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**Protinároky států v investiční arbitráži:**

**Vynucení odpovědnosti investorů za porušování lidských práv**

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**Host-State Counterclaims in Investment Arbitration:**

**Holding Investors Accountable for Human Rights Violations**

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## LIST OF ABBREVIATIONS

Art./Arts.	Article/Articles
BIT(s)	Bilateral investment treaty/treaties
COMESA	Common Market for Eastern and Southern Africa
ECT	Energy Charter Treaty
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA(s)	International investment agreement(s)
OIC	Organisation of Islamic Cooperation
para./paras.	paragraph/paragraphs
PCIJ	Permanent Court of International Justice
p./pp.	page/pages
SADC	Southern African Development Community
SCC	Stockholm Chamber of Commerce
TIP(s)	Treaty/treaties with investment provisions
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties

## INTRODUCTION

In his 2008 Report, the UN Special Representative for Business and Human Rights John Ruggie recognized the growing imbalance between the rights of transnational corporations and the needs of host states. Pointing to the high number of BITs which are designed to provide large protection to foreign investors, he concluded that host states might find it more difficult to strengthen the social, environmental or human rights standards without fear of investors' challenges.<sup>1</sup> Furthermore, their position is even more complicated when it comes to the defence against violations of domestic laws and human rights abuses by foreign investors. This asymmetry has provoked an intensive debate about the possible ways of how to enforce investors' compliance in investment arbitration.<sup>2</sup>

One of the often cited mechanisms which could help to redress these deficiencies is the filing of counterclaims by host states in arbitral proceedings. Unlike proposals of progressive reforms, counterclaims have been long available to the parties in investment arbitration, yet they were brought mainly before contract-based tribunals. Only in 2001 did a treaty-based tribunal deal with a counterclaim filed by a host state for the first time.<sup>3</sup> Since then, counterclaims were heard in another more than 20 cases, receiving increasing attention of academics and practitioners.<sup>4</sup>

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<sup>1</sup> Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights - Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, 7 April 2008, A/HRC/8/5, pp. 5-6 and 11.

<sup>2</sup> See for example DUMBERRY, Patrick, DUMAS-AUBIN, Gabrielle (2012). *How to Impose Human Rights Obligations on Corporations under Investment Treaties?* Yearbook on International Investment Law and Policy, 2011-2012, Vol. 4; KUBE, Vivian, PETERSMANN, Ernst-Ulrich (2016). *Human Rights Law in International Investment Arbitration*. Asian Journal of WTO and International Health Law and Policy, Vol. 11, No. 1; LABORDE, Gustav (2010). *The Case for Host State Claims in Investment Arbitration*. Journal of International Dispute Settlement, Vol. 1, No. 1; TORAL, Mehmet, SCHULTZ, Thomas (2010). *The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations*. In: WAIBEL, Michael, KAUSHAL, Asha, CHUNG, Kyo-Hwa L., BALCHIN, Claire, *The Backlash against Investment Arbitration: Perceptions and Reality* (Alphen aan den Rijn: Kluwer Law International); WEILER, Todd (2004). *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*. Boston College International and Comparative Law Review, Vol. 27, No. 2.

<sup>3</sup> *Alex Genin and others v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 ("Alex Genin v. Estonia").

<sup>4</sup> POPOVA, Ina C., POON Fiona (2015). *From Perpetual Respondent to Aspiring Counterclaimant? State Counterclaims in the New Wave of Investment Treaties*. BCDR, International Arbitration Review, Vol. 2, No. 2, Annex A, pp. 246-260.

Despite their promising role in enforcing investors' compliance with human rights standards, counterclaims have, surprisingly, addressed this issue only in the recent dispute between the Spanish investor Urbaser and Argentina.<sup>5</sup> This paper, therefore, poses a question whether counterclaims can indeed live up to the expectations and allow host states to hold foreign investors accountable for human rights violations in investment arbitration. When bringing counterclaims before an arbitral tribunal, host states as respondents face numerous obstacles created by the wording of IIAs which eventually makes counterclaims often fall out of the tribunal's jurisdiction or fail in the stage of merits. Through the analysis of existing case law and the language of IIAs, this paper examines individual conditions upon which counterclaims can be successfully heard in investment arbitration.

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<sup>5</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016 (“*Urbaser v. Argentina*”).

# 1 METHODOLOGY

## 1.1 Research questions

Despite the growing popularity of investment arbitration for the settlement of disputes between investors and host states, counterclaims are only rarely used in the proceedings. According to the UNCTAD statistics, there are over 800 known treaty-based investor-state arbitrations, yet counterclaims were filed and effectively addressed in less than 30 of them.<sup>6</sup> One of the reasons why host states remain “*perpetual respondents*”<sup>7</sup> without the opportunity to adopt a more offensive tactics against investors is the language of IIAs that determines whether counterclaims can be heard or not. This paper, therefore, examines the obstacles that host states must overcome both on procedural, as well as substantive grounds and proposes the possible wording of IIAs which would permit host states to defend human rights.

As any dispute settlement mechanism, investment arbitration is based on the mutual consent of both parties which determines the scope of jurisdiction of an arbitral tribunal.<sup>8</sup> While a dispute settlement clause in an IIA generally provides for jurisdiction over claims of an investor, this fact does not necessarily mean that jurisdiction equally extends over host state’s counterclaims. Since the consent to counterclaims is dependent on the wording of the dispute settlement clauses in individual IIAs, a question arises as to which language would effectively enable host states to bring their claims in the proceedings.

Apart from the jurisdictional obstacles, counterclaims must have a close legal and factual connection to claimant’s primary claims in order to be admissible in investment arbitration.<sup>9</sup> Although this requirement has been consistently applied in all

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<sup>6</sup> UNCTAD (2018). *Investment Dispute Settlement Navigator* (<http://investmentpolicyhub.unctad.org/ISDS>, last accessed on 30 March 2018).

<sup>7</sup> POPOVA, Ina C., POON Fiona (2015). *From Perpetual Respondent to Aspiring Counterclaimant? State Counterclaims in the New Wave of Investment Treaties*. BCDR, *International Arbitration Review*, Vol. 2, No. 2, p. 223.

<sup>8</sup> ŠTURMA, Pavel, BALAŠ, Vladimír (2013). *Mezinárodní ekonomické právo* (Praha: C. H. Beck), p. 422; SCHREUER, Christoph (2005). *Consent to Arbitration*. *Transnational Dispute Management*, Vol. 5 ([www.transnational-dispute-management.com/article.asp?key=555](http://www.transnational-dispute-management.com/article.asp?key=555), last accessed on 30 March 2018).

<sup>9</sup> KJOS, Hege E. (2013). *Applicable Law in Investor-State Arbitration* (Oxford: Oxford University Press), p. 147.

types of international litigation,<sup>10</sup> this paper argues that treaty-based tribunals have adopted an unjustifiably narrow approach which does not reflect the specific features of international investment law. In the light of these facts, this paper analyses the case law of the ICJ, the Iran/United States Claims Tribunal and arbitral tribunals to determine whether the connexity requirement is reasonable in treaty-based arbitration.

