiling-point-strengthening-corporate-accountability-in-the-tea-industry/> (Last visited on June 27, 2024) (In 2022, a report by the Business & Human Rights Resource Centre linked Unilever, Ekaterra, and Starbucks to human rights abuses on tea plantations in India, Sri Lanka, Bangladesh, Kenya, and Uganda, including issues with worker compensation, health and safety, and retaliation against union activities. The report criticized companies for lacking transparency in their supply chains, relying on third-party certifications like Rainforest Alliance and Fair Trade without sufficient due diligence. Unilever acknowledged some reported issues and committed to updating its supplier list, while Ekaterra did not clarify whether abusive plantations remained in its supply chain. Starbucks, though sourcing tea from these plantations at low volumes, pledged to investigate all human rights abuse allegations and reinforce supplier compliance with sustainability standards).

<sup>30</sup> Schill, *supra* note 27.

<sup>31</sup> *Supra* note 28; Bilateral Investment Treaties generally extend comprehensive protections to foreign investors, creating enforceable rights that allow them to hold host states accountable through international arbitration. While such provisions enhance investor confidence and promote cross-border investment flows, they also contribute to an asymmetrical framework that prioritises investor protection over host state policy space, *see* Dolzer, *supra* note 26, 88–140; Sornarajah, *supra* note 13, 129–135; Bonnitca, *supra* note 16, 145–150; UNCTAD Report, *supra* note 25, 120–125.

<sup>32</sup> *Id.*

<sup>33</sup> Nicolás M. Perrone, *The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?*, Vol. 7(3), TRANSNAT’L LEGAL THEORY, 17 (2016) (‘Perrone’).

*Corporation v. Peru* ('Bear Creek'),<sup>34</sup> and *Copper Mesa v. Ecuador* ('Copper Mesa'),<sup>35</sup> wherein the tribunals had opportunity(s) to engage with the social accountability of investors but largely chose not to impose any direct obligations on them. In Bear Creek, the Canadian mining company, Bear Creek Mining Corporation, initiated arbitration under the Canada-Peru Free Trade Agreement, 2009,<sup>36</sup> following Peru's revocation of its mining concession, which came after significant opposition from Indigenous communities. A central issue was whether Bear Creek, as a foreign investor, had obligations under international law toward these communities. The majority of the tribunal were of the view that the International Labour Organisation ('ILO') Convention No. 169, 1991,<sup>37</sup> places obligations solely on States, not private investors.<sup>38</sup> Arbitrator Philippe Sands, in his dissenting opinion,<sup>39</sup> inspired by Urbaser,<sup>40</sup> observed that international instruments such as ILO Convention No. 169 could be interpreted to imply responsibilities for investors, particularly to refrain from actions that negatively impact human rights. He advocated for a more balanced approach that ensured recognition of investors' rights as well as community interests.<sup>41</sup> Nevertheless, the tribunal ultimately found that Peru had unlawfully expropriated Bear Creek's rights and violated due process, awarding partial damages to the company.<sup>42</sup> These decisions exemplify the asymmetric nature of IIL — structural concerns like parties to the IIA, and the nature of protections recognised by the law — as causing the invisibilisation of the carrier.

Similarly, in Copper Mesa, the tribunal addressed Copper Mesa Mining Corporation's claim against the Republic of Ecuador under the Canada-Ecuador BIT, 1997,<sup>43</sup> after Ecuador revoked its mining concessions due to environmental concerns and escalating conflicts with local communities. The case also presented an opportunity to assess the investor's conduct. The tribunal acknowledged that the investor, along with its contractors and subcontractors, was responsible for the "reckless escalation of violence" in the Junín area.<sup>44</sup> It noted the investor's reputation for intimidation, threats, and violence among local communities.<sup>45</sup> Nonetheless, the tribunal emphasised Ecuador's awareness of the investor's behaviour and its failure to act in a timely manner.<sup>46</sup> The tribunal "preferred" to ground its opinion in the investor's negligence, rather than to conclude that Copper Mesa's actions had

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<sup>34</sup> *Bear Creek Mining Corporation v. Republic of Peru*, Award, November 30, 2017, ICSID Case No. ARB/14/21 ('Bear Creek').

<sup>35</sup> *Copper Mesa Mining Corporation v. Republic of Ecuador*, Award, March 15, 2016, P.C.A. Case No. 2012-2 ('Copper Mesa').

<sup>36</sup> Free Trade Agreement between Canada and the Republic of Peru (Canada & Peru) (adopted on May 29, 2008, entered into force on August 1, 2009) available at <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng> (Last visited on November 15, 2025).

<sup>37</sup> Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 1650 U.N.T.S. 383 (adopted on June 27, 1989, entered into force on September 5, 1991).

<sup>38</sup> *Bear Creek*, *supra* note 34, 664.

<sup>39</sup> *Bear Creek*, *supra* note 34, Partial Dissenting Opinion of Professor Philippe Sands QC, ¶¶7–12.

<sup>40</sup> *Id.*, ¶10.

<sup>41</sup> *Id.*, ¶13.

<sup>42</sup> *Bear Creek*, *supra* note 34, ¶415–416.

<sup>43</sup> Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments (Canada & Ecuador) (adopted on April 29, 1996, entered into force on June 6, 1997, terminated on May 19, 2018) available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/609/download> (Last visited on November 15, 2025).

<sup>44</sup> *Copper Mesa*, *supra* note 35, ¶4.265.

<sup>45</sup> *Id.*, ¶6.99.

<sup>46</sup> *Id.*, ¶7.6.11.

been wilfully driven by the senior management in Canada.<sup>47</sup> However, the tribunal ordered that Ecuador had expropriated Copper Mesa's investment and violated the FET standard, though it reduced the compensation by thirty percent due to the investor's contribution to the project's failure.<sup>48</sup>

This outcome reflects a recurring pattern:<sup>49</sup> even when investors engage in harmful conduct leading to social unrest, tribunals seldom hold them directly accountable. Instead, compensation is often awarded, and investor misconduct is downplayed or mitigated by attributing partial responsibility to host States. As a result, investment tribunals continue to adopt approaches that prioritise investor rights while leaving limited space for the recognition of community interests or investor accountability within the framework of IIL.<sup>50</sup>

The persistent reluctance of investment tribunals to impose responsibility on foreign investors even when their misconduct is acknowledged can be traced to the structural design of the investment treaty regime itself. A key limitation lies in the invisibility of the various entities that constitute the carrier of investment. Their exclusion from the treaty framework obscures the full scope of the investor's operations and narrows/obliterates the tribunal's capacity to examine investor conduct, particularly in cases involving adverse human rights, social or environmental impact.

Investment treaties are primarily oriented toward the protection of investors, often omitting any substantive obligations on their part. As a result, tribunals frequently find themselves constrained by the treaty text, lacking the normative tools to hold investors accountable even where their actions clearly harm human rights and other social rights of the carriers of investment. This asymmetry has contributed to a doctrinal and structural imbalance in the interpretation and application of IIL, privileging investor rights while leaving affected communities without recourse, as evident from *Glencore v. Bolivia* ('Glencore').<sup>51</sup> In this case, the investors initiated UNCITRAL arbitration proceedings, challenging the nationalisation of its four mining-related assets, which were taken by Bolivian decrees between 2007 and 2012 without compensation. The key issues in the dispute involved whether Bolivia's actions constituted unlawful expropriation and breaches of FET and FPS under the treaty.<sup>52</sup> Bolivia defended its actions by invoking its human rights obligations to promote social justice, protect the collective rights of its people, and exercise sovereignty over natural resources in the public interest.<sup>53</sup> Bolivia argued that the applicable legal framework should not be confined to the Bolivia-United Kingdom BIT,<sup>54</sup> but should also include international human rights obligations and domestic Bolivian law.<sup>55</sup> Bolivia emphasised that its commitments under instruments such as the International Covenant on Civil and Political Rights ('ICCPR') and the American

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<sup>47</sup> *Id.*, ¶6.102.

<sup>48</sup> *Id.*, ¶¶6.66–6.67, 7.27.

<sup>49</sup> *Lupaka Gold Corp. v. Republic of Peru*, Award, June 30, 2025, ICSID Case No. ARB/20/46 (It may be noted here that the tribunal established under the Canada-Peru FTA, 2008, refused to consider the violence perpetrated by the private security force of the transnational corporation, Lupaka Gold Corporation, as a mitigating factor in calculation and award of compensation to the tune of 30 million dollars against Peru.)

<sup>50</sup> Perrone, *supra* note 33.

<sup>51</sup> *Glencore Finance (Bermuda) Ltd v. Plurinational State of Bolivia*, Award, September 8, 2023, P.C.A. Case No. 2016-39 ('Glencore Finance').

<sup>52</sup> *Id.*, ¶¶197, 243, 305.

<sup>53</sup> *Id.*, ¶¶519–523.

<sup>54</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments (Bolivia & United Kingdom) (adopted on May 24, 1988, entered into force on February 16, 1990) available at <https://treaties.fcd.o.gov.uk/data/Library2/pdf/1994-TS0045.pdf> (Last visited on November 15, 2025).

<sup>55</sup> *Glencore Finance*, *supra* note 51, ¶130.

Convention on Human Rights should inform the tribunal's assessment of investor claims.<sup>56</sup> Moreover, Bolivia maintained that domestic law was critical in defining the legal rights connected to the contested assets.<sup>57</sup> While the tribunal acknowledged that the applicable law included both the treaty and Bolivian law,<sup>58</sup> it rejected the contention that Bolivia's human rights obligations could substantively limit the protections accorded to investors under the treaty.<sup>59</sup> The tribunal noted that such obligations might be relevant in interpreting treaty breaches, but in the absence of clear textual language within the investment treaty, they could not restrict the substantive rights granted to the investor.<sup>60</sup> This assertion is much similar to the observations in the *Amco v. Indonesia*,<sup>61</sup> wherein the tribunal insisted that the jurisdiction for any counterclaim directly arising out of the subject matter of the dispute requires to be within the scope of the consent of the parties.<sup>62</sup> This position reflects a broader doctrinal trend in investment arbitration: tribunals are hesitant to read human rights considerations into the treaty unless expressly incorporated. In *Urbaser*,<sup>63</sup> the dispute arose from the termination of a water and sanitation services concession in Buenos Aires following Argentina's 2001–2002 financial crisis. Urbaser claimed that Argentina's measures, such as tariff "pesification" and regulatory changes, breached the Spain-Argentina BIT standards for FET, expropriation, and non-discrimination.<sup>64</sup> Argentina counterclaimed, accusing Urbaser of failing to invest adequately in the concession, which Argentina argued violated both the contract and international human right to water obligations.<sup>65</sup> While noting an FET obligation violation against Argentina, the tribunal also addressed Argentina's human rights counterclaim, recognising for the first time in investment arbitration that corporations can have negative human rights obligations (*i.e.*, not to infringe human rights), but found that positive obligations (*i.e.*, to proactively ensure the right to water) rested with States and not with private investors under international law. Corporations have only such obligations as are identified within the IIA. In other words, investors would have human rights obligations only if they are incorporated as such within the IIAs.<sup>66</sup>

The following section will examine the scope of States' regulatory authority in the public interest under IIL. The discussion addresses how structural asymmetries and vague treaty standards, particularly the FET clause, cause a chilling effect on the regulatory activity.

### *B. THE SCOPE OF STATES' REGULATORY AUTHORITY IN THE PUBLIC INTEREST UNDER IIL*

While States retain the sovereign right to regulate the conduct of investors,<sup>67</sup> the effective exercise of this regulatory authority remains contentious owing to the structural

<sup>56</sup> *Id.*, ¶130.

<sup>57</sup> *Id.*, ¶130.

<sup>58</sup> *Id.*, ¶¶132–133.

<sup>59</sup> *Id.*, ¶133.

<sup>60</sup> *Id.*, ¶133.

<sup>61</sup> *Amco Asia Corporation and others v. Republic of Indonesia*, Award, November 20, 1984, ICSID Case No. ARB/81/1.

<sup>62</sup> *Id.*, ¶¶118, 130 (wherein the tribunal referred to ICSID Convention Article 46 to reiterate the importance of consent of the parties to the counterclaims which are otherwise within the jurisdiction of the Centre).

<sup>63</sup> *Urbaser*, *supra* note 22.

<sup>64</sup> *Id.*, ¶240–241.

<sup>65</sup> *Id.*, ¶1156–1166.

<sup>66</sup> *Id.*, ¶1207.

<sup>67</sup> Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, Vol. 36(1), U. PA. J. INT'L L., 4 (2014) (noting that the right to regulate refers to the power of a sovereign state to adopt and maintain measures aimed at achieving public welfare objectives, such as health, safety, environmental protection, and social justice).

asymmetries embedded in international investment treaties.<sup>68</sup> Regulatory measures adopted in pursuit of legitimate public interest objectives are frequently challenged through ISDS mechanisms for alleged infringements of investor rights guaranteed under such treaties.<sup>69</sup> The asymmetrical nature of IIAs, coupled with the absence of a human rights-centred normative framework within investment law and the relative invisibility of the entities comprising the carriers of investment, has resulted in limited scope for arbitral tribunals to consider a State's duty to protect the human rights of its citizens when assessing the extent of its right to regulate.<sup>70</sup> Consequently, arbitral tribunals often encounter interpretative challenges when scrutinising State measures for alleged excesses, with outcomes that tend to favour investor protection over regulatory autonomy.<sup>71</sup> States generally seek to enforce investor accountability through the exercise of their regulatory powers. However, the examination of such regulatory measures under investment protection standards potentially exposes States to adverse findings, largely because of the investment-oriented design of IIAs.

There have been several instances in which public interest-driven regulations adopted to advance environmental, social, or economic objectives were challenged by investors as breaches of treaty obligations. For instance, in *Tecnicas Medioambientales Tecmed SA v. The United Mexican States*,<sup>72</sup> Mexico's refusal to renew a landfill permit on environmental and public health grounds was found to breach the FET standard. The tribunal held that the measure was disproportionate and violated the investor's legitimate expectations, thereby constraining Mexico's regulatory autonomy in environmental governance. Similarly, in *CMS Gas Transmission Company v. Argentina*,<sup>73</sup> Argentina's emergency measures during its 2001–2002 financial crisis were deemed inconsistent with FET obligations. Although the tribunal acknowledged the legitimacy of Argentina's economic emergency, it concluded that the measures frustrated investor expectations.

The framework of IIAs, which largely omits corresponding investor obligations, has fostered an interpretative approach that prioritises investor rights over State regulatory interests.<sup>74</sup> Among the various protection standards, the FET clause has evolved into a “catch-all” provision for investors,<sup>75</sup> often succeeding where claims of expropriation, discrimination, or denial of justice have failed.<sup>76</sup> The concept of FET lacks a clear definition, and the language of treaties often does not provide detailed guidance on how dispute settlement bodies should interpret these provisions, resulting in differing interpretations, some of which are expansive

<sup>68</sup> Bonnitcha, *supra* note 16, ¶¶145–150.

<sup>69</sup> *Id.*, 150.

<sup>70</sup> Urbaser, *supra* note 22, ¶¶1192–1210; Glencore Finance, *supra* note 51, ¶133; Sornarajah, *supra* note 13, 382–385; Surya Deva, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS, 95–98 (Routledge, 2012); Catharine Titi, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW, 45–48 (Nomos, 2014); UNCTAD Report, *supra* note 25, 126–130.

<sup>71</sup> Glencore Finance, *supra* note 51, ¶¶129–133.

<sup>72</sup> *Tecnicas Medioambientales Tecmed SA v. The United Mexican States*, Award, May 29, 2003, ICSID Case No. ARB(AF)/00/2, ¶¶154–157.

<sup>73</sup> *CMS Gas Transmission Company v. Argentina*, Award, May 12, 2005, ICSID Case No. ARB/01/8, ¶¶274–280.

<sup>74</sup> Dolzer, *supra* note 26, 119–121; Andrew Newcombe & Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, 253–255 (Kluwer Law International, 2009).

<sup>75</sup> INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, *A Sustainability Toolkit for Trade Negotiators: Trade and investment as vehicles for achieving the 2030 Sustainable Development Agenda*, 5.4.5, available at <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-4-safeguarding-policy-space/5-4-5-fair-and-equitable-treatment-fet-or-minimum-standard-of-treatment-mst/> (Last visited on June 18, 2024).

<sup>76</sup> See, e.g., *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, January 19, 2007, ICSID Case No. ARB/02/5, ¶238.

and undermine legal security for host States.<sup>77</sup> Traditionally, breaches of the FET standard were assessed based on concepts such as “outrage”, “bad faith”, “willful disregard of due process of law”, and “willful neglect of duty”.<sup>78</sup> However, contemporary interpretations have adopted a more expansive approach, incorporating criteria such as “idiosyncratic”, “unreasonable”, “legitimate expectations”, “stability of the legal or business framework”, and “affirmative transparency”.<sup>79</sup>

To prevent expansive interpretations such as mentioned above, some States have excluded FET entirely from their international agreements.<sup>80</sup> Others have continued to include a version of FET but have tried to limit its scope. One approach has been to draft the standard or an interpretive note to clarify that the treatment equates to no more than the customary international law minimum standard of treatment of aliens.<sup>81</sup>

It needs to be noted here that the Vienna Convention on the Law of Treaties, 1969 (‘VCLT’),<sup>82</sup> mandates that treaties be interpreted in good faith, in accordance with the ordinary meaning of their terms, in their context, and in light of their object and purpose. The asymmetrical nature of the BITs impacts their efficient interpretation, leading to refrain from host States in exercising regulatory authority in public interest.<sup>83</sup> Creating a balanced investment regulation framework necessitates revisiting the architecture of IIAs and incorporating investor accountability for human rights and other social obligations.

Owing to the prevailing treaty framework and arbitral practice, States, particularly those that are economically weaker, often refrain from adopting public interest-oriented regulatory measures out of concern that such actions may trigger ISDS proceedings. Scholarship has found this apprehension as causing a phenomenon commonly referred to as

<sup>77</sup> Dolzer, *supra* note 26, 130.

<sup>78</sup> Mathew C. Porterfield, *A Distinction without a Difference? The Interpretation of Fair and Equitable Treatment under Customary International Law by Investment Tribunals*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, March 22, 2013, available at <https://www.iisd.org/itn/en/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/> (Last visited on July 18, 2023).

<sup>79</sup> Haneul Jung & Nu Ri Jung, *Unravelling the Longstanding Riddle About the Doctrine of Legitimate Expectation Under International Investment Law: Ascertainning Legal Tests for the Customary International Law’s Minimum Standard of Treatment*, Vol. 42(2), NW. J. INT’L L. & BUS., 189 (2022).

<sup>80</sup> U. N. TRADE AND DEVELOPMENT, *IIA Content Mapping*, available at <https://investmentpolicy.unctad.org/international-investment-agreements/iaa-mapping> (Last visited on June 15, 2024) (‘IIA Mapping’). See Patrick Dumberry, *THE FORMATION AND IDENTIFICATION OF RULES OF CUSTOMARY INTERNATIONAL LAW IN INTERNATIONAL INVESTMENT LAW*, Vol. 1, 145 (Cambridge University Press, 2016) (Dumberry noted that in 2014, only fifty out of a total of 1,964 BITs did not contain an FET provision. However, arbitral tribunals have been importing an FET clause using other treaty-based protections. In *PAO Tatneft (formerly OAO Tatneft) v. Ukraine*, P.C.A. Case No. 2008-8, Award on the Merits, 29 July 2014, ¶¶326–365, wherein the Russia-Ukraine BIT did not contain an FET clause but was imported from the UK-Ukraine BIT through the most-favoured nation clause in the Russia-Ukraine BIT).

<sup>81</sup> North American Free Trade Agreement, 32 I.L.M. 289 (adopted on December 17, 1992, entered into force on January 1, 1994) Notes of Interpretation of Certain Chapter 11 Provisions (adopted on July 31, 2011), Art. 2, Minimum Standard of Treatment in Accordance with International Law.

<sup>82</sup> The Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (adopted on May 23, 1969, entered into force on January 27, 1980) Art. 31(1) (‘VCLT’).

<sup>83</sup> Berfu Beysulen-Angin, *The Right to Regulate vs Investment Protection: Unveiling the Causes of Imbalance and the Limits of Current Reform Efforts in International Investment Law*, Vol. 40(1), ICSID REV. - FILJ., 11, 15 (2025).

“regulatory chill”, which is especially pronounced in economically vulnerable States of the Global South.<sup>84</sup> The following section discusses the phenomenon of regulatory chill.

### C. REGULATORY CHILL AND ITS IMPACT ON STATES’ PUBLIC INTEREST POWERS

Expansive and ambiguous interpretations of the FET and expropriation clauses by the tribunals resulted in successful challenges by investors, caused a significant financial burden, and contributed to a phenomenon widely referred to as regulatory chill.<sup>85</sup> Extravagant claims upheld by tribunals and the resultant compensation awarded against States have led to a growing hesitancy among host States to exercise their regulatory powers, particularly in developing and LDCs, where economic vulnerabilities amplify the deterrent effect of potential litigation.

In its submission to UNCITRAL Working Group III on the possible reform of ISDS, South Africa stated that investors are prone to deploying ISDS claims as a coercion mechanism to achieve favourable terms for their investments from host States. Governments may, therefore, refrain from regulatory action for public interest, because of such claims and the possible damages that they entail.<sup>86</sup>

Invisibilising the entities that constitute the carrier of investment and failure to acknowledge the potential adverse impact of investor conduct, particularly in relation to such carriers’ human rights and broader social rights, leaves little room for embedding meaningful investor accountability. Investment tribunals, faced with interpretive challenges, refuse to impose substantive obligations on foreign investors. At best, States may rely on public interest or regulatory justifications as defensive arguments within investor-State arbitration. As has been aptly noted, within the current system of international investment arbitration, a state can never truly ‘win’ — the most it can realistically hope for is to avoid losing.<sup>87</sup> A comparable approach was adopted in *Maffezini v. Spain*, where the tribunal concluded that Spain’s conduct did not rise to the level of a full FET violation. Nevertheless, it awarded part of the claimant’s losses and costs, underscoring that findings short of a treaty breach may still attract financial consequences.<sup>88</sup>

### D. COUNTERCLAIMS AS A MECHANISM TO ENFORCE INVESTORS’ OBLIGATIONS

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<sup>84</sup> Fabio C Morosini & Ely Caetano Xavier Junior, *A New Analytical Matrix for Understanding International Investment Law Agreements in the Global South*, Vol. 16(2), J. INT’L DISP. SETTLEMENT, 1 (2025); Fabio Morosini & Michelle Ratton Sanchez Badin, *RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH*, (Cambridge University Press, 2017) (‘Morosini-Sanchez’).

<sup>85</sup> *Id.*

<sup>86</sup> U. N. Commission on International Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS) : Submission from the Government of South Africa*, ¶63, U.N. Doc. A/CN.9/WG.III/WP.176 (July 17, 2019).

<sup>87</sup> Bonniticha, *supra* note 16, 158–161; Miles, *supra* note 25, 275–280. Emilio Augustin Maffezini v. The Kingdom of Spain, Award, November 13, 2000, ICSID Case No. ARB/97/7 (The tribunal found that Spain’s actions, found improper, did not meet the threshold for FET breach. Nevertheless, the tribunal awarded compensation for part of the claimant’s losses reasoning that some of the harm suffered could be sourced to Spain’s actions, and thus merited a financial remedy).

<sup>88</sup> *Emilio Agustín Maffezini v Kingdom of Spain* (Decision on the Merits, 13 November 2000) ICSID Case No ARB/97/7. paras 64–66.

Counterclaims could be an effective method to address the asymmetry in investment law.<sup>89</sup> While IIAs typically empower investors to initiate claims against host States, they rarely provide reciprocal mechanisms for States to seek redress against investors for misconduct. A counterclaim is a claim instituted by a host State against an investor to hold the latter accountable for its unlawful conduct, in the same arbitration initiated by the investor. Its objective is not only to refute the initial claim but also to hold the claimant accountable for violating the relevant laws governing the dispute.<sup>90</sup> Counterclaims enable States to hold investors accountable within the same arbitral proceeding, fostering a more equitable system that considers both parties' conduct in a dispute.<sup>91</sup> Counterclaims enable tribunals to consider both parties' conduct within the same proceeding, thereby integrating issues such as environmental protection, labour standards, and respect for human rights into the adjudicatory process. This approach promotes a more coherent and equitable dispute settlement framework, ensuring that investor rights are not interpreted in isolation from their corresponding responsibilities.<sup>92</sup>

The UNCITRAL Working Group III identified counterclaims as a potential mechanism to address the structural asymmetry in the investor-centric international investment regime.<sup>93</sup> There was a broad consensus that counterclaims could help rebalance this asymmetry.<sup>94</sup> The Working Group noted that while counterclaims are not alien to investment arbitration, their use is limited due to the absence of reciprocal investor obligations in most treaties.<sup>95</sup> Effective use of counterclaims would require both procedural and substantive reforms, particularly the inclusion of investor obligations related to human rights, other social rights, and environmental rights.<sup>96</sup> Noting the absence of a mandate to define substantive

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<sup>89</sup> James J. Nedumpara & Aditya Laddha, *Human Rights and Environmental Counterclaims in Investment Treaty Arbitration* in HANDBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY, 1 (Springer, 2021) ('Nedumpara & Laddha').

<sup>90</sup> Constantine Antonopoulos, COUNTERCLAIMS BEFORE THE INTERNATIONAL COURT OF JUSTICE, 50 (Springer, 2011).

<sup>91</sup> Andrea K. Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, Vol. 17(2), LEWIS & CLARK L. REV., 461, 475–477 (2013) ('Bjorklund'); Nedumpara & Laddha, *supra* note 89.

<sup>92</sup> *Id.*, 471–475.