Finally, IIAs do not usually regulate non-commercial aspects of investor's activities in the territory of host states, such as protection of environment or human rights.<sup>11</sup> To find legal support for their claims, host states, therefore, need to rely on other sources of law, such as contracts or domestic law, whose application by investment tribunals is often questionable. Given all these controversies, this paper intends to provide answers to the following questions:

1. What is the required wording of dispute settlement clauses in IIAs permitting arbitral tribunals to establish their jurisdiction over counterclaims?
2. How should arbitral tribunals interpret the requirement of legal and factual connection between a primary claim and a counterclaim?
3. Which provisions in IIAs could enable host states to invoke substantive obligations of investors under various legal sources?

Before further examination of the methodology, it is necessary to point to the limitations of this paper. While the analysis addresses important procedural and substantive issues related to counterclaims, it does not deal with the types of human rights obligations owed by investors as private entities under international law. In light of the recent arbitral award in *Urbaser v. Argentina*,<sup>12</sup> this topic has undeniably given

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<sup>10</sup> DOUGLAS, Zachary (2009). *The International Law of Investment Claims* (Cambridge: Cambridge University Press), p. 256.

<sup>11</sup> The recent investment treaty practice, however, adopts a different approach. For example, Article 13 of the 2007 COMESA Investment Agreement requires that investors comply with “*all applicable domestic measures of the Member State in which their investment is made*”. Furthermore, Part III of the 2012 Model BIT for the SADC goes even further by imposing on investors obligations related to anti-corruption measures, compliance with domestic laws, environmental impact, human rights and minimum labor standards. Equally, India's 2015 Model BIT provides for obligations of investors in the area of anti-corruption measures, compliance with host state's taxation as well as domestic legislation.

<sup>12</sup> In this case, the dispute arose out of the termination of a concession for water and sewerage services granted to the claimant's subsidiary. During the ICSID proceedings, Argentina filed a counterclaim alleging that through their failure to make appropriate investment, the claimants had breached international human rights obligations, namely the right to water. The tribunal agreed that the

rise to many questions, however, the paper does not intend to contribute to this discussion.

## 1.2 Sources and method

To provide answers to the research questions, the analysis primarily draws upon the case law of arbitral tribunals which dealt with counterclaims against investors. Although investment arbitration can be initiated both through a contract, concluded directly between an investor and a host state,<sup>13</sup> as well as an IIA, this paper examines only the case law in treaty-based arbitrations where counterclaims face a number of procedural and substantive obstacles. Apart from the reasoning of the tribunals, the analysis also addresses the language of individual IIAs out of which the disputes arose.

As for the secondary sources, this paper relies on academic articles and commentaries of the case law in investment arbitration. Up to the present, there is no publication which would comprehensively address the issues related to counterclaims in investment arbitration. So far, such study exists only with regard to counterclaims before the ICJ<sup>14</sup> and provides, therefore, merely a useful context for this paper. Furthermore, most of the published articles restrict themselves to particular issues in relation to counterclaims, such as the requirement of consent, or the evaluation of recent case law. For these reasons, the aim of this paper is to synthesize the accessible information to provide a complex framework for the bringing of counterclaims in treaty-based arbitration.

In the light of the research questions, this paper applies the method of analysis of the case law and synthesis of the reasoning of individual arbitral tribunals that is

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Argentina-Spain BIT primarily imposed obligations on host states rather than on investors, but rejected Urbaser's argument that corporations cannot be subject of obligations under international law. See *Urbaser v. Argentina*, paras. 1185 and 1195.

<sup>13</sup> Investment contracts are bilateral agreements between private entities and host states which regulate the administration of investment projects. Due to the incorporation of dispute settlement clauses permitting the initiation of arbitration, they played a crucial role in guaranteeing the protection to the investments of investors in the territory of host states before the expansion of IIAs. See ŠTURMA, Pavel, BALÁŠ, Vladimír (2012). *Ochrana mezinárodních investic v kontextu obecného mezinárodního práva*. Studie z mezinárodního práva č. 3 (Praha: Univerzita Karlova v Praze, Právnická fakulta), pp. 26-28.

<sup>14</sup> ANTONOPOULOS, Constantine (2011). *Counterclaims before the International Court of Justice* (The Hague: T.M.C. Asser Press).

supplemented with the comparative study of the language of individual IIAs. This combination enables to explain the differences in the outcomes of the decisions about counterclaims and to formulate propositions for the drafting of provisions that would permit the successful filing of counterclaims.

The final note in this section concerns the terminology applied in this paper. In the context of general debates about investment arbitration, this paper refers to international investment agreements (IIAs) which comprise both bilateral investment treaties (BITs) and treaties with investment provisions (TIPs), such as the OIC Treaty. Where the discussion relates to a specific case, this paper refers to the individual BIT or TIP instead.

### **1.3 Structure of the study**

This paper is divided into five chapters. Chapter 1 introduces three research questions regarding procedural and substantive aspects of counterclaims which will be addressed in individual sections of the paper. It further describes the methodology of the study and presents the sources upon which the analysis is based. The theoretical part of the paper is concluded by Chapter 2 which outlines individual features of counterclaims in international litigation and distinguishes between counterclaims and other legal actions of respondents, such as the defence on the merits and set-offs. Finally, Chapter 2 examines the role of counterclaims in investment arbitration, explaining its potential advantages and disadvantages.

With regard to the procedural issues, Chapter 3 assesses the requirement of consent to counterclaims in investment treaty arbitration. Firstly, this section studies the requirements for counterclaims in the procedural rules most often applied by investment tribunals. It then provides a general explanation of parties's consent to counterclaims under IIAs and concludes by examining the wording of dispute settlement provisions with regard to the jurisdiction *ratione materiae* and *locus standi*. Chapter 4 then moves to the analysis of the admissibility of counterclaims in investment arbitration. After introducing the connection test between a primary claim and a counterclaim, the section further examines its application by the ICJ and the Iran/United States Claims Tribunal. Finally, Chapter 4 maps the influence of their findings on the analysis of the admissibility of counterclaims by investment tribunals.

Turning to the substantive issues, Chapter 5 describes individual provisions of IIAs which could be invoked as causes of action for bringing counterclaims before arbitral tribunals. The section, therefore, focuses on the language of IIAs to identify provisions that establish investors' obligations by themselves or by reference to other sources of law.

The conclusion of this paper summarizes the findings in previous chapters and provides answers to the research questions set out in Chapter 1. Building on the analysis of procedural and substantive hurdles of counterclaims in investment arbitration, the conclusion outlines possible solutions for rebalancing the asymmetric positions of investors and host states in international investment law.

## 2 COUNTERCLAIMS IN INTERNATIONAL LAW

### 2.1 Definition of counterclaim

In essence, a counterclaim is a claim made by the respondent in opposition to a claim presented by the claimant within the same proceedings.<sup>15</sup> The bringing of a counterclaim is not an exercise of the right to defence, but, in the words of Judge Cançado Trindade, it rather “*appears as a counter-attack.*”<sup>16</sup> Counterclaims are an independent cause of action, the success or failure of which is not dependent on the fate of the claimant’s primary claim.<sup>17</sup> At the same time, they are, however, also connected to the primary claim as they must be based on the same legal and factual context.<sup>18</sup> *A contrario*, as Judge Weeramantry aptly summarized:

[A] claim that is autonomous and has no bearing on the determination of the initial claim does not thus qualify as a counterclaim.<sup>19</sup>

A counterclaim is a legal action which is generally admitted in all domestic legal systems. Despite its origin, the institute has been, without much controversy, transposed into international procedural law as a general principle of law in light of Article 38(1)(c) of the Statute of the ICJ.<sup>20</sup> Discussions, nevertheless, remain as to whether

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<sup>15</sup> ANTONOPOULOS, Constantine (2011). *Counterclaims before the International Court of Justice* (The Hague: T.M.C. Asser Press), p. 50; ATANASOVA, Dafina, MARTINEZ BENOIT, Adrian, OSTŘANSKÝ, Josef (2014). *The Legal Framework for Counterclaims in Investment Treaty Arbitration*. Journal of International Arbitration, Vol. 31, No. 3, p. 359.

<sup>16</sup> *Jurisdictional Immunities of the State (Germany v. Italy)*, Counter-Claim, Order of 6 July 2010, ICJ Reports 2010, Dissenting Opinion of Judge Cançado Trindade, para. 17.

<sup>17</sup> RENTELN, Alison D. (1986). *Encountering Counterclaims*. Denver Journal of International Law and Policy, Vol. 15, p. 380.

<sup>18</sup> ATANASOVA, Dafina, MARTINEZ BENOIT, Adrian, OSTŘANSKÝ, Josef (2014). *The Legal Framework for Counterclaims in Investment Treaty Arbitration*. Journal of International Arbitration, Vol. 31, No. 3, p. 378.

<sup>19</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Counter-Claims, Order of 17 December 1997, ICJ Reports 1997, Dissenting opinion of Vice-President Weeramantry, p. 291.

<sup>20</sup> LAUTERPACHT, Hersch (1958). *The Development of International Law by the International Court* (London: Stevens & Sons), p. 167; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Counter-Claims, Order of 17 December 1997, ICJ Reports 1997, Dissenting opinion of Vice-President Weeramantry, p. 288.

counterclaims should operate in the same manner as in municipal law or adapt to the field of public international law. While the former approach has been advocated by Judges Weeramantry and Trindade in their dissenting opinions,<sup>21</sup> international courts introduced modified rules on counterclaims to address the consensual nature of their jurisdiction.<sup>22</sup>

The possibility to raise counterclaims has been available since the beginnings of treaty arbitration.<sup>23</sup> One of the earliest examples of disputes involving counterclaims was the *Behring Sea Seal Fishing* arbitration between the United States and the United Kingdom. The United Kingdom brought a counterclaim based on Article VIII of the 1892 Arbitration Treaty which entitled each contracting party to submit any question of fact in connection with the presented claims to the tribunal.<sup>24</sup> In the aftermath of the World War I, counterclaims were expressly incorporated also in the rules of the Anglo-Austrian, Anglo-Bulgarian and Anglo-Hungarian Mixed Arbitral Tribunals:

Where a Defendant seeks to rely upon any matters contained in his Answer as the grounds of a counterclaim he must in his Answer state specifically that he does so by way of a counterclaim.<sup>25</sup>

The central rationale underlying counterclaims is the principle of sound administration of justice and procedural economy, allowing the judicial bodies to have better overview of the parties's claims and decide disputes in a more consistent

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<sup>21</sup> *Jurisdictional Immunities of the State (Germany v. Italy)*, Counter-Claim, Order of 6 July 2010, ICJ Reports 2010, Dissenting Opinion of Judge Cançado Trindade, para. 4; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Counter-Claims, Order of 17 December 1997, ICJ Reports 1997, Dissenting opinion of Vice-President Weeramantry, p. 291.

<sup>22</sup> ANTONOPOULOS, Constantine (2011). *Counterclaims before the International Court of Justice* (The Hague: T. M. C. Asser Press), p. 56.

<sup>23</sup> ATANASOVA, Dafina, MARTINEZ BENOIT, Carlos A., OSTRÁNSKÝ, Josef (2012). *Counterclaims in Investor-State Dispute Settlement (ISDS) under International Investment Agreements (IIAs)*. The Graduate Institute of Geneva, Centre for Trade and Economic Integration, Trade and Investment Law Clinic Papers, p. 2.

<sup>24</sup> BEVANS, Charles I. (1974). *Treaties and Other International Agreements of the United States of America 1776-1949* (Washington D.C.: Department of State Publication), pp. 220-225.

<sup>25</sup> SIMPSON, John L., FOX, Hazel (1959). *International Arbitration: Law and Practice* (London: Stevens & Sons).

fashion.<sup>26</sup> For these reasons, counterclaims were eventually codified in the rules of international courts, such as the PCIJ and the ICJ,<sup>27</sup> as well as the rules governing the settlement of disputes between investors and host states.

## 2.2 Distinction from a defence on the merits and set-offs

Counterclaims are distinguishable from other legal actions which can be pursued by the respondent in judicial or arbitral proceedings. A defence on the merits is a submission presented by a respondent which bears features of a claim but is devised to render the claimant's primary claim devoid of its factual or legal basis.<sup>28</sup> In other words, the purpose of a defence on the merits is the defeat of the claimant's original claim. By way of example, the plea of *force majeure* by a respondent facing a claim of non-performance of its contractual obligations against the claimant, as argued by Iran in *Gould Marketing, Inc v. Ministry of National Defense of Iran* before the Iran/United States Claims Tribunal, constitutes precisely an instance of a defence on the merits.<sup>29</sup>

Contrary to the defence on the merits, by a counterclaim the respondent seeks a decision in its favour “*over and above the dismissal*”<sup>30</sup> of claimant's claims. The respondent might, therefore, deny claimant's primary claim while requesting damages for a breach of claimant's obligations. In this respect, a counterclaim has a dual character; it reacts to the primary claim made by the claimant but, at the same time, also

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<sup>26</sup> HAMIDA, Walid B. (2005). *L'arbitrage Etat-investisseur cherche son équilibre perdu: Dans quelle mesure l'Etat peut introduire des demandes reconventionnelles contre l'investisseur privé?* International Law FORUM du droit international, Vol. 7, No. 4, pp. 270-271; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Counter-Claims, Order of 17 December 1997, ICJ Reports 1997, Dissenting opinion of Judge Koroma, p. 275.

<sup>27</sup> Rules of the PCIJ, Art. 40; Rules of the ICJ, Art. 80.

<sup>28</sup> ANTONOPOULOS, Constantine (2011). *Counterclaims before the International Court of Justice* (The Hague: T. M. C. Asser Press), p. 60.

<sup>29</sup> *Gould Marketing, Inc. v. Ministry of National Defense of Iran*, Interlocutory Award No. ITL 24-49-2, 27 July 1983, 3 Iran-US CTR.

<sup>30</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Order of 29 November 2001, ICJ Reports 2001, para. 29.

constitutes a new and separate claim widening the original subject-matter of the dispute.<sup>31</sup>

The respondent may further preserve its interests by bringing set-offs which aim at reducing, balancing or neutralizing a monetary claim made by the claimant in full or in part.<sup>32</sup> Similarly to counterclaims, set-offs are presented to avoid circuitry of action as they allow mutual extinction of parties' claims within the same judicial proceedings. On the other hand, a set-off defence only allows the respondent to reduce the amount for which it is liable and as such cannot, therefore, exceed the claimant's original claim.<sup>33</sup> In the opposite case, the respondent would have to initiate separate litigation in order to recover its damages in their entirety.