<sup>93</sup> *Id.*

<sup>94</sup> Anthea Roberts & Zeineb Bouraoui, *UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims*, EJIL: TALK, June 6, 2018, available at <https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/> (Last visited on November 18, 2025) (During the 34th session of UNCITRAL Working Group III (December, 2017) on investor-State dispute settlement concerns, various States commented on counterclaims. South Africa supported counterclaims to rebalance the system and discourage frivolous claims. South Korea and Argentina were generally in favour but noted drawbacks, such as the lack of a substantive basis for state counterclaims in BITs, which primarily establish investor rights and state duties. Korea emphasised that counterclaims should only be allowed if specified in the relevant instrument. Canada highlighted concerns about why investors have privileged access to ISDS, preventing states from enforcing obligations like environmental protections or tax payments. Canada also cautioned that integrating everything into the ISDS system could undermine its legitimacy and detract from domestic courts better suited for handling domestic law issues).

<sup>95</sup> U. N. Commission on International Trade Law, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session - Part II*, ¶¶3–6, U.N. Doc. A/CN.9/930/Add.1/Rev.1 (February 26, 2018) (The Report noted the limited ability of States to bring counterclaims in ISDS due to lack of substantive investor obligations in treaties, while emphasising that procedural efficiency, fairness, and balance may justify considering mechanisms for counterclaims where a legal basis exists, without expanding the Working Group's mandate to cover substantive obligations).

<sup>96</sup> U. N. Commission on International Trade Law, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session*, ¶59, U.N. Doc. A/CN.9/1044 (November 10, 2020).

obligations,<sup>97</sup> the Working Group suggested the possibility of counterclaims, the legal base for which exists within the ISDS framework.<sup>98</sup>

The *Texaco/Chevron v. Ecuador* dispute,<sup>99</sup> concerning environmental and human rights issues, illustrated the concerns about litigating before domestic forums involving complex legal challenges, including questions around the legitimacy of domestic court decisions, the enforcement capacity of host States, issues of *locus standi*, *forum non conveniens*, and jurisdiction that have resulted in protracted litigation. The dispute concerned environmental contamination from oil operations in the Ecuadorian Amazon. Between 1972 and 1993, Texaco (later acquired by Chevron) was accused of dumping billions of gallons of toxic waste and crude oil in the region, which led to devastating impacts on local communities and the environment. In 1993, around 30,000 indigenous and small-scale farmers inhabiting the Amazon launched a legal case against Texaco, seeking compensation for the pollution. Texaco became Chevron's responsibility after its 2001 merger. Chevron was eventually found guilty by Ecuadorian courts and ordered to pay billions in compensation — initially USD 18.2 billion, later reduced to USD 9.5 billion — after lengthy litigation. Chevron responded by filing for international arbitration against Ecuador under the Ecuador-US BIT, 1993. It claimed that the judicial procedures in Ecuador engaged in 'unfair conduct', that the verdict was fraudulent and violated international treaties.<sup>100</sup> The arbitration tribunal sided with Chevron in 2018, ruling that the Ecuadorian judgment was procured through fraud and corruption and should not be recognised internationally. Although Ecuadorian courts upheld the judgment, Chevron has not paid the compensation, and the contaminated site remediation remains unresolved. The dispute has become an emblematic case of international investment arbitration, corporate accountability for environmental harm, and the limitations faced by affected communities seeking justice. Counterclaims within the ISDS framework offer a more coherent solution for the resolution of interconnected issues within a unified dispute resolution process.<sup>101</sup>

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<sup>97</sup> *Id.*, ¶¶57–59 (Noting that counterclaims in ISDS involve both procedural and substantive elements; while procedural issues such as jurisdiction and admissibility merit further discussion, particularly in the context of a standing multilateral body, the Working Group affirmed that the development of investor obligations as a basis for counterclaims falls outside its current mandate).

<sup>98</sup> U. N. Commission on International Trade Law, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session*, ¶35, U.N. Doc A/CN.9/970 (April 9, 2019) (Where it was stressed that any work by the Working Group would not foreclose consideration of the possibility that claims might be brought against an investor where there was a legal basis for doing so).

<sup>99</sup> *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)*, Third Interim Award on Jurisdiction and Admissibility, February 27, 2012, P.C.A. Case No. 2009-23 (The dispute arose from environmental damage caused by Texaco's oil operations in the Ecuadorian Amazon. After U.S. courts dismissed the plaintiffs' claims on *forum non conveniens* grounds, the case proceeded in Ecuador, resulting in a multi-billion-dollar Judgement against Chevron. Chevron challenged enforcement globally, citing fraud and treaty breaches under the US-Ecuador BIT. The case illustrates the jurisdictional and enforcement challenges of suing foreign investors in domestic courts and highlights the intersection of domestic remedies and investor protections under international law).

<sup>100</sup> *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)*, Claimants' Memorial on the Merits, September 6, 2010, P.C.A. Case No. 2009-23, ¶¶538–547.

<sup>101</sup> *See*, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, Decision on Jurisdiction and Liability, November 10, 2017, ICSID Case No. ARB/12/1 (Counterclaims for violations of local mining regulations and the joint-venture contract); *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, Guatemala's Counter-Memorial, December 7, 2020, ICSID Case No. ARB/18/43 (Raising a counterclaim for environmental remediation on the basis that claimants had violated Guatemalan law and were likely to abandon the mining project); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, (U.N. Commission on International Trade Law), Award on Jurisdiction and Liability, April 28, 2011, ¶678 (Counterclaiming that the claimants violated their environmental obligations under gold-mining licences); *Nedumpara & Laddha*, *supra* note 89.

Counterclaims in the context of investor obligations are, however, hinged upon their presence within the text of the IIA.<sup>102</sup> In *Urbaser*,<sup>103</sup> the dispute arose from a concession agreement for the provision of water and sewerage services in Buenos Aires. The investors alleged that Argentina had breached the Argentina-Spain BIT<sup>104</sup> by failing to maintain the economic balance of the concession during the 2001–2002 financial crisis. In a notable development, Argentina filed a counterclaim asserting that the investors had violated their obligation to respect the human right to water, thereby failing to fulfil their responsibilities under international law and the concession contract.<sup>105</sup> The *Urbaser* tribunal, when addressing the human rights-based counterclaim, emphasised the importance of incorporating human rights obligations within the scope of the applicable BIT to ensure that such claims have a firm legal foundation.<sup>106</sup> However, it ultimately dismissed the counterclaim on the merits, reasoning that the BIT imposed no explicit human rights duties on investors and that the applicable legal framework did not provide a sufficient basis for liability.<sup>107</sup> Despite this outcome, the decision remains a landmark for its acknowledgement that corporations may, in principle, bear human rights responsibilities under international law.<sup>108</sup> The case underscores both the potential and the limitations of counterclaims as a means to integrate human rights accountability into investment arbitration, illustrating the pressing need to embed explicit investor obligations within future treaty frameworks to achieve a more balanced and equitable system. While recent BITs have begun including provisions on investor responsibilities regarding human and social rights,<sup>109</sup> a major challenge remains the non-binding nature of these obligations under current international law.

<sup>102</sup> Bjorklund, *supra* note 91, 476–478.

<sup>103</sup> *Urbaser*, *supra* note 22.

<sup>104</sup> Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments (Argentina & Spain) (adopted on October 3, 1991, entered into force on September 28, 1992) 1699 U.N.T.S. 187 (‘Argentina-Spain BIT’).

<sup>105</sup> *Urbaser*, *supra* note 22, ¶¶1151–1210.

<sup>106</sup> *Id.*, ¶¶1192–1210.

<sup>107</sup> *Id.*, ¶¶1206–1210.

<sup>108</sup> *Id.*, ¶¶1194–1200.

<sup>109</sup> See GOVERNMENT OF INDIA, *Model Text for the Indian Bilateral Investment Treaty*, Arts. 11–14, January 14, 2016, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download> (Last visited on November 16, 2025) (‘2016 Indian Model BIT’) (conditioning treaty protections on investor compliance with host-state law and incorporating obligations relating to human rights, environmental protection, and corporate social responsibility); Treaty Between the Republic of India and the United Arab Emirates Concerning Foreign Investment (India & United Arab Emirates) (adopted on February 13, 2024, entered into force on August 31, 2024), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/8492/download> (Last visited on November 16, 2025) (imposing express investor obligations, including anti-corruption and CSR duties); Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India (adopted on January 25, 2020), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download> (Last visited on November 16, 2025) (encouraging adherence to CSR principles and establishing institutional mechanisms for cooperation) (‘2020 India-Brazil BIT’); Treaty Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Qatar for the Promotion and Reciprocal Protection of Investments (adopted on November 28, 2018), Arts. 13–14, available at <https://jusmundi.com/fr/document/treaty/en-agreement-between-the-government-of-the-federal-democratic-republic-of-ethiopia-and-the-government-of-the-state-of-qatar-for-the-promotion-and-reciprocal-protection-of-investments-ethiopia-qatar-bit-2017-tuesday-14th-november-2017> (Last visited on November 16, 2025) (requiring investors to comply with domestic laws and respect internationally recognised human rights in the course of their operations); Agreement for the Promotion, Protection and Facilitation of Investments between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe (adopted on November 27, 2009, entered into force on September 15, 2010), Art. 6, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2948/south-africa---zimbabwe-bit-2009-> (Last visited on November 16, 2025) (providing that investors must observe host-state laws

### III. LEGAL FRAMEWORK OF COUNTERCLAIMS IN INTERNATIONAL LAW

Counterclaims have long been recognised and deployed within international legal procedural frameworks. Article 80 of the Rules of the International Court of Justice ('ICJ') provides for the institution of counterclaims and sets out three primary conditions for their admissibility:<sup>110</sup>

1. the counterclaim must fall within the jurisdiction of the ICJ;
2. it must bear a direct connection to the subject matter of the applicant's claim;  
and
3. it must be submitted as part of the counter-memorial.

In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*,<sup>111</sup> the ICJ considered counterclaims pertinent for the sound administration of justice and ensuring procedural economy. The ICJ, by majority, explained that a counterclaim has a dual nature: it is independent in that it represents a distinct legal action presenting a new claim before the ICJ, yet it is also connected to the principal claim because it is formulated in response to it. The purpose of a counterclaim, therefore, is not merely to seek dismissal of the applicant's main claim but to expand the scope of the dispute by introducing additional objectives.<sup>112</sup>

Interestingly, the Iran-United States Claims Tribunal pursued counterclaims despite the absence of an explicit provision for them in Article II(1) of the Claims Settlement Declaration.<sup>113</sup> The Tribunal permitted counterclaims on the condition that they arose out of the same contract, transaction, or occurrence as the national's original claim.<sup>114</sup>

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including those related to environmental and labour standards); For a detailed discussion on the South Asian understanding of investor obligations and responsible investment frameworks, see Annexure I.

<sup>110</sup> There is no provision regarding counterclaims in the Statute of the International Court of Justice. According to Article 30(1) of the Statute, "the Court shall frame the rules for carrying out its functions. In particular, it shall lay down its rules of procedure". Counterclaims are viewed as a matter of procedure. *See* Rules of Court (adopted on April 14, 1978, entered into force on July 1, 1978), 33 U.N.T.S. 993, Art. 80 (provides for the institution of counterclaims:

The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party. A counter-claim shall be made in the Counter-Memorial and shall appear as part of the submissions contained therein. The right of the other party to present its views in writing on the counter-claim, in an additional pleading, shall be preserved, irrespective of any decision of the Court, in accordance with Article 45, paragraph 2, of these Rules, concerning the filing of further written pleadings. Where an objection is raised concerning the application of paragraph 1 or whenever the Court deems necessary, the Court shall take its decision thereon after hearing the parties).

<sup>111</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, February 26, 2007, I.C.J. Rep. 2007, 43 ('Bosnia v. Serbia'); *Bosnia v. Serbia*, Order, December 17, 1997, I.C.J. Rep. 1997, 243.

<sup>112</sup> *Bosnia v. Serbia*, Order, December 17, 1997, I.C.J. Rep. 1997, ¶27.

<sup>113</sup> 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 (Claims Settlement Declaration), Art. II(1), 19 January 1981, available at <https://jusmundi.com/en/document/treaty/en-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-claims-settlement-declaration-1981-algiers-declaration-claims-settlement-1981-monday-19th-january-1981> (Last visited on November 16, 2025).

<sup>114</sup> George H. Aldrich, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL*, 156–157 (Oxford University Press, 1996).