Apart from the procedural aspects, the fate of set-offs is highly dependent on the original claims presented by the claimant. Consequently, once the tribunal finds against the primary claim of the claimant, set-offs cannot be heard at all.<sup>34</sup> As famously described by Sir Cockburn CJ, set-offs can only be used due to their defensive nature "*as a shield, not as a sword*".<sup>35</sup>

### 2.3 Role of counterclaims in investment arbitration

Despite their rare use up to the present, counterclaims could have a significant impact on the shaping of investment arbitration. From the procedural point of view, counterclaims may presumably enhance the overall efficiency of complex proceedings which are often simultaneously pursued before investment tribunals and domestic

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<sup>31</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Counter-Claims, Order of 17 December 1997, ICJ Reports 1997, p. 256.

<sup>32</sup> ANTONOPOULOS, Constantine (2011). *Counterclaims before the International Court of Justice* (The Hague: T. M. C. Asser Press), p. 65.

<sup>33</sup> KEE, Christopher (2005). *Set-off in International Commercial Arbitration: What can the Asian region learn?* Asian International Arbitration Journal, Vol. 1, No. 2, p. 146; KARRER, Pierre A. (1986). *Arbitration Saves Costs: Poker and Hide-and-Seek*. Journal of International Arbitration, Vol. 3, No. 1, pp. 35 and 38.

<sup>34</sup> PAVIC, Vladimir (2006). *Counterclaim and Set-off in International Arbitration*. Annals International Edition, p. 104; *Oxus Gold plc v. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat*, UNCITRAL, Award, 17 December 2015, para. 972 ("*Oxus Gold v. Uzbekistan*").

<sup>35</sup> *Stooke v. Taylor* [1880], 5 Queen's Bench Division 569, para. 575.

courts, with decision-makers being unaware of the whole picture of the case.<sup>36</sup> In this respect, the concentration of all claims related to the same cluster of events through counterclaims would enable arbitrators to become well acquainted about all relevant facts and, consequently, to render fairer decisions.<sup>37</sup> Having one hearing and one legal representation could also streamline the process and reduce the risk of duplication of legal costs.<sup>38</sup>

Furthermore, allowing counterclaims could discourage host states from filing frivolous objections to jurisdiction, thus enabling arbitral tribunals to address the merits of the disputes.<sup>39</sup> In other words, host states as “*perpetual respondents*”<sup>40</sup> in investment arbitration could adopt a more offensive tactics against investors. Without this ability, investment arbitration could remain a rigid dispute settlement procedure where “*a state cannot win; the most it can hope to do is not lose.*”<sup>41</sup> In this context, counterclaims could have, however, also an opposite effect. Investors, who have to take into consideration claims that might be filed against them, could be less willing to initiate arbitral proceedings in the first place. Therefore, permitting counterclaims could eventually diminish the protection of investors which has formed the rationale of international investment law from its beginnings.

Apart from the benefits during the investment proceedings, the adjudication of counterclaims by arbitral tribunals would have a significant impact also for the stage of

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<sup>36</sup> KALICKI, Jean E. (2013). *Counterclaims by States in Investment Arbitration*. International Institute for Sustainable Development, 14 January 2013 (<https://www.iisd.org/itn/2013/01/14/counterclaims-by-states-in-investment-arbitration-2/>, last accessed on 30 March 2018).

<sup>37</sup> BJORKLUND, Andrea K. (2013). *The Role of Counterclaims in Rebalancing Investment Law*. Lewis & Clark Law Review, Vol. 17, p. 475.

<sup>38</sup> KJOS, Hege E. (2007). *Counterclaims by Host States in Investment Treaty Arbitration*. Transnational Dispute Management, Vol. 4, No. 4 ([www.transnational-dispute-management.com/article.asp?key=1026](http://www.transnational-dispute-management.com/article.asp?key=1026), last accessed on 30 March 2018).

<sup>39</sup> KRYVOI, Yaraslau (2011). *Counterclaims in Investor-State Arbitration*. LSE, Law, Society and Economy Working Papers 8/2011 ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1891935](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1891935), last accessed on 30 March 2018), p. 4.

<sup>40</sup> POPOVA, Ina C., POON Fiona (2015). *From Perpetual Respondent to Aspiring Counterclaimant? State Counterclaims in the New Wave of Investment Treaties*. BCDR, International Arbitration Review, Vol. 2, No. 2, p. 223.

<sup>41</sup> BJORKLUND, Andrea K. (2013). *The Role of Counterclaims in Rebalancing Investment Law*. Lewis & Clark Law Review, Vol. 17, p. 464.

enforcement.<sup>42</sup> Awards rendered by arbitral tribunals might be enforced either under the ICSID Convention or the New York Convention on Recognition and Enforcement of Arbitral Awards. Both mechanisms require that signatory states recognize arbitral awards rendered in other countries as decisions of their domestic courts, allowing for only a very limited list of exceptions for their challenge.<sup>43</sup> Judgments of domestic courts are, to the contrary, subject to enforcement laws of countries in which the unsuccessful party has its assets and may be extensively reviewed.<sup>44</sup> In this respect, counterclaims would ensure greater equality between investors and host states in investment arbitration.

A frequent objection to this call is that the unfairness under IIAs is in fact crucial for rebalancing the existing asymmetry between investors and host states. International investment law was developed to stimulate the flow of investment by moderating the political risk related to the host state's sovereign powers.<sup>45</sup> As a consequence, it is the conduct of the host state, not that of investor, that should be regulated in more detail. Taking into account the capital of individual parties, this argument has fundamental flaws. Some foreign investors have economic muscle unrivalled by many developing countries, with turnovers far exceeding state budgets,<sup>46</sup> as was clearly visible, for instance, in the proceedings brought by the multi-billion-dollar tobacco company Phillip

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<sup>42</sup> KJOS, Hege E. (2013). *Applicable Law in Investor-State Arbitration* (Oxford: Oxford University Press), pp. 136-137; KRYVOI, Yaroslau (2011). *Counterclaims in Investor-State Arbitration*. LSE, Law, Society and Economy Working Papers 8/2011 ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1891935](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1891935), last accessed on 30 March 2018), p. 4; WEILER, Todd (2004). *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*. Boston College International and Comparative Law Review, Vol. 27, No. 2, p. 437.

<sup>43</sup> ICSID Convention, Art. 54; New York Convention on Recognition and Enforcement of Arbitral Awards, Arts. III and V.

<sup>44</sup> BISHOP, R. Doak (2009). *Introduction: The Enforcement of Arbitral Awards against Sovereign*. In: BISHOP, R. Doak (ed.), *Enforcement of Arbitral Awards Against Sovereigns* (New York: JurisNet), pp. 3-4.

<sup>45</sup> ŠTURMA, Pavel, BALAŠ, Vladimír (2013). *Mezinárodní ekonomické právo* (Praha: C. H. Beck), p. 306 and 312-313; SUBEDI, Surya P. (2008). *International Investment Law* (Oxford: Hart Publishing), p. 89.

<sup>46</sup> GLOBAL JUSTICE NOW (2016). *10 biggest corporations make more money than most countries in the world combined* ([http://www.globaljustice.org.uk/sites/default/files/files/resources/corporations\\_vs\\_governments\\_final.pdf](http://www.globaljustice.org.uk/sites/default/files/files/resources/corporations_vs_governments_final.pdf), last accessed on 30 March 2018).

Morris against Uruguay.<sup>47</sup> In this regard, investment arbitration should be able to restrain equally the conduct of investors as that of host states.

Perhaps more importantly, counterclaims may potentially contribute to address the growing criticism that investment arbitration is structurally biased against host states. Permitting governments to bring more counterclaims before tribunals would help to redress concerns regarding the asymmetry of the dispute settlement mechanism in which investors are entitled to rights and remedies while host state have neither.<sup>48</sup> An equal access to a neutral forum was advocated also by the tribunal in *SGS v. Pakistan* which held that:

[i]t would be inequitable if, by reason of the invocation of ICSID jurisdiction, the [foreign investor] could on the one hand elevate its side of the dispute to international adjudication and, on the other, preclude the [host state] from pursuing its own claim for damages [...].<sup>49</sup>

On the other hand, a too expansive view of counterclaims could unintentionally further undermine the reputation of investment arbitration as such. To provide legal background for their claims, host states often rely on their domestic legislation. Under such circumstances, arbitrators would have to apply domestic law in which they cannot – unlike domestic judges – claim any special expertise.<sup>50</sup> Counterclaims could, therefore, deprive domestic courts of their opportunity to hear disputes which might otherwise have been resolved locally.

In conclusion, as a matter of policy, counterclaims seem to correct many deficiencies which have been at the center of long-term criticism. Indeed, it is ironic to force host states to bring their claims against investors only before domestic courts

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<sup>47</sup> *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award, 8 July 2016.

<sup>48</sup> BUBROWSKI, Helene (2013). *Balancing IIA Arbitration Through the Use of Counterclaims*. In: DE MESTRAL, Armand, LÉVESQUE, Céline, *Improving International Investment Agreements* (London: Routledge), pp. 214-215.

<sup>49</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2, 16 October 2002, para. 302 (“*SGS v. Pakistan*”).

<sup>50</sup> KALICKI, Jean E. (2013). *Counterclaims by States in Investment Arbitration*. International Institute for Sustainable Development, 14 January 2013 (<https://www.iisd.org/itn/2013/01/14/counterclaims-by-states-in-investment-arbitration-2/>, last accessed on 30 March 2018).

when the recourse to these courts is precisely what investment arbitration was designed to avoid.<sup>51</sup> Their advantages should not, however, shadow potential risks to the legitimacy of investment arbitration which might siphon off disputes involving issues related to local laws from domestic courts.<sup>52</sup> Given that arbitral tribunals need a particular expertise to justify their authority, they should hear only a limited range of counterclaims that are inextricably connected to the dispute before the arbitral tribunal.

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<sup>51</sup> *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Declaration of W. Michael Reisman, 28 November 2011.

<sup>52</sup> BJORKLUND, Andrea K. (2013). *The Role of Counterclaims in Rebalancing Investment Law*. Lewis & Clark Law Review, Vol. 17, p. 478.

### 3 JURISDICTION OVER COUNTERCLAIMS

#### 3.1 Requirement of consent in investment arbitration

Similarly to commercial arbitration, consent is the organising principle for the jurisdiction of investment tribunals.<sup>53</sup> In its absence either on the side of a host state or an investor, the dispute cannot be heard in arbitral proceedings. In the context of treaty-based arbitration, consent to arbitrate is a rather unique phenomenon which is perfected in two steps.<sup>54</sup>

First, by concluding an IIA with another sovereign state, a host state extends its standing offer to arbitrate which is addressed to investors with the nationality of the other signatory state.<sup>55</sup> This offer is irrevocable in that it remains valid for as long as the treaty is in force.<sup>56</sup> As for the possible modalities, host states often, but not always, make their offer by giving unequivocal consent to arbitration.<sup>57</sup> This would be the case where the dispute settlement provision in an IIA provides that “*each Contracting Party hereby consents*”<sup>58</sup> or that a dispute “*shall be submitted*”<sup>59</sup> to arbitration. However, not all IIAs contain a firm offer, but may incorporate an undertaking to give consent in the future instead.<sup>60</sup> Although a refusal to do so would eventually constitute a breach of the

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<sup>53</sup> SORNARAJAH, M. (2010). *The International Law on Foreign Investment* (Cambridge: Cambridge University Press), p. 306.

<sup>54</sup> NOLAN, Michael D., SOURGENS, Frédéric G. (2010). *Limits of Consent – Arbitration Without Privity and Beyond*. In: CREMADES, Bernardo M., FERNANDEZ-BALLESTEROS, Miguel A., ARIAS, David, *Liber Amicorum: Bernardo Cremades* (Madrid: La Ley) ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2180302](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180302), last accessed on 30 March 2018), pp. 2-3.

<sup>55</sup> SCHREUER, Christoph (2005). *Consent to Arbitration*. *Transnational Dispute Management*, Vol. 5 ([www.transnational-dispute-management.com/article.asp?key=555](http://www.transnational-dispute-management.com/article.asp?key=555), last accessed on 30 March 2018).

<sup>56</sup> PAULSSON, Jan (1995). *Arbitration without Privity*. *ICSID Review*, Vol. 10., No. 2, p. 234; SCHREUER, Christoph (2005). *Consent to Arbitration*. *Transnational Dispute Management*, Vol. 5 ([www.transnational-dispute-management.com/article.asp?key=555](http://www.transnational-dispute-management.com/article.asp?key=555), last accessed on 30 March 2018).

<sup>57</sup> ŠTURMA, Pavel, BALÁŠ, Vladimír (2013). *Mezinárodní ekonomické právo* (Praha: C. H. Beck), pp. 426-427.

<sup>58</sup> See for example Czech Republic-Netherlands BIT (1991) or Israel-Uzbekistan BIT (1994).

<sup>59</sup> See for example United Kingdom-Uzbekistan BIT (1993) or United Kingdom-Venezuela BIT (1995).

<sup>60</sup> See for example Japan-Pakistan BIT (1998).

host state's obligations under an IIA, a mere promise cannot operate as a substitute for host state's binding offer to arbitrate.<sup>61</sup>

To establish jurisdiction of an arbitral tribunal, an investor, furthermore, has to accept the host state's offer as set out in an IIA.<sup>62</sup> While the treaties rarely provide for a specific form of acceptance, it is an established practice that investors may accept an offer by instituting arbitral proceedings.<sup>63</sup> This was confirmed in *Generation Ukraine v. Ukraine* where the respondent argued against the tribunal's jurisdiction because the claimant had not communicated its consent prior to initiating ICSID arbitration. The tribunal, however, did not accept this position, pointing to the absence of such requirement in the Ukraine-United States BIT.<sup>64</sup> The reasoning of the tribunal implies that some IIAs might, on the other hand, expressly provide that investors must give their written consent to arbitration before initiating the proceedings. One of the examples is the Canada-Philippines BIT that reads:

An investor may submit a dispute [...] to arbitration [...] only if:  
(a) the investor has consented in writing thereto [...]<sup>65</sup>

Irrespective of the timing of investor's acceptance, once expressed, it culminates in the parties' arbitration agreement that forms the basis of the overall consent to arbitration and, therefore, the tribunal's jurisdiction to hear the case.<sup>66</sup> In light of the

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<sup>61</sup> SCHREUER, Christoph (2005). *Consent to Arbitration*. Transnational Dispute Management, Vol. 5 ([www.transnational-dispute-management.com/article.asp?key=555](http://www.transnational-dispute-management.com/article.asp?key=555), last accessed on 30 March 2018).