Article 46 of the ICSID Convention outlines three key requirements for admissibility of counterclaims:<sup>115</sup> (a) the counterclaim must be connected to the subject matter of the primary claim, (b) it must fall within the scope of the parties' consent under Article 25, and (c) it must meet the jurisdictional criteria of the Centre. Rule 40 of the ICSID Arbitration Rules complements Article 46 by stipulating that a counterclaim must be raised in the counter-memorial.<sup>116</sup> Under the UNCITRAL Arbitration Rules, Article 19(3)<sup>117</sup> of the 1976 version permitted counterclaims arising from the same contract or legal relationship, but this was considered inadequate for treaty-based arbitrations. The revised UNCITRAL Arbitration Rules 2010, under Article 21(3),<sup>118</sup> allow counterclaims or set-offs as long as the tribunal has jurisdiction. However, the Rules are silent on the degree of connectedness required, thereby granting tribunals broad discretion to determine admissibility based on the specific facts and circumstances of each case.<sup>119</sup>

1. the tribunal must have jurisdiction over the counterclaim, i.e., the consent requirement; and
2. the counterclaim must be sufficiently connected to the principal claim, the connectedness requirement.

This subsequent subsection examines the evolving legal framework governing counterclaims in international law, focusing on jurisdictional and admissibility requirements under various instruments such as the ICJ Rules, ICSID Convention, and UNCITRAL Arbitration Rules. It then analyses how evolving tribunal practice — from restrictive to liberal interpretations — has shaped consent and connectedness requirements, particularly in cases involving human rights and environmental counterclaims. Finally, it explores the emerging potential of modern BITs and domestic law provisions to integrate human rights-oriented counterclaims as tools to address issues like modern slavery and enhance investor social accountability.

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<sup>115</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 U.N.T.S. 159 (adopted on 18 March, 1965, entered into force on 14 October, 1966) Art. 46 (“Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or 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.”) (‘ICSID Convention’).

<sup>116</sup> The International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings, 2006, R. 40, April 10, 2006, available at <https://jusmundi.com/en/document/rule/en-icsid-arbitration-rules-2006-icsid-arbitration-rules-2006> (Last visited on November 16, 2025) (“(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or a counterclaim arising directly out of the subject-matter of the dispute, provided that such claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.

(2) A party shall file such a claim no later than in its counter-memorial or, if the incidental or additional claim or the counterclaim arises after the filing of the counter-memorial, no later than in the reply; provided that the Tribunal may admit a later filing if it finds that the delay was justified under the circumstances.

(3) The Tribunal shall fix a time limit within which the other party shall file its observations on the claim.”).

<sup>117</sup> The UNCITRAL Arbitration Rules (as revised in 2010), 2010, Art. 19(3) available at <https://docs.pca-cpa.org/2016/01/UNCITRAL-2010-English.pdf> (Last visited on November 16, 2025)

(“In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off”) (‘UNCITRAL Arbitration Rules’).

<sup>118</sup> UNCITRAL Arbitration Rules, Art. 21(3) (“In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it”).

<sup>119</sup> Bjorklund, *supra* note 91, 474–475.

### A. THE JURISDICTIONAL REQUIREMENT FOR ADMISSIBILITY OF COUNTERCLAIM

Consent is the cornerstone of arbitration and the foundation for establishing the jurisdiction of the arbitral tribunal.<sup>120</sup> Under Article 25(1) of the ICSID Convention, the Centre’s jurisdiction extends to any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State, provided that both parties have given their consent in writing to submit the dispute to ICSID arbitration.<sup>121</sup> An explicit mention of the possibility of a counterclaim under the scope of the IIA is the ideal form of expression of consent. Article 28(9) of the Common Market for Eastern and Southern Africa Investment Agreement, 2007 (‘COMESA’),<sup>122</sup> permits a Member State to assert a counterclaim if a COMESA investor has failed to fulfil its obligations under the Agreement or applicable domestic measures, or has not taken adequate measures to mitigate potential damages.<sup>123</sup> Similarly, the Slovakia-Iran BIT permits the Respondent to raise a counterclaim where the Claimant has failed to comply with the host State’s laws or has not taken all reasonable steps to mitigate potential damages, as required under the Agreement.<sup>124</sup> The Argentina-UAE BIT permits the respondent to submit a counterclaim, provided it is directly related to the dispute and the disputing party clearly specifies its legal and factual basis.<sup>125</sup>

The explicit inclusion of counterclaims remains relatively uncommon, as a significant number of BITs do not contain such expressions of consent. Notably, none of the BITs signed after the adoption of India’s 2016 Model BIT,<sup>126</sup> which explicitly incorporated provisions on investors’ human rights and other social obligations, included a specific clause on counterclaims. It is worth mentioning that even the final version of the 2016 Model BIT omitted such a provision; only the earlier draft model had included promising and effective

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<sup>120</sup> *Id.*

<sup>121</sup> ICSID Convention, *supra* note 115, Art. 25(1).

<sup>122</sup> Investment Agreement for the COMESA Common Investment Area, Art. 28(9), May 23, 2007, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download> (Last visited on November 18, 2025) (“*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*”).

<sup>123</sup> *Id.*

<sup>124</sup> Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (Slovakia & Iran) (adopted on January 19, 2016, entered into force on August 30, 2017), Art. 14(3), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3601/download> (Last visited on November 18, 2025) (“*The respondent may assert as a defense, counterclaim, right of set off or other similar claim that the claimant has not fulfilled its obligations under this Agreement to comply with the Host State law or that it has not taken all reasonable steps to mitigate possible damages. For avoidance of any doubt, if the tribunal does not dismiss the claim under paragraph 2 above, it shall take such violations into account when assessing the claim if raised as a defense, counterclaim, right of set off or other similar claim by the respondent*”).

<sup>125</sup> Agreement for The Reciprocal Promotion And Protection of Investments Between the Argentine Republic and the United Arab Emirates (Argentina & U.A.E.) (adopted on April 16, 2018), Art. 28, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5761/download> (Last visited on November 18, 2025) (“*The Arbitral Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph 1 shall be oral. If the Arbitral Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures. 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 related with the dispute, provided that the disputing party shall specify precisely the basis for the counter-claim*”).

<sup>126</sup> 2016 Indian Model BIT, *supra* note 106.

language concerning counterclaims.<sup>127</sup> Investors frequently contend before tribunals that, due to the inherent asymmetry of the IIL regime, host States do not possess enforceable rights in the same way as investors do not bear corresponding obligations.<sup>128</sup> This argument is rooted in a traditional and narrow interpretation of the object and purpose of investment treaties, focused primarily on the protection and promotion of foreign investment. Accordingly, the assumption of jurisdiction by an investment tribunal over a counterclaim becomes particularly difficult in cases where the treaty is silent on both procedural mechanisms and the substantive basis necessary to support such claims.<sup>129</sup>

Tribunal practice regarding the identification of consent to arbitration of counterclaims reveals two key aspects. *Firstly*, it concerns whether a general agreement to submit disputes to arbitration under the ICSID Convention is sufficient to encompass consent to counterclaims within the meaning of Article 46. *Secondly*, it examines whether additional sources of consent are required and, if so, what form of treaty language is adequate to support the inclusion of counterclaims within the tribunal's jurisdiction.

This next subsection examines the jurisdictional requirement for the admissibility of counterclaims in investment arbitration, focusing on consent as the foundation of tribunal jurisdiction. It explores how tribunals interpret consent under Article 25 and Article 46 of the ICSID Convention, distinguishing between general and specific consent. The discussion traces the evolution of tribunal practice from restrictive approaches, which deny jurisdiction in the absence of explicit treaty provisions, to more liberal interpretations that infer consent from broadly worded dispute resolution clauses. It further analyses how recent jurisprudence has incorporated domestic and international legal frameworks to support counterclaims, particularly in cases involving human rights and social responsibilities of investors.

#### 1. GENERAL CONSENT AS A BASIS FOR JURISDICTION OVER COUNTERCLAIMS: EVOLVING TRIBUNAL PRACTICE

Agreement to arbitrate under an IIA through the ICSID Convention is generally interpreted to include consent to counterclaims under Article 46, which explicitly permits counterclaims that fall within the Centre's jurisdiction and are connected to the principal claim. This position is commonly referred to as general consent *ipso facto*, including consent to counterclaims. This interpretation was upheld by the tribunal in *Goetz v. Burundi II* ('Goetz'),<sup>130</sup> where Belgian investors challenged the expropriation of their interests in Burundian banks. In response, Burundi submitted counterclaims alleging the investors' non-compliance with their operating licenses. Although the BLEU-Burundi BIT, 1989,<sup>131</sup> did not

<sup>127</sup>GOVERNMENT OF INDIA, *Draft Indian Model Bilateral Investment Treaty Text*, available at <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/Model-Text-for-the-Indian-Bilateral-Investment-Treaty.pdf> (Last visited on July 7, 2025) ('2015 Indian Draft Model BIT').

<sup>128</sup> *Spyridon Roussalis v. Romania*, Award, December 7, 2011, ICSID Case No. ARB/06/1, ¶¶817-822 ('Spyridon Roussalis').

<sup>129</sup> Yaraslau Kryvoi, *Counterclaims in Investor-State Arbitration*, 8 (London School of Economics and Political Science Law Department, LSE Law, Society and Economy Working Papers 8/2011, 2011) ("*BITs are inherently asymmetrical and provide investors with rights but not obligations.*").

<sup>130</sup> *Antoine Goetz and others and S.A. Affinage des Métaux v. Republic of Burundi*, Award, June 21, 2012, ICSID Case No. ARB/01/2, ¶¶224-236.

<sup>131</sup> Agreement between the Belgium-Luxembourg Economic Union and the Republic of Burundi concerning the Reciprocal Encouragement and Protection of Investments (B.L.E.U. & Burundi) (adopted on April 13, 1989, entered into force on September 12, 1993), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/335/download> (Last visited on November 18, 2025).

explicitly allow counterclaims, the tribunal held that consent to ICSID arbitration included acceptance of ICSID's procedural framework, including Article 46 and dismissed the Claimants' jurisdictional objection. The tribunal relied upon the dissenting opinion of Professor W. Michael Reisman in *Roussalis v. Romania* ('Roussalis'),<sup>132</sup> which stated that excluding counterclaims forces the host State to pursue domestic dispute resolution, a result which the investor initially sought to avoid. This, he argued, leads to duplication, inefficiency, and inconsistent adjudication, undermining the objectives of IIL.<sup>133</sup>

The ICSID tribunal in *Gavazzi v. Romania* ('Gavazzi')<sup>134</sup> differed from Goetz and held similar to the majority opinion in *Roussalis*. It opined that a specific consent to arbitrate counterclaims under Article 46 would be required, and a general consent (within a broadly worded dispute resolution clause) under Article 25 may be insufficient. The tribunal in *Gavazzi*, interpreted the Italy-Romania BIT, 1990, to decline jurisdiction for the host State's right to counterclaims, refuting the argument that such jurisdiction should be presumed unless expressly excluded within the BIT. This strict interpretation reflects the principle that consent is fundamental to arbitration of counterclaims under the ICSID Convention.

## 2. THE NEED FOR SPECIFIC CONSENT: INSIGHTS FROM EVOLVING TRIBUNAL PRACTICE

Within this section, the prerequisite for a counterclaim, consent, is discussed. While interpreting the treaty language to determine this 'specific consent', the tribunal attempts to decipher the dispute resolution clause along with the structure of the treaty to determine the scope of specific consent for arbitrating counterclaims. The divergence between the restrictive and liberal approaches to interpreting specific consent reflects the evolving jurisprudence on counterclaims in investment arbitration. This section examines how tribunals have approached the question of specific consent through the interpretation of dispute resolution clauses and treaty structures.

### a. The Restrictive Approach

Tribunal practice evidences that, in the absence of explicit language in the treaty, no inference can be drawn regarding their jurisdiction to entertain counterclaims.<sup>135</sup> This restrictive interpretation stems from the inherently asymmetric nature of investment treaties, wherein the absence of investors' obligations provides an insufficient basis for

<sup>132</sup> Spyridon Roussalis, *supra* note 128, Declaration of W. Micheal Reisman (Award).

<sup>133</sup> *Id.* ("In rejecting ICSID jurisdiction over counterclaims, a neutral tribunal — which was, in fact, selected by the claimant — perforce directs the respondent State to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now constrained to become the defendant. (And if an adverse Judgement ensues, that erstwhile defendant might well transform to claimant again, bringing another BIT claim.) Aside from duplication and inefficiency, the sorts of transaction costs which counter-claim and set-off procedures work to avoid, it is an ironic, if not absurd, outcome, at odds, in my view, with the objectives of international investment law").

<sup>134</sup> Marco Gavazzi and Stefano Gavazzi v. Romania, Decision on Jurisdiction, Admissibility and Liability, April 21, 2015, ICSID Case No. ARB/12/25, ¶281 ('Marco Gavazzi'). For an example of a broadly worded dispute resolution clause that generally satisfies the requirements of Article 25 of the ICSID Convention, see Argentina-Spain BIT, *supra* note 104; ("Disputes arising between one of the Parties and an investor of the other Party concerning investments within the meaning of this Agreement shall, to the extent possible, be settled amicably between the parties to the dispute").

<sup>135</sup> *Id.*

counterclaims.<sup>136</sup> Tribunals, unable to locate consent, conclude that the parties did not intend to arbitrate counterclaims.

In Roussalis,<sup>137</sup> Romania submitted counterclaims for breaches of the same share purchase agreement on which the Claimant relied and sought monetary damages. However, the tribunal declined jurisdiction over Romania's counterclaims, reasoning that there was an "absence of consent".<sup>138</sup> The tribunal found that the dispute resolution clause defined a 'dispute' as a breach of the host State's obligations towards the investor.<sup>139</sup> A similar approach was also taken in Gavazzi,<sup>140</sup> wherein the tribunal rejected counterclaims filed by Romania, siding with the Claimants' arguments that the Greece-Romania BIT,<sup>141</sup> envisaged that investors alone could initiate arbitration proceedings, ruling out the possibility of a counterclaim.<sup>142</sup> The tribunal, stepping away from pursuing treaty interpretation, relied on the absence of an explicit provision of counterclaims within the treaty framework.

Hence, in situations where the State seeks to use the counterclaim mechanism to hold investors accountable for violations of their duties, particularly in relation to human rights and other social responsibilities, it becomes essential to have a legal framework that supports such action. This requires two key elements: *first*, a dispute resolution clause that permits counterclaims; and *second*, the treaty framework, explicitly or otherwise, includes substantive obligations for investors, especially concerning human rights and social responsibilities. Together, these elements can empower tribunals to hold investors accountable for serious violations, including modern slavery. A major obstacle in this regard is the lack of a well-developed legal framework clearly establishing investors' human rights and social obligations under international law. This challenge is compounded by the traditional structure of international law, where investors, being non-State actors, are often viewed as 'objects' rather than 'subjects' and thus not directly bound by international legal norms. IIL vests the TNCs with extensive treaty-based protection as well as protection via customary international law.<sup>143</sup> Customary international law requires that, for an expropriation to be lawful, it is undertaken in the public interest, without arbitrariness, and discrimination on the basis of nationality and accompanied by the payment of compensation. The latter has been the subject of protracted disagreements between developed and developing countries, especially in the framework of the former's efforts to establish a New International Economic Order. IIL has contributed to the universalisation of certain norms and values, and therefore the

<sup>136</sup> See generally Spyridon Roussalis, *supra* note 127.

<sup>137</sup> Spyridon Roussalis, *supra* note, 127.

<sup>138</sup> *Id.*, ¶872.

<sup>139</sup> Agreement between the Government of the Hellenic Republic and the Government of Romania on the Promotion and Reciprocal Protection of Investments (Greece & Romania) (adopted on May 5, 1997, entered into force on June 6, 1998), Art. 9(1), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6544/download> (Last visited on November 18, 2025) ("Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way and Art. 9(2) 2. If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor concerned may submit the dispute either to the competent courts of the Contracting Party in the territory of which the investment has been made or to international arbitration.") ("Greece-Romania BIT, 1997").

<sup>140</sup> Marco Gavazzi, *supra* note, , Award, April 18, 2017, ICSID Case No ARB/12/25.

<sup>141</sup> Greece-Romania BIT, 1997, *supra* note, 138.

<sup>142</sup> Marco Gavazzi, *supra* note, ¶152.

<sup>143</sup> Jan Wouters, & Anna-Luise Chané, *Multinational Corporations in International Law*, LUEVEN CENTRE FOR GLOBAL GOVERNANCE STUDIES, Working Paper No. 129, 2013, available at [https://ghum.kuleuven.be/ggs/publications/working\\_papers/2013/129wouterschane](https://ghum.kuleuven.be/ggs/publications/working_papers/2013/129wouterschane) (Last visited on November 18, 2025).

universalisation of their implementation as well. However, such universalisation blindsides the multicultural perspectives and instead actively encourages political and cultural homogenisation,<sup>144</sup> resulting in subordination of States, their interests and peoples to the decisions at international arbitral tribunals.<sup>145</sup> The concepts and practices in international arbitration have been shaped under the hegemony of Western legal traditions, and they continue to dominate the tribunal pronouncements, often privileging the investor from a capital-exporting Western nation over the sovereign State in the Global South. Narratives within IIL have been blind to specific frustration about the regime from the developing world.<sup>146</sup> Such narratives have also not noticed the alternatives emerging from the region and consider locating them within the mainstream regime.<sup>147</sup>

#### b. Liberal Approach

Recent jurisprudence reflects a shift towards interpreting the silence of BITs on counterclaims as not implying exclusion, unless expressly prohibited. This marks a transition from requiring explicit authorisation to a presumption of admissibility, provided two conditions are met: *first*, that the dispute resolution clause evidences mutual consent to arbitrate; and *second*, that the relevant BIT provides a legal basis for the counterclaim. A notable example is Urbaser,<sup>148</sup> wherein the Spanish investor challenged regulatory measures following Argentina's financial crisis. In response, Argentina filed a counterclaim alleging the investor's failure to fulfil obligations under the concession agreement, thereby causing breach of the human right to water. Although the Argentina-Spain BIT<sup>149</sup> did not explicitly mention counterclaims, the tribunal adopted a liberal interpretive approach. It emphasised the neutral language in Article X,<sup>150</sup> which referred to "either party to the dispute" without identifying specific Claimant or Respondent roles.<sup>151</sup> On this basis, the tribunal found that the dispute resolution clause ('DRC') demonstrated sufficient mutual consent to encompass counterclaims, including those grounded in international human rights obligations.<sup>152</sup>

In *David R. Aven v. Costa Rica* ('David R. Aven'),<sup>153</sup> the U.S. investors alleged expropriation of their real estate project under the Dominican Republic-Central America-United States Free Trade Agreement ('DR-CAFTA'),<sup>154</sup> while Costa Rica filed a counterclaim asserting violations of domestic environmental laws. The tribunal's interpretation of the DRC under DR-CAFTA offers an important insight into the evolving jurisprudence on counterclaims. While DR-CAFTA explicitly limits counterclaims only in specific circumstances, such as when the investor has received compensation through insurance or

<sup>144</sup> See Mathanki Narayan, *TWAIL and International Investment Law: A Subaltern Critique of the Formation of BITs and Their Implementation through Investment Arbitration*, CENTRE FOR TRADE AND INVESTMENT LAW, February 1, 2024, available at <https://ctil.org.in/cms/docs/Papers/Publish/02-International%20Investment%20Law%20and%20TWAIL.pdf> (Last visited on November 18, 2025).

<sup>145</sup> Mansour Vesali, Mahmoud & Hosna Sheikhattar, *A Call for Rethinking International Arbitration: A TWAIL Perspective on Transnationality and Epistemic Community*, Vol. 35(2), LAW AND CRITIQUE, 412 (2024).

<sup>146</sup> Morosini-Sanchez *supra* note, 1–5.

<sup>147</sup> *Id.*, 1, 2.

<sup>148</sup> Urbaser, *supra* note 23.

<sup>149</sup> Agreement between the Argentine Republic and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investments (signed 3 October 1991, entered into force 28 September 1992)

<sup>150</sup> Argentina-Spain BIT, *supra* note 104, Art. X.

<sup>151</sup> Urbaser, *supra* note, ¶1143.

<sup>152</sup> *Id.*, ¶1150.

<sup>153</sup> David R. Aven and Others v. Republic of Costa Rica, Award, September 18, 2018, ICSID Case No. UNCT/15/3, ¶¶6, 706 ('David R. Aven').

<sup>154</sup> The Dominican Republic-Central America-United States Free Trade Agreement (adopted on August 5, 2004, entered into force on January 1, 2009) ('DR-CAFTA').

guarantees, Costa Rica argued that this implied a general allowance for counterclaims in all other cases.<sup>155</sup> The tribunal acknowledged the treaty’s structural asymmetry, noting that only investors may initiate claims and that the roles of ‘Claimant’ and ‘Respondent’ are clearly defined.<sup>156</sup> However, it clarified that this asymmetry does not inherently preclude counterclaims by the host State. It further recognised that Part A of DR-CAFTA imposes obligations on investors, which could serve as a basis for counterclaims.<sup>157</sup> Despite these findings, the tribunal ultimately dismissed Costa Rica’s counterclaim on procedural grounds, without rejecting the conceptual possibility of such claims under the treaty.<sup>158</sup> With respect to the basis of counterclaims, the tribunal in Urbaser emphasised that a BIT should not be read in isolation when assessing investor obligations and looked to the applicable law clause<sup>159</sup> within the Spain-Argentina BIT, which allowed the use of international law.<sup>160</sup> This opened the door to considering external human rights obligations. However, the tribunal encountered a normative challenge: contemporary international law remains largely State-centric and does not clearly impose binding human rights obligations on corporations.

While the applicable law clause also referred to domestic law and private international law, the tribunal did not explore these as alternative bases for investor accountability, possibly due to concerns about relying solely on domestic law. This raises an important question: if a BIT expressly allows the application of domestic legal obligations, can counterclaims based on those obligations, especially those related to human rights-related, be considered admissible? This possible scenario was illustrated in *David R. Aven*, where Costa Rica filed a counterclaim based on environmental damage caused by an American investor’s project. The tribunal adopted a broad reading of the DRC and found no issue in relying on Costa Rican domestic law, since Part A of DR-CAFTA explicitly required investors to comply with such laws.<sup>161</sup> Although the counterclaim was ultimately dismissed on procedural grounds, the case shows how a treaty can legitimise counterclaims by incorporating domestic legal obligations, including those related to human rights.

It is important to recognise that in the context of human rights-oriented counterclaims, particularly those seeking to hold investors accountable for violations such as modern slavery, domestic law can serve as an effective mechanism, especially when international law faces normative limitations. However, the ability of a tribunal to rely on domestic law depends heavily on the provisions of the relevant BIT. The treaty must allow for

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<sup>155</sup> *Id.*, Art. 10.20.7. (“A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.”); *David R. Aven*, *supra* note 153, ¶¶687–690.

<sup>156</sup> *David R. Aven*, *supra* note 153, ¶¶693, 731.

<sup>157</sup> *Id.*, ¶¶735–742.

<sup>158</sup> *Id.*, ¶747.

<sup>159</sup> *Argentina-Spain BIT*, *supra* note 104, Art. X(5) (“The arbitral tribunal shall decide on the basis of this treaty and, where appropriate, on the basis of other treaties in force between the Parties, the domestic law of the Party in whose territory the investment was made, including its rules of private international law, and the general principles of international law”).

<sup>160</sup> *Urbaser*, *supra* note 22, ¶1186.

<sup>161</sup> *DR-CAFTA*, *supra* note 154, Art. 10.11; *David R. Aven*, *supra* note 153, ¶734 (“Furthermore, Article 10.1 makes it clear that Article 10.11 covers all investments in the territory of the Party. A logical effect of Article 10.11 could be that the ‘measures’ adopted by the host State for the protection of the environment should be deemed to be compulsory for everybody under the jurisdiction of the State, particularly the foreign investors. Therefore, following said interpretation the investors have the obligation, not only under domestic law but also under Section A of Chapter 10 of DR-CAFTA to abide and comply the environmental domestic laws and regulations, including the measures adopted by the host State to protect human, animal, or plant life or health. No investor can ignore or breach such measures, and its breach is a violation of both domestic and international law, so that the perpetrator cannot be exempt of liability for the damages caused”).

the integration of domestic legal norms, thereby enabling the tribunal to attribute specific obligations to investors. The tribunal's interpretation in *David R. Aven* is instructive in this regard. Although the counterclaim in that case was ultimately dismissed on procedural grounds, the tribunal affirmed that when a BIT explicitly requires investors to comply with the host State's environmental legal framework, it allows the tribunal to rely on domestic environmental laws as a valid basis for a counterclaim.

Consent to counterclaims, which ensures the tribunal's jurisdictional capacity, does not guarantee the successful institution of a counterclaim. An investment tribunal that has assumed jurisdiction over a counterclaim may still refuse to exercise that jurisdiction if it finds the claims inadmissible. After successfully assuming jurisdiction, a tribunal will decide whether such human rights counterclaims are admissible or not.<sup>162</sup> The following section addresses the important requirement for admissibility — the connectedness of the counterclaim to the original/principal claim.

### *B. THE ADMISSIBILITY REQUIREMENT: CONNECTEDNESS*

The term 'admissibility' is often either not mentioned or not defined in investment arbitration instruments. To elaborate, decisions on jurisdiction concern the competence of the tribunal, whereas decisions on admissibility depend on whether it is appropriate for the tribunal to hear the counterclaim.<sup>163</sup> Tribunals have greater discretion over matters of admissibility. Typically, four requirements for admissibility may be relevant to a dispute:

1. a close connection between the principal claim and counterclaim,
2. compliance with procedural rules related to pleading requirements by the host State,
3. questions pertaining to the host State's standing, and
4. other related matters such as cooling-off periods.