<sup>62</sup> STEINGRUBER, Andrea M. (2012). *Consent in International Arbitration* (Oxford: Oxford University Press), pp. 206-207.

<sup>63</sup> DOUGLAS, Zachary (2012). *The International Law of Investment Claims* (Cambridge: Cambridge University Press), p. 258.

<sup>64</sup> *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, paras. 12.1-12.3.

<sup>65</sup> Canada-Philippines BIT (1995), Art. 13.

<sup>66</sup> ATANASOVA, Dafina, MARTINEZ BENOIT, Adrian, OSTŘANSKÝ, Josef (2014). *The Legal Framework for Counterclaims in Investment Treaty Arbitration*. Journal of International Arbitration, Vol. 31, No. 3, p. 366; HOFFMANN, Anne K. (2013). *Counterclaims in Investment Arbitration*. ICSID Review, Vol. 28, No. 2, p. 447.

principle of *kompetenz/kompetenz*, the tribunal alone determines the validity of parties' consent and the scope of its jurisdiction to settle a dispute under an IIA.<sup>67</sup>

As follows from the explanation above, the consent “*without privity*”<sup>68</sup> is a hallmark in treaty-based arbitrations as its scope is not mutually agreed by the parties, but it is the state who “*sets the rule of the game*”<sup>69</sup> through its offer. The offer does not, however, affect only jurisdiction in general, but also the host states' entitlement to bring counterclaims against investors.<sup>70</sup> In other words, for a counterclaim to fall within the tribunal's jurisdiction, it has to be incorporated in the offer to arbitrate. This principle was confirmed by the tribunal in *Spyridon Roussalis v. Romania* which noted that:

The investor's consent to the BIT's arbitration clause can only exist in relation to counterclaims if such counterclaims come within the consent of the host state as expressed in the BIT.<sup>71</sup>

To allow a host state the bringing of counterclaims before an arbitral tribunal, the offer to arbitrate counterclaims must be equally accepted by investors. In several disputes, investors have, nevertheless, raised a defence that their consent to arbitration was limited to their own claims and did not extend to the host states' right to advance counterclaims.<sup>72</sup> The debate about the modification of host state's offer is far from being settled. Some authors argue that investor's acceptance relates to the offer as an

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<sup>67</sup> KJOS, Hege E. (2013). *Applicable Law in Investor-State Arbitration* (Oxford: Oxford University Press), p. 112; ŠTURMA, Pavel, BALÁŠ, Vladimír (2013). *Mezinárodní ekonomické právo* (Praha: C.H. Beck), p. 417; WAIBEL, Michael (2014). *Investment Arbitration: Jurisdiction and Admissibility*. Legal Studies Research Paper Series, Paper No. 9/2014, University of Cambridge ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2391789](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2391789), last accessed on 30 March 2018), p. 21.

<sup>68</sup> PAULSSON, Jan (1995). *Arbitration without Privity*. ICSID Review, Vol. 10, No. 2, p. 234.

<sup>69</sup> STEINGRUBER, Andrea M. (2013). *Antoine Goetz and others v Republic of Burundi: Consent and Arbitral Tribunal Competence to Hear Counterclaims in Treaty-based ICSID Arbitrations (Case Comment)*. ICSID Review, Vol. 28, No. 2, p. 299.

<sup>70</sup> KJOS, Hege E. (2007). *Counterclaims by Host States in Investment Treaty Arbitration*. Transnational Dispute Management, Vol. 4, No. 4 ([www.transnational-dispute-management.com/article.asp?key=1026](http://www.transnational-dispute-management.com/article.asp?key=1026), last accessed on 30 March 2018).

<sup>71</sup> *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, para. 866 (“*Spyridon Roussalis v. Romania*”).

<sup>72</sup> *Spyridon Roussalis v. Romania*, para. 821; *Oxus Gold v. Uzbekistan*, para. 917; *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Award, 15 December 2014, paras. 481-483 (“*Al Warraq v. Indonesia*”).

indivisible whole.<sup>73</sup> By initiating arbitral proceedings against the host state, the investor accepts the host state's offer as it stands in the IIA.<sup>74</sup> It cannot decide to arbitrate only its own claims by making “*an à la carte selection of provisions*”<sup>75</sup> of the treaty to be applied in the proceedings.

This approach was advocated in *ICS Inspection and Control Services Limited v. Argentina* where the tribunal made the following observation:

At the time of commencing dispute resolution under the treaty, the investor can only accept or decline the offer to arbitrate, but cannot vary its terms. The investor, regardless of the particular circumstances affecting the investor or its belief in the utility or fairness of the conditions attached to the offer of the host State, must nonetheless contemporaneously consent to the application of the terms and conditions of the offer made by the host State, or else no agreement to arbitrate may be formed.<sup>76</sup>

Equally, the tribunal in the recent case *Urbaser v. Argentina* confirmed that the claimant's acceptance had to mirror Argentina's offer to arbitrate, otherwise there had been no arbitration agreement between the parties.<sup>77</sup> As follows, tribunals qualified host state's offers as “take it or leave it” options, excluding the power of investors to alter its scope.

The same conclusion would be reached, were the acceptance of an investor as a private entity analysed through the general contract theory, as suggested by Sourgens

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<sup>73</sup> LALIVE, Pierre, HALONEN, Laura (2011). *On the Availability of Counterclaims in Investment Treaty Arbitration*. Czech Yearbook of International Law, Vol. 2, p. 150; HAMIDA Walid B. (2005). *L'arbitrage Etat-investisseur cherche son équilibre perdu: Dans quelle mesure l'Etat peut introduire des demandes reconventionnelles contre l'investisseur privé?* International Law FORUM du droit international, Vol. 7, No. 4, p. 269.

<sup>74</sup> KJOS, Hege E. (2013). *Applicable Law in Investor-State Arbitration* (Oxford: Oxford University Press), p. 135.

<sup>75</sup> LALIVE, Pierre, HALONEN, Laura (2011). *On the Availability of Counterclaims in Investment Treaty Arbitration*. Czech Yearbook of International Law, Vol. 2, p. 150.

<sup>76</sup> *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, para. 272.

<sup>77</sup> *Urbaser v. Argentina*, para. 1147.

and Nolan.<sup>78</sup> Under these terms, a response of a private party which modifies the original offer by a public party should be understood as a counteroffer. This implies that in the absence of its acceptance by a host state, the arbitration agreement is not reached.<sup>79</sup>

On the other hand, the contrary opinion does not lack support either. According to Shihata and Parra, to establish the jurisdiction of a tribunal, the consent of an investor does not need to be broader than necessary to allow the bringing only of investor's claims.<sup>80</sup> Such approach is, however, highly undesirable as it would turn investment arbitration strictly to a "one-way road" where investors may advance their claims while forcing host states to seek relief in their own courts or another forum, despite the wording of an IIA. In the context of this debate, the middle-ground argument proposed by Professor Schreuer, therefore, appears to be the most plausible. Mindful of the role of investor's acceptance, he notes that the jurisdiction of individual tribunals is restricted to the claims brought by the investors into the proceedings. However, this does not mean that investors have unlimited power to exclude those counterclaims which are closely connected to their original complaints.<sup>81</sup>

In conclusion, the obstacles related to consent to host states' counterclaims are unique in the context of investment treaty arbitrations. In comparison, contract-based tribunals have traditionally found little difficulty in adjudicating counterclaims which derived from a pre-existing contract concluded directly between an investor and a host state.<sup>82</sup> In contractual investment disputes, the consent of both parties is expressed in one instrument that also contains easily identifiable obligations not only for a host state,

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<sup>78</sup> NOLAN, Michael D., SOURGENS, Frédéric G. (2010). *Limits of Consent – Arbitration Without Privity and Beyond*. In: CREMADES, Bernardo M., FERNANDEZ-BALLESTEROS, Miguel A., ARIAS, David, *Liber Amicorum: Bernardo Cremades* (Madrid: La Ley) ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2180302](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180302), last accessed on 30 March 2018), pp. 4-5.