The mechanism of counterclaim presupposes the existence of a principal claim and another claim that runs counter to the principal claim, and as such is connected to the principal claim. Therefore, towards admissibility of counterclaims, the first prong of admissibility, connectedness, is relevant. The rationale behind the 'connectedness' requirement is to enhance procedural economy and the administration of justice.<sup>164</sup> Tribunal practice has established two types of connectedness when considering the admissibility of counterclaims: factual connectedness and legal connectedness. Legal connectedness means that the claim and counterclaim must share the same legal basis, while factual connectedness requires that the claim and counterclaim arise from the same dispute.<sup>165</sup>

In practice, the level of connection is assessed both in law and in fact, with tribunals often seeking to establish both types of connection. The tribunal in *Urbaser* determined that the factual connection between the principal claim and the counterclaim was evident, as both arose from the same investment and the same concession, involving either the

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<sup>162</sup> Pierre Lalive & Laura Halonen, *On the Availability of Counterclaims in Investment Treaty Arbitration*, Vol. 2, CZECH Y.B. INT'L L., 141 (2011).

<sup>163</sup> Yuval Shany, *QUESTIONS OF JURISDICTION AND ADMISSIBILITY BEFORE INTERNATIONAL COURTS*, 47–53 (Cambridge University Press, 2016).

<sup>164</sup> See generally Maxi Scherer et al., *Environmental Counterclaims in Investment Treaty Arbitration*, Vol. 36(2), ICSID REV. - FILJ, 431(2021).

<sup>165</sup> Tomoko Ishikawa, *Counterclaims and the Rule of Law in Investment Arbitration*, Vol. 113, AJIL UNBOUND, 33, 35–36 (2019).

performance or the alleged lack of sufficient investment. This shared factual basis was considered sufficient to establish jurisdiction over the counterclaim. With respect to the legal connection, the tribunal further noted that the counterclaim was not founded solely on domestic law.<sup>166</sup> This reasoning opens the path for a liberal interpretation of the ‘connectedness’ requirement, wherein an approach that mandates only the fulfilment of factual connectedness emerges as a more coherent and effective standard for admitting counterclaims, thereby ensuring a balanced and extensive exercise of the tribunal’s jurisdiction.<sup>167</sup>

The use of domestic law as the basis for a counterclaim to satisfy the legal connectedness criterion was notably observed in *David R. Aven*. In that case, the tribunal held that although Costa Rica’s counterclaim was founded on obligations under its domestic environmental law, it met the legal and factual connectedness requirement because Part A of DR-CAFTA explicitly required investors to comply with such laws.<sup>168</sup> This elevated the domestic obligations to the level of treaty obligations. Differently, in *Anglo American PLC v. Venezuela*,<sup>169</sup> the tribunal refused jurisdiction for a counterclaim based on alleged violations of domestic law. The tribunal interpreted Article 47(1) of the Arbitration Additional Facility Rules in the sense that a counterclaim can be raised only if:

1. the parties have not expressly excluded it and
2. the counterclaim falls within the scope of the parties’ arbitration agreement.<sup>170</sup>

It went on to assess such conditions in the case at stake and found that the wording of Article 8(3) of DR-CAFTA excluded claims from the host State and limited jurisdiction to disputes related to obligations of that State.<sup>171</sup> Accordingly, the tribunal found that it had no jurisdiction over the Respondent’s counterclaim. It added that this held true also considering that such a counterclaim, contrary to the Claimant’s claims, was only based on the alleged violation of the Venezuelan law, not of the Treaty.<sup>172</sup>

Overall, the evolving jurisprudence on counterclaims in investment arbitration reveals a significant shift from the traditional, consent-centric and restrictive interpretations of jurisdiction to a more balanced and purposive framework that accommodates both State and investor interests. The gradual acceptance of general consent as encompassing counterclaims under the ICSID Convention, coupled with the liberal appreciation of the connectedness requirement, as seen in *Urbaser* and subsequent cases, reflects tribunals’ growing willingness to ensure procedural economy and substantive justice. This trajectory marks a movement toward recognising that factual connectedness, supported by the incorporation of domestic and international legal standards, can provide a coherent basis for admitting counterclaims. Such an approach not only strengthens the legitimacy and inclusiveness of investment arbitration but also opens the door for integrating human rights and social responsibility considerations into the arbitral process. In doing so, it redefines the contours of investor-State relations, aligning investment protection with broader principles of accountability and sustainable development.

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<sup>166</sup> *Urbaser*, *supra* note 22, ¶1151.

<sup>167</sup> Mees Brenninkmeijer & Fabien Gélinas, *Counterclaims in Investment Arbitration: Towards an Integrated Approach*, Vol. 38(3), ICSID REV. - FILJ., 567 (2023).

<sup>168</sup> *David R. Aven*, *supra* note 153, ¶734.

<sup>169</sup> *Anglo American PLC v. Bolivarian Republic of Venezuela*, Final Award, January 18, 2019, ICSID Case No. ARB(AF)/14/1 (‘*Ango American PLC*’).

<sup>170</sup> *Id.*, ¶525.

<sup>171</sup> *Id.*, ¶527.

<sup>172</sup> *Id.*, ¶529.

*C. EXPLORING HUMAN RIGHTS COUNTERCLAIMS IN MODERN BITS AS A TOOL TO ADDRESS HUMAN RIGHTS ACCOUNTABILITY OF INVESTORS*

The requirement for legal connectedness stipulates that a counterclaim must be based on the BIT or any other legal document upon which the principal claim is based. However, factual connectedness allows for counterclaims based on domestic laws or other international laws, provided that both the claim and the counterclaim arise from the same dispute.<sup>173</sup> There are examples of cases where counterclaims based on domestic laws were successfully admitted. In *Burlington v. Ecuador*,<sup>174</sup> and *Perenco v. Ecuador*,<sup>175</sup> the counterclaims brought by Ecuador were related to the investors' breaches of Ecuadorian environmental law during their investment operations.<sup>176</sup> In both cases, since the disputing parties agreed that the tribunals could entertain the environmental counterclaims based on host States' domestic law, issues of admissibility did not arise.<sup>177</sup>

To ensure effective counterclaims, the BIT must either explicitly include human rights obligations for investors or allow for the application of complementary legal frameworks, such as international or domestic laws that include these obligations. However, while international organisations have developed various guidelines to promote corporate accountability for human rights, such as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 1977,<sup>178</sup> the United Nations Ten Principles of the UN Global Compact 2000,<sup>179</sup> the UN Guiding Principles on Business and Human Rights 2011,<sup>180</sup> the Investment Policy Framework for Sustainable Development 2015,<sup>181</sup> and the OECD Guidelines for Multinational Enterprises 2011,<sup>182</sup> the voluntary and indirect nature of these guidelines raises concerns about their adequacy in holding corporations accountable for human rights. The inclusion of a corporate social responsibility clause and other complementary human rights-related obligations is a significant development to rebalance the obligation of States and investors under the framework of international investment treaty-

<sup>173</sup> Urbaser, *supra* note 22, ¶1151; David R. Aven, *supra* note 153, ¶¶737–740; Anglo American PLC, *supra* note 169, ¶¶330–340.

<sup>174</sup> *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Liability, December 14, 2012, ICSID Case No. ARB/08/5 ('Burlington').

<sup>175</sup> *Perenco Ecuador Ltd. v. The Republic of Ecuador and Petroecuador*, Interim Decision on the Environmental Counterclaim, August 11, 2015, ICSID Case No. ARB/08/6 ('Perenco').

<sup>176</sup> *Burlington*, *supra* note 174, Decision on Ecuador's Counterclaims, February 7, 2017, ¶¶52–54; *Perenco*, *supra* note 175, ¶¶34–42 (In *Burlington*, the tribunal recognised Ecuador's right to bring counterclaims under domestic environmental law and awarded approximately USD 39.2 million for environmental damage caused in Blocks 7 and 21. In contrast, the *Perenco* tribunal upheld Ecuador's counterclaims but reduced the claimed compensation to USD 54 million after applying proportionality and excluding pre-existing environmental harm).

<sup>177</sup> *Burlington*, *supra* note 174, ¶93; *Perenco*, *supra* note 175, ¶¶9, 19.

<sup>178</sup> The Governing Body of the International Labour Organization (204<sup>th</sup> Session), *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, OB Vol. LXI, 1978, Series A, No. 1, DOCNO:28197701 (November, 1977) ('MNE Declaration').

<sup>179</sup> UNITED NATIONS GLOBAL COMPACT, *The Ten Principles of the UN Global Compact*, July 26, 2000, available at <https://unglobalcompact.org/what-is-gc/mission/principles> (Last visited on November 16, 2025) (The UN Global Compact was initially launched with nine principles. Kofi Annan added the tenth principle against corruption on June 24, 2004 during the first Global Compact Leaders' summit per the U.N. Convention Against Corruption, 2003).

<sup>180</sup> U. N. Human Rights Council, *Guiding Principles on Business and Human Right: Implementing the United Nations Protecting, Respecting and Remedy Framework*, U.N. Doc. A/HRC/17/31 (March 21, 2011) ('UNGP').

<sup>181</sup> U. N. Trade and Development, *Investment Policy Framework for Sustainable Development*, U.N. Doc. UNCTAD/DIAE/PCB/2015/5 (December 23, 2015).

<sup>182</sup> ORGANISATION FOR ECONOMIC COOPERATION DEVELOPMENT, *OECD Guidelines for Multinational Enterprises*, May 25, 2011, available at [https://www.mofa.go.jp/mofaj/gaiko/csr/pdfs/oecd\\_gm.pdf](https://www.mofa.go.jp/mofaj/gaiko/csr/pdfs/oecd_gm.pdf) (Last visited on November 18, 2025).

making.<sup>183</sup> Although the integration of such provisions within the investment treaty framework is in an embryonic stage, research by the United Nations Conference on Trade and Development (‘UNCTAD’) shows a consistent increase in the inclusion of CSR clauses in new-generation international investment agreements (those signed after 2010).<sup>184</sup> These clauses relied on exclusive CSR-oriented international guidelines, related international standards like sustainable development goals, international human rights and other social rights frameworks, host countries’ domestic laws, and CSR-related self-regulating corporate policies to identify the investors’ human rights and other social right obligations. For example, the Morocco-Nigeria BIT, 2016 includes an exclusive CSR clause<sup>185</sup> that encourages the investors to fulfil the sustainable development goals, apply the ILO Tripartite declaration, and comply with all applicable laws and regulations of the host country as part of their CSR obligation. However, the usages of voluntary language, the inclusion of soft law obligations like guidelines, and the reference to international standards for facilitating investors’ social accountability in these clauses raise questions on their legal adequacy and certainty.<sup>186</sup>

The concern over the non-binding and indeterminate character of CSR obligations in investment treaties underscores the need to situate these clauses within the broader debate on the role of soft law in international governance. The increasing reliance on voluntary instruments and normative frameworks, though lacking direct enforceability, reflects a pragmatic approach by States and international organisations to balance flexibility with cooperation in complex regulatory spaces such as investment and human rights. Understanding the dynamics of these soft law mechanisms is therefore essential to assess their transformative potential in shaping investor behaviour and gradually influencing the evolution of binding legal norms in IIL.

Soft law instruments are concluded by States to achieve co-operation with a flexibility to accommodate changing circumstances.<sup>187</sup> However, the relevance of soft law cannot be denied in a post-colonial world, especially in International economic law.<sup>188</sup> Contemporary soft law instruments contain extensive features, including monitoring procedures.<sup>189</sup> These instruments not only contain features that are regulatory in nature, “but

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<sup>183</sup> IIA Mapping, *supra* note 80.

<sup>184</sup> *Id.*

<sup>185</sup> Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic Of Nigeria (Morocco & Nigeria) (adopted on December 3, 2016), Art. 24, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download> (Last visited on November 18, 2025) (“*Corporate Social Responsibility*”:

1. *In addition to the obligation to comply with all applicable laws and regulations of the Host State and the obligations in this Agreement, and in accordance with the size, capacities and nature of an investments, and taking into account the development plans and priorities of the Host State and the Sustainable Development Goals of the United Nations, investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices.*

2. *Investors should apply the ILO Tripartite Declaration on Multinational Investments and Social Policy as well as specific or sectorial standards of responsible practice where these exist.*

3. *Where standards of corporate social responsibility increase, investors should strive to apply and achieve the higher level standards”.*

<sup>186</sup> See Sai Ramani Garimella & Soumya Rajsingh, *Bilateral Investment Treaties and Investors’ Social Accountability: The Law and Praxis in South Asia*, Vol. 23 (2–3), J. INT’L TRADE L. & POL’Y, 129 (2024).

<sup>187</sup> Christine Mary Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, Vol. 38(4), INT’L & COMPAR. L.Q., 850 (1989) (‘Chinkin’).

<sup>188</sup> *Id.*, 853.

<sup>189</sup> Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, Vol. 54(3), INT’L ORG., 421 (2003) (‘Abbott & Snidal’).

are intended to construct a new international economic structure”.<sup>190</sup> One of the prominent arguments in favour of the soft law is the “revolutionary change in the structure of the system itself”.<sup>191</sup> The growing reliance of countries over soft law instruments has changed the criteria to validate the sources of law.

Kenneth W. Abbott and Duncan Snidal provided a valuable framework for assessing the legal adequacy of investors’ human rights and social obligations in IIAs.<sup>192</sup> They conceptualised legalisation along a continuum of ‘hard’ and ‘soft’ law, assessed through three dimensions — obligation, precision, and delegation. “Obligation” concerns the binding nature of a norm, where CSR clauses placed in preambles are largely aspirational, while those in operative provisions may create enforceable duties. “Precision” relates to the clarity of language: terms like “encourage” or “promote” denote weak commitments, whereas “shall comply” or “must respect” indicate stronger obligations. “Delegation” refers to mechanisms ensuring compliance, such as monitoring bodies or reporting requirements, which are often absent in IIAs. The ILO similarly underscores that the effectiveness of such clauses depends on the strength of these three dimensions. Applying this framework reveals that while CSR clauses signify progress toward investor accountability, their predominantly voluntary and imprecise nature limits their legal effectiveness.<sup>193</sup>

There is a strong possibility of attributing human rights and social accountability-related obligations to investors through domestic law provisions, either via a mandatory compliance with domestic law clause or through the applicable law clause within BITs. According to Article 31(1) of the VCLT, treaties must be interpreted in good faith and in light of their object and purpose.<sup>194</sup> This interpretative approach allows the integration of domestic human rights norms into the treaty framework, provided the BIT contains clauses that enable such human rights-oriented interpretation. The Netherlands Model BIT, 2019 requires compliance with the domestic law of the host State.<sup>195</sup>

Domestic law thus presents the most certain and realistic foundation for imposing human rights obligations on investors, particularly in the Global South, where treaty reform alone may be insufficient. Elevating domestic law obligations into the treaty framework offers a two-step solution: *first*, by developing a robust and enforceable domestic legal framework on human rights and environmental protection; and *second*, by incorporating these domestic obligations as binding commitments within IIAs. However, many Global South States currently lack both a comprehensive domestic regulatory framework and the capacity to integrate such obligations into treaty-making, thereby weakening the potential of domestic law as a vehicle for investor accountability.

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<sup>190</sup> Chinkin, *supra* note 187, 852, 853.

<sup>191</sup> American Society of International Law, *Proceedings of the ASIL Annual Meeting 1979*, Oscar M. Garibaldi, *The Legal Status of General Assembly Resolutions: Some Conceptual Observations*, Vol. 73, PROCEEDINGS OF THE ANNUAL MEETING AMERICAN SOCIETY OF INTERNATIONAL LAW, 324 (1979).

<sup>192</sup> Abbott & Snidal, *supra* note 189, 421.

<sup>193</sup> MNE Declaration, *supra* note 178.

<sup>194</sup> VCLT, *supra* note 82.

<sup>195</sup> *Netherlands Model Investment Agreement*, Art. 7 (1), March 22, 2019, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> (Last visited on November 18, 2025) (“*Corporate Social Responsibility I: Investors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labour laws*”).

#### IV. SCOPE FOR HUMAN RIGHTS COUNTERCLAIMS IN SOUTH ASIAN IIAS

Since 2001, a total of thirty BITs,<sup>196</sup> have been signed or come into force in South Asia. However, the possibility of human rights-related counterclaims therefrom is negligible. Given the requirements for counterclaims supported within the treaty as discussed above, only four South Asian BITs include exclusive provisions on investors' obligations. An interesting example is the Bangladesh-Denmark BIT, 2009,<sup>197</sup> which prohibits certain types of counterclaims similar to the provisions in DR-CAFTA, 2004. However, whether the Bangladesh-Denmark BIT supports human rights-oriented counterclaims is doubtful, as the treaty does not impose direct human rights obligations on investors or support the application of relevant external laws.

All four Indian BITs signed after the new model BIT, 2016<sup>198</sup> with Brazil 2020,<sup>199</sup> the Kyrgyz Republic 2019,<sup>200</sup> Belarus 2018,<sup>201</sup> and Taiwan 2018,<sup>202</sup> incorporated a dedicated CSR clause along with an exclusive chapter on investors' obligations. Except these Indian BITs, no other South Asian BIT included an exclusive CSR clause in its text.

It needs to be noted that despite investors having exclusive human rights and social rights obligations, these BITs do not facilitate human rights-centric counterclaims due to the restrictive nature of the dispute resolution clauses. The India-Brazil BIT, termed as the Investment Cooperation and Facilitation Treaty, limits the tribunal's power to specific areas only, excluding Part III, which contains provisions related to investors' human rights and social

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<sup>196</sup> This assessment includes only twenty-eight BITs, as two Sri Lankan BITs could not be evaluated due to the unavailability of English translations. The BITs contracted by South Asian nations until 2020 have been included in this assessment.

<sup>197</sup> Agreement on the Promotion and Reciprocal Protection of Investment Between the Government of the People Republic of Bangladesh and the Kingdom of Denmark (Bangladesh & Denmark) (adopted on November 5, 2009, entered into force on February 27, 2013), Art. 9(6), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5125/download> (Last visited on November 18, 2025) (“*In any proceeding involving an investment dispute, a Contracting Party shall not assert, as a defense, counterclaim or 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.*”).

<sup>198</sup> 2016 Model Indian BIT, *supra* note 109.

<sup>199</sup> 2020 India-Brazil BIT, *supra* note 109.

<sup>200</sup> Bilateral Investment Treaty between the Government of the Kyrgyz Republic and the Government of the Republic of India (Kyrgyzstan & India) (adopted on June 14, 2019, not yet entered into force), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5993/download> (Last visited on November 18, 2025) (“India-Kyrgyz Republic BIT”).

<sup>201</sup> Treaty between the Republic of Belarus and the Republic of India on Investments (Belarus & India) (adopted on September 24, 2018, not yet entered into force), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5724/download> (Last visited on November 18, 2025) (“India-Belarus BIT”).

<sup>202</sup> Agreement between The India Taipei Association in Taipei and The Taipei Economic and Cultural Center in New Delhi on The Promotion and Protection of Investments (Taiwan Province of China & India) (adopted on December 18, 2018, entered into force on 14 February 2019), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1606/download> (Last visited on November 18, 2025) (“India-Taiwan BIT”).

rights obligations.<sup>203</sup> Consequently, these obligations are beyond the dispute settlement.<sup>204</sup> A similar provision is there in the rest of the three BITs.<sup>205</sup>

The 2015 Draft Model BIT suggested compulsory compliance with domestic laws related to human rights by investors<sup>206</sup> and granted States the authority to make a counterclaim if investors failed to comply.<sup>207</sup> This clearly allows for the possibility of human rights-related counterclaims. However, the final model BIT and the four BITs substantially based on it significantly differ from the 2015 Draft Model BIT in their approach to rebalancing the asymmetry of BITs. To understand the potential for human rights-oriented counterclaims, it is noteworthy that Footnote 4 to Article 26.3 of the Model BIT, 2016,<sup>208</sup> as well as similar provisions in the BITs with Belarus,<sup>209</sup> Taiwan,<sup>210</sup> and the Kyrgyz Republic,<sup>211</sup> mandated that the tribunal consider the damage caused by the investor to the environment or local community when calculating monetary damages. These provisions also take into account the need to balance public interest with the interests of the investor. Despite some scholars arguing that these mitigating factors could reintroduce counterclaims indirectly, considering the overall scope of the BIT, it is more likely that this provision facilitates the State's regulatory power as a defence against investor claims. These four Indian BITs have attempted to balance the asymmetry of investment treaties by incorporating a high degree of State regulatory power. However, these powers primarily address financial regulation and the avoidance of corruption, not human rights in general. When it comes to investor accountability in social and human rights matters, the CSR clauses in these four Indian BITs are voluntary. They promote the voluntary adoption of internationally recognised principles of corporate social responsibility as a means of encouraging responsible business conduct and have kept their application out of the scope of tribal power.

It is important to note that out of the twenty-eight South Asian BITs assessed, only four explicitly incorporate investors' human rights and other social accountability provisions within their texts, while three BITs include partial mentions in their preambles (refer to Figure 2 and Annexure-I). Given the lack of explicit human rights obligations for investors in other BITs in the region, the only viable solution for facilitating human rights-centric

<sup>203</sup> India-Brazil BIT, *supra* note 109, Art. 19.3 (It made matters related to Part III wherein the investors' obligations are located beyond the jurisdiction of the arbitral tribunal. Further, the Treaty avoids ISDS model and instead includes SSDS).

<sup>204</sup> *Id.*, (“A Tribunal constituted under this Article shall examine matters related to Part I, Part 11 (excluding Articles 8 and 10.1), Article 16, Article 21, and Part VII of this Treaty”).

<sup>205</sup> India-Taiwan BIT, *supra* note 202, Arts. 13.1 & 13.2; India-Belarus BIT, *supra* note 201, Arts. 13.1 & 13.2; India-Kyrgyz Republic BIT, *supra* note 200, Arts. 13.2 & 13.2.

<sup>206</sup> 2015 Indian Draft Model BIT, *supra* note 127, Art. 12.1 (“Investors and their Investments shall be subject to and comply with the Law of the Host State. This includes, but is not limited to, the following: .....(v) Law relating to human rights”).

<sup>207</sup> *Id.*, Art.14.11 (“Counterclaims by Parties (i) A 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”).

<sup>208</sup> 2016 Indian Model BIT, *supra* note 109, Art. 26.3 (It provides: for the calculation of monetary damages, the tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure, or other mitigating factors. Footnote 4: “Mitigating factors can include, current and past use of the investment, the history of its acquisition and purpose, compensation received by the investor from other sources, any unremedied harm or damage that the investor has caused to the environment or local community or other relevant considerations regarding the need to balance public interest and the interests of the investor.”).

<sup>209</sup> India-Belarus BIT, *supra* note 201, Art. 26.3.

<sup>210</sup> India-Taiwan BIT, *supra* note 202, Art. 25.3 & Footnote 1 to Art. 25.

<sup>211</sup> India-Kyrgyz Republic BIT, *supra* note 200, Art. 26.3 & Footnote 4 to Art. 26.

counterclaims is for the BITs to allow the application of relevant external laws along with affirmative consent in the dispute resolution clause. Addressing the consent requirement in South Asian BITs, eleven out of the twenty-eight BITs have restrictions: either only investors can submit disputes to arbitration, or the arbitral tribunal's power does not effectively include the interpretation of investors' obligations. (refer to Figure 1 and Annexure). A detailed examination of the applicable law clauses in these BITs reveals that four BITs reference the host country's law, six reference both domestic and international law, and three reference only international law, along with the BIT itself. It is also noteworthy that a significant number of BITs do not include an explicit applicable law clause, leaving it to the interpretation of the tribunal (refer to Figure 3 and Annexure). A human rights-oriented counterclaim is possible, even in the absence of explicit investors' human rights obligations, when the applicable law clause permits the inclusion of external laws, such as domestic law, and when the context of the treaties supports a human rights-oriented interpretation of the applicable law clause. This approach facilitates the application of relevant external laws. However, none of the BITs in the South Asian region contain all the requisites necessary to facilitate a human rights-oriented counterclaim.

Despite the growing global discourse on investor accountability, South Asian countries lack an IIA framework that facilitates human rights-oriented counterclaims. Since 2008, thirty BITs have been signed or entered into force across the region; however, the possibility of human rights-based counterclaims within these treaties remains negligible. Only four South Asian BITs include explicit provisions on investors' obligations, and even among these, the capacity to ground counterclaims remains limited. For instance, the Bangladesh-Denmark BIT, 2009, restricts certain counterclaims in a manner comparable to the DR-CAFTA, 2004, offering little scope for human rights-oriented interpretation. While a few BITs make reference to investors' human rights and social obligations, their voluntary and non-justiciable character raises doubts about their ability to attract genuine accountability.

In a comparative perspective, the Indian BITs signed after the 2016 Model BIT, with Brazil in 2020, the Kyrgyz Republic in 2019, Belarus in 2018, and Taiwan in 2018, represent a more structured attempt to incorporate investor obligations. These treaties include dedicated CSR clauses and an exclusive chapter on investors' obligations, reflecting India's post-2016 policy shift toward rebalancing treaty asymmetry. However, despite these progressive elements, the restrictive scope of the dispute settlement clauses prevents human rights-related counterclaims. Article 19.3 of the India-Brazil BIT, for instance, excludes from the tribunal's jurisdiction provisions related to investor obligations under Part III, a limitation mirrored in the other three BITs. Although Footnote 4 to Article 26.3 of the 2016 Model BIT and its corresponding clauses in the aforementioned treaties allow tribunals to consider environmental or social damage caused by investors when determining compensation, such provisions function more as regulatory defences than as bases for counterclaims. Thus, even where human rights or CSR clauses are included, they remain soft law commitments: voluntary, non-binding, and beyond the scope of enforceable investor accountability.