<sup>79</sup> HAMIDA, Walid B. (2005). *L'arbitrage Etat-investisseur cherche son équilibre perdu: Dans quelle mesure l'Etat peut introduire des demandes reconventionnelles contre l'investisseur privé?* International Law FORUM du droit international, Vol. 7, No. 4, p. 269.

<sup>80</sup> SHIHATA, Ibrahim F., PARRA, Antonio (1999). *The Experience of the International Centre for Settlement of Investment Disputes*. ICSID Review – Foreign Investment Law Journal, Vol. 14, p. 320.

<sup>81</sup> SCHREUER, Christopher, MALINTOPPI, Loretta, REINISCH, August, SINCLAIR, Anthony (2009). *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press), p. 756.

<sup>82</sup> KJOS, Hege E. (2013). *Applicable Law in Investor-State Arbitration* (Oxford: Oxford University Press), p. 147.

but also for an investor.<sup>83</sup> Since the same does not hold true for treaty-based arbitration, the consent in such cases requires careful examination.

### 3.2 Arbitration rules

For the purpose of settling disputes between host states and investors, IIAs contain provisions governing the arbitration procedure (*lex arbitri*). The treaties may provide for a specific body of rules in this respect,<sup>84</sup> but most often they refer to standard arbitration rules such as the ICSID Convention, UNCITRAL Arbitration Rules, ICC Arbitration Rules or SCC Arbitration Rules. Insofar as these mechanisms are included in the dispute settlement clause of an IIA, they are supposed to be considered as a part of parties' consent. For these reasons, before turning to the question related to the scope of consent to counterclaims under IIAs, it is crucial to examine how individual arbitration rules approach the issue of counterclaims and, more specifically, the requirements for raising counterclaims as such.

#### 3.2.1 ICSID Convention

In 1965, the IBRD formulated the ICSID Convention with the aim of encouraging the flow of investments and stimulating the growth of developing economies.<sup>85</sup> For this purpose, the Convention established the International Centre for the Settlement of Investment Disputes providing tools for the resolution of disputes between investors and host states, such as arbitration or conciliation.

The rules for filing counterclaims in arbitration procedures under the Centre's jurisdiction are embodied in Article 46 of the ICSID Convention:

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<sup>83</sup> KALICKI, Jean E. (2013). *Counterclaims by States in Investment Arbitration*. International Institute for Sustainable Development, 14 January 2013 (<https://www.iisd.org/itn/2013/01/14/counterclaims-by-states-in-investment-arbitration-2/>, last accessed on 30 March 2018); HOFFMANN, Anne K. (2013). *Counterclaims in Investment Arbitration*. ICSID Review, Vol. 28, No. 2, p. 446.

<sup>84</sup> Specific rules for the settlement of disputes between investors and host states are incorporated, for instance, in Article 17 of the OIC Treaty which regulates in detail the initiation of arbitral proceedings, appointment of arbitrators and character of arbitral awards.

<sup>85</sup> ICSID (1970). *History of the ICSID Convention – Analysis of Documents: Volume I* (<https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20I.pdf>, last accessed on 30 March 2018), p. 2.

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.<sup>86</sup>

This provision sets out three conditions to be complied with in order to file a counterclaim, except otherwise expressed by the parties. First, the counterclaim must fall within the consent of the parties to a dispute. The requirement does not, however, relate to the procedural rules under the Convention, but to the specific arbitration offer in the IIA applicable to the dispute.<sup>87</sup> Executive Board Comment 24 provides further guidance in this regard, noting that the consent may be included in an investment agreement or in a *compromis* regarding an existing dispute, without being “*expressed in a single instrument.*”<sup>88</sup> Second, Article 46 anticipates the factual and legal connection between a counterclaim and the primary claim. This condition was further elaborated in the 1968 Arbitration Rules that required the adjudication of counterclaims in order to “*dispose of all the grounds of dispute arising out of the same subject matter.*”<sup>89</sup> Finally, the counterclaim must fulfil the general requirements of Article 25 of the Convention to fit within the jurisdiction of the Centre, which means that the counterclaim must directly arise out of an investment.<sup>90</sup>

In the context of the Convention, counterclaims play an important role in ensuring equal protection of both investors and host states. This objective was explicitly

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<sup>86</sup> ICSID Convention, Art. 46.

<sup>87</sup> *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award of the Tribunal, 21 July 2017, para. 1058 (“*Teinver v. Argentina*”).

<sup>88</sup> IBRD (1965). *Report of the Executive Directors of the International Bank for the Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (<http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/partB.htm>, last accessed on 30 March 2018), para. 24.

<sup>89</sup> SCHREUER, Christopher, MALINTOPPI, Loretta, REINISCH, August, SINCLAIR, Anthony (2009). *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press), p. 751.

<sup>90</sup> DUDAS, Stefan (2018). *Chapter 14: Treaty Counterclaims under the ICSID Convention*. In: BALTAG, Crina, *ICSID Convention after 50 Years: Unsettled Issues* (Alphen aan den Rijn: Kluwer Law International), p. 390.

stressed by the Executive Board of the World Bank which recognized the importance of maintaining a careful balance between the interests of the parties to a dispute:

[...] the Convention permits the institution of proceedings by host States as well as investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases.<sup>91</sup>

Furthermore, the principle of efficient protection and finality was also endorsed in the 1968 Model Clauses that originally provided only for claims made by investors, however, the instrument was later revised to allow the bringing of claims by host states as well.<sup>92</sup>

### 3.2.2 ICSID Additional Facility Rules

The ICSID Additional Facility Rules were formulated in 1978 to facilitate the settlement of disputes outside the scope of the ICSID Convention through arbitration, conciliation or fact-finding.<sup>93</sup> Article 47 of the Additional Facility Rules permits the filing of counterclaims, provided that they fall within the arbitration agreement of the parties. Unlike the ICSID Convention, the Additional Facility Rules do not require the application of a three-fold test. This is confirmed by the wording of Article 3:

Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein.<sup>94</sup>

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<sup>91</sup> IBRD (1965). *Report of the Executive Directors of the International Bank for the Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (<http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/partB.htm>, last accessed on 30 March 2018), para. 13.

<sup>92</sup> SCHREUER, Christoph, MALINTOPPI, Loretta, REINISCH, August, SINCLAIR, Anthony (2009). *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press), pp. 733-734.

<sup>93</sup> ICSID (2018). *ICSID Additional Facility Rules* (<https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Additional-Facility-Rules.aspx>, last accessed on 30 March 2018).