Given this regional trend, domestic law emerges as the most certain and practical avenue for attributing human rights and social accountability obligations to investors. Yet, this potential remains unrealised across South Asia due to two interrelated shortcomings: *first*, the absence of robust domestic legal frameworks effectively regulating corporate human rights responsibilities; and *second*, the failure to elevate domestic law obligations to treaty status within IIAs. Of the twenty-eight South Asian BITs examined, only four explicitly incorporate investors' human rights or social accountability provisions, and just three include partial mentions in their preambles. Moreover, restrictive dispute settlement clauses and limited

references to applicable law further curtail the space for human rights-oriented counterclaims. Comparative lessons from regions such as Latin America and Africa, where domestic law has increasingly been invoked through treaty clauses or counterclaim mechanisms, demonstrate that strengthening domestic legal frameworks and incorporating them explicitly into BITs can serve as a realistic and transformative pathway for the Global South. To achieve this, South Asian States must adopt a two-step approach: *first*, by developing comprehensive domestic legislation embedding investor obligations in human rights and environmental protection, and *second*, by elevating these domestic obligations to the treaty level, ensuring that arbitral tribunals can apply them as part of the applicable law. Only then can domestic law evolve from a residual mechanism into a solid and enforceable foundation for rebalancing investor-State relations in the region.

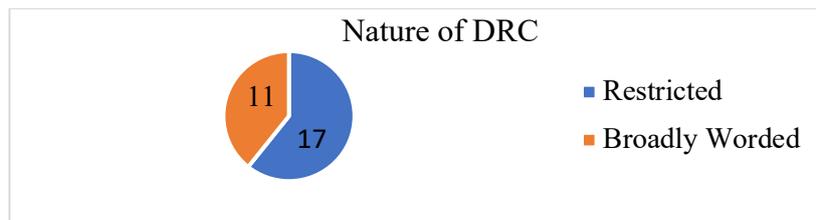
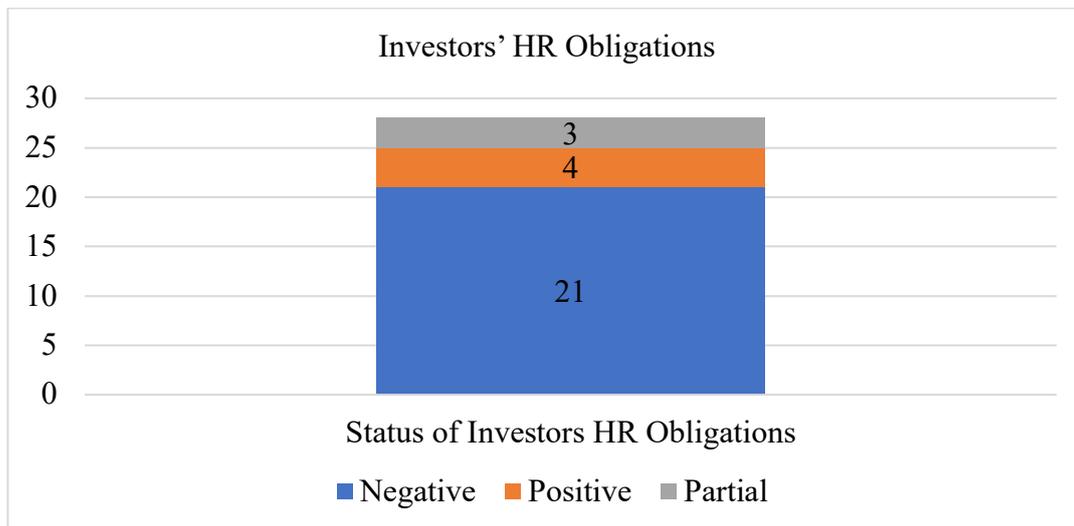


Figure 1: Nature of Dispute Resolution Clause in South Asian BITs<sup>212</sup>

This classification has been developed by the authors to analyse the scope of counterclaims within DRCs. The categorisation into “Restricted” and “Broadly Worded” clauses is based on the authors’ examination of the language used in the DRCs of BITs discussed in the article. Where the language of a clause is broadly worded, the authors identify a greater possibility for admitting counterclaims. Conversely, where the language is restricted, the potential for counterclaims is limited or non-existent. This analytical framework aims to establish the connection between the formulation of dispute resolution clauses and the admissibility of counterclaims. For further clarity, readers may refer to the section discussing the requirement of consent.



<sup>212</sup> Based on the information available from International Investment Agreements Navigator, See U. N. Trade and Development, *International Investment Agreements Navigator*, available at <https://investmentpolicy.unctad.org/international-investment-agreements> (Last visited on June 26, 2024).

Figure 2: Status of Investors' HR Obligations in South Asian BITs<sup>213</sup>

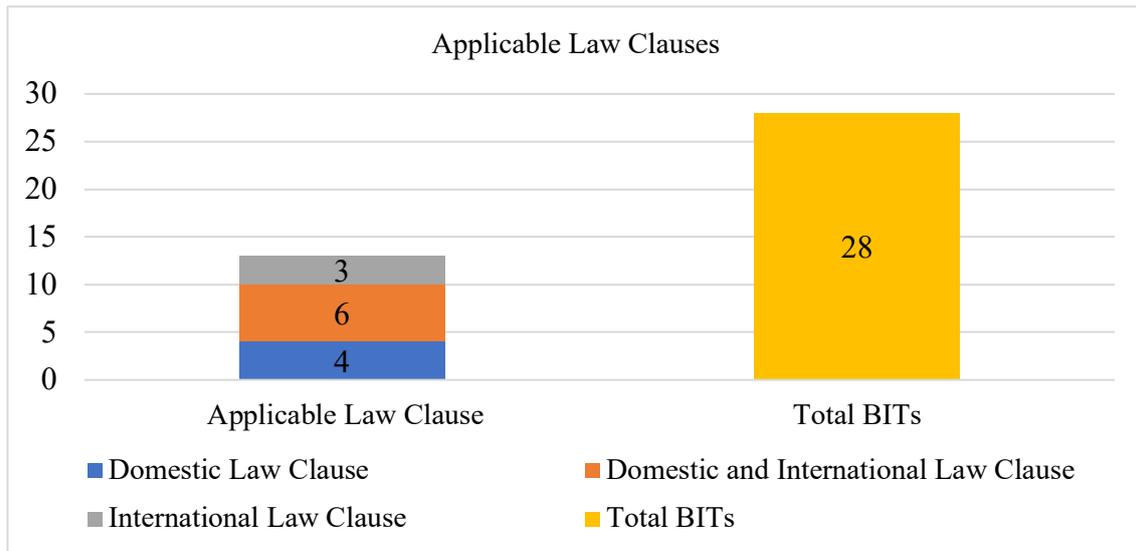


Figure 3: Nature of Applicable Laws in South Asian BITs<sup>214</sup>

## V. CONCLUSION

This study uncovered a pronounced imbalance in the IIL regime, particularly as manifested in South Asian IIAs signed after 2008. These treaties continue to prioritise protections for foreign investors, while offering little substantive recognition of investors' human rights obligations. Consequently, host States are left with limited recourse to address egregious abuses, such as modern slavery, within the ISDS framework. The doctrinal architecture of most South Asian BITs remains asymmetric: dispute resolution clauses are narrowly drafted, applicable law sections rarely reference international human rights obligations, and language introducing positive investor responsibilities is rarely operationalised into enforceable norms or bases for counterclaims. Jurisprudence in cases like *Glencore* and *Urbaser* confirms a widespread reluctance by arbitral tribunals to read investor human rights obligations into BITs unless these are clearly and explicitly incorporated into treaty text. The same pattern persists in South Asia, where prevailing BITs largely fail to empower host States to pursue human rights-oriented counterclaims, even in the context of serious abuses caused to the carriers of investment. Insight into the normative challenge with respect to international law, which is State-centric and where corporations lack legal personality, reveals that it does not provide an adequate legal framework. The tribunal's approach in *David R. Aven* underscores the critical role of domestic law in investment dispute proceedings.

For South Asia, this highlights the urgent need for treaties to clearly incorporate host State domestic law (including human rights and labour standards) within their applicable law clauses, thereby reinforcing States' regulatory autonomy and providing a tangible basis for counterclaims. Counterclaims based on human rights abuses, including modern slavery, are virtually unattainable given the prevailing treaty framework and interpretative practice.

To enable South Asian States (and similarly situated jurisdictions) to meaningfully address modern slavery and other human rights abuses within the investment arbitration system, the following solutions are paramount: (1) ensuring affirmative and unambiguous consent for counterclaims; (2) incorporating direct and binding human rights

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

obligations for investors; and (3) enabling the application of relevant domestic and international legal frameworks through robust applicable law clauses. Innovative legal drafting and a renewed appreciation of the importance of domestic law within international investment arbitration can foster a more balanced, equitable, and socially responsible international investment regime.

VI. ANNEXURE-I

Scope of Human Rights Oriented Counterclaim in South Asian BITs (This research study BITs signed or came into force after 2008) <sup>215</sup>							
Country	#	BIT	Status	Nature of DRC	Status of Investors' HR Obligation	Applicable Law Clause	Scope of HR Oriented Counterclaim
India	1	India-Livia BIT, 2007 (signed in 2007, came in force 2009)	In force	Broadly Worded	Negative	Host Country Domestic Law	Negative
	2	India-Senegal BIT, 2008	In force	Broadly Worded	Negative	Host Country Domestic Law	Negative
	3	India-Cambodia BIT, 2009	In force	Restricted	Negative	Host Country Domestic Law	Negative
	4	India-Bangladesh BIT, 2009	In force	Broadly Worded	Negative	Host Country Domestic Law	Negative
	5	India-Lithuania BIT, 2011	In force	Restricted	Negative	Absence Of Applicable Law Clause	Negative
	6	India-Belarus BIT, 2018	In force	Restricted	Positive	BIT, General Principles of Public International Law, Host Country Domestic Law	Negative
	7	India-Taiwan BIT, 2018	In force	Restricted	Positive	BIT, General Principles Of Public International Law, Host Country Domestic Law	Negative

<sup>215</sup> *Id.*

	8	India-Kyrgyz Republic BIT, 2019	Not In force	Restricted	Positive	BIT, General Principles of Public International Law, Host Country Domestic Law	Negative
	9	India-Brazil BIT, 2020	Not In force	Restricted	Positive	Absence Of Applicable Law Clause	Negative
Bangladesh	10	Bangladesh-Denmark BIT, 2009	In force	Broadly Worded & Allows Counterclaim	Negative	Absence Of Applicable Law Clause	Negative
	11	Bangladesh-UAE BIT, 2011	In force	Broadly Worded	Negative	Absence Of Applicable Law Clause	Negative
	12	Bangladesh-Turkey BIT, 2012	In force	Restricted	Partial	BIT, International Law, Host Country Domestic Law with Conflict of Laws Rules	Negative
	13	Bangladesh-Belarus BIT, 2012	Not In Force	Restricted	Negative	Absence Of Applicable Law Clause	Negative
	14	Bangladesh-Cambodia BIT, 2014	Not In Force	Broadly Worded	Negative	Absence Of Applicable Law Clause	Negative
	15	Bangladesh-Bahrain BIT, 2015	Not In Force	Broadly Worded	Negative	Absence Of Applicable Law Clause	Negative
	16	Bangladesh-Kuwait BIT, 2016	Not In Force	Restricted	Negative	Absence Of Applicable Law Clause	Negative
Pakistan	17	Pakistan-Bosnia and Herzegovina BIT, 2001(signed in 2001,	In Force	Broadly Worded	Negative	Absence Of Applicable Law Clause	Negative

		came in force 2010)					
	18	Pakistan-Kazakhstan BIT, 2003(signed in 2003, came in force 2009)	In Force	Restricted	Negative	Absence Of Applicable Law Clause	Negative
	19	Pakistan-Tajikistan BIT, 2004(signed in 2004, came in force 2009)	In Force	Restricted	Negative	BIT, International Law	Negative
	20	Pakistan-Germany BIT, 2009	Not In Force	Restricted	Negative	Absence Of Applicable Law Clause	Negative
	21	Pakistan-Kuwait BIT, 2011	In Force	Restricted	Negative	Absence Of Applicable Law Clause	Negative
	22	Pakistan-Turkey BIT, 2012	In Force	Restricted	Negative	BIT, International Law, Host Country Domestic Law with Conflict of Laws Rules	
	23	Pakistan-Bahrain BIT, 2014	In Force	Broadly Warded	Negative	Absence Of Applicable Law Clause	Negative
Sri Lanka	24	Sri Lanka-Iran BIT, 2000(signed in 2000, came in force 2016)	In Force	Broadly Warded	Negative	Absence Of Applicable Law Clause	Negative
	25	Sri Lanka-Czech Republic BIT, 2011	In Force	Restricted	Negative	BIT, International Law	Negative

	26	Sri Lanka-Qatar BIT, 2012	Not In Force	Broadly Warded	Negative	BIT, International Law	Negative
	27	Sri Lanka-Kuwait BIT, 2009	Not In Force	English translation copy of BIT is not available			
	28	Sri Lanka-Vietnam BIT, 2009	In Force	English translation copy of BIT is not available			
Afghanistan	29	Afghanista-Azerbaijan BIT, 2017	Not In Force	Restricted	Partial	BIT, International Law, Host Country Domestic Law	Negative
Nepal	30	Nepal-Finland BIT, 2009	In Force	Restricted	Partial	Absence Of Applicable Law Clause	Negative