<sup>94</sup> Additional Facility Rules, Art. 3.

Apart from the condition of consent, the Additional Facility Rules do not pose further restrictions for the filing of counterclaims, leaving it to the consideration of arbitral tribunals whether they fall within their jurisdiction.<sup>95</sup> Such decision may, however, only take place, had the counterclaim been filed in the respondent's countermemorial at the latest, unless the tribunal authorizes otherwise.<sup>96</sup>

### 3.2.3 UNCITRAL Arbitration Rules

The UNCITRAL Arbitration Rules were initially adopted for the settlement of disputes arising in the context of international commercial relations,<sup>97</sup> but have been also extensively used by *ad hoc* investment treaty tribunals. Before turning to the current version of the UNCITRAL Arbitration Rules, the wording of the 1976 edition of the UNCITRAL Arbitration Rules requires a brief analysis.

Article 19(3) of the 1976 UNCITRAL Arbitration Rules requires that counterclaims arise “*out of the same contract*”. While contract-based arbitrations do not pose any difficulty in this respect, the application of the 1976 UNCITRAL Arbitration Rules gains more complexity with regard to disputes concerning treaty violations in the absence of an investment contract. The tribunals have, however, bypassed this procedural obstacle by relying solely on the scope of consent in individual BITs, without discussing the actual language of the Rules.<sup>98</sup>

The narrow wording of Article 19(3) of the 1976 UNCITRAL Arbitration Rules has been widely criticized as “*inappropriate to arbitration arising under international*

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<sup>95</sup> ATANASOVA, Dafina, MARTINEZ BENOIT, Carlos A., OSTRÁNSKÝ, Josef (2012). *Counterclaims in Investor-State Dispute Settlement (ISDS) under International Investment Agreements (IIAs)*. The Graduate Institute of Geneva, Centre for Trade and Economic Integration, Trade and Investment Law Clinic Papers, p. 9.

<sup>96</sup> Additional Facility Rules, Art. 47(2).

<sup>97</sup> United Nations General Assembly Resolution 2205 (XXI): Establishment of the United Nations Commission on International Trade Law, 17 December 1966.

<sup>98</sup> *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, paras. 37-39 (“*Saluka v. Czech Republic*”); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, paras. 688-689 (“*Paushok v. Mongolia*”).

*treaties.*”<sup>99</sup> To bridge the lacuna, the UNCITRAL Working Group on Arbitration and Conciliation proposed to modify the provision “*so as to allow counter-claims that were substantially connected to (or arose out of) the initial claim.*”<sup>100</sup> Eventually, the provision was replaced by Article 21(3) of the 2010 UNCITRAL Arbitration Rules which reads:

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>101</sup>

Compared to the ICSID Convention, Article 21(3) of the 2010 UNCITRAL Arbitration Rules does not explicitly prescribe any requirements for the bringing of counterclaims. Although the tribunals are left with a wide discretion in determining their jurisdiction as well as admissibility of counterclaims in individual cases, they do not depart from previous practice and apply the connection test, inspired by Article 46 of the ICSID Convention, as a generally accepted principle of law.<sup>102</sup>

### **3.2.4 SCC and ICC Arbitration Rules**

The SCC Arbitration Rules and ICC Arbitration Rules lay down only a general framework for the filing of counterclaims. According to the SCC Arbitration Rules, counterclaims shall be outlined in Respondent’s Answer to Claimant’s request for arbitration.<sup>103</sup> The Rules, however, remain silent on any further conditions, including the parties’ consent and connection between a claim and a counterclaim. Despite their

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<sup>99</sup> PAULSSON, Jan, PETROCHILOS, Georgios (2006). *Revision of the UNCITRAL Arbitration Rules* ([https://www.uncitral.org/pdf/english/news/arbrules\\_report.pdf](https://www.uncitral.org/pdf/english/news/arbrules_report.pdf), last accessed on 30 March 2018), para. 174.

<sup>100</sup> UNCITRAL, *Report of the Working Group on Arbitration and Conciliation on the work of its forty-sixth session (New York, 5-9 February 2007)*, 20 March 2007, A/CN.9/619, para. 158.

<sup>101</sup> 2010 UNCITRAL Arbitration Rules, Art. 21(3).

<sup>102</sup> *Saluka v. Czech Republic*, para. 76.

<sup>103</sup> 2017 SCC Arbitration Rules, Art. 9; 2010 SCC Arbitration Rules, Art. 5; 2007 SCC Arbitration Rules, Art. 5; 1999 SCC Arbitration Rules, Art. 10(3).

absence, the tribunal in *Amtco v. Ukraine* explained that its jurisdiction over Ukraine's counterclaim depended on:

the terms of the dispute resolution provisions of the treaty, the nature of the counterclaim, and the relationship of the counterclaims with the claims in the arbitration.<sup>104</sup>

The tribunal, therefore, confirmed uniform application of these requirements, irrespective of the nature of the rules governing the dispute settlement procedure.

Similarly to the SCC Arbitration Rules, the ICC Arbitration Rules refer to counterclaims only in connection with the written submissions of the parties, providing that “[a]ny counterclaims made by the respondent shall be submitted with the Answer.”<sup>105</sup> So far, there has not been any investment arbitration under the ICC Arbitration Rules where counterclaims were brought before a tribunal.<sup>106</sup> Nevertheless, given the similar nature of the rules, the approach adopted by the tribunals which operated under the UNCITRAL Arbitration Rules and the SCC Arbitration Rules could be reasonably followed.

### 3.3 Consent to counterclaims under IIAs

Despite the practice of examining the wording of arbitration rules in the first place, arbitral tribunals standardly derive their jurisdiction from the scope of parties' consent as expressed in the applicable IIA.<sup>107</sup> This reasoning was endorsed, for instance, in *Saluka v. Czech Republic* where the tribunal relied on the broad wording of the

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<sup>104</sup> *Limited Liability Company Amtco v. Ukraine*, SCC Case No. 080/2005, Award, 26 March 2008, para. 118 (“*Amtco v. Ukraine*”).

<sup>105</sup> ICC Arbitration Rules, Art. 5(1).

<sup>106</sup> The issue of counterclaims has been, however, repeatedly addressed in commercial arbitrations under the ICC Arbitration Rules. See for example Award in Case No. 3779 of 13 August 1981, ICCA Yearbook, Vol. IX (1984), 124-130; Award in Case No. 4567 (1985), ICCA Yearbook, Vol. XI (1986), 143-147; Award in Case No. 8486 (1996), ICCA Yearbook, Vol. XXIVa (1999), 162-173.

<sup>107</sup> HOFFMANN, Anne K. (2015). *Counterclaims*. In: KINNEAR, Meg, FISCHER, Geraldine R. et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID* (Alphen aan den Rijn: Kluwer Law International), p. 509.

dispute settlement clause in Article 8 of the Czech Republic-Netherlands BIT, which referred to “*all disputes*”, to conclude:

The Tribunal agrees that, in principle, the jurisdiction conferred upon it by Article 8, particularly when read with Article 19.3, 19.4 and 21.3 of the UNCITRAL Rules, is in principle wide enough to encompass counterclaims.<sup>108</sup>

As the citation shows, the tribunal focused on the wording of the BIT itself, rather than on the requirements under the 1976 UNCITRAL Arbitration Rules. According to its analysis, the Rules were, therefore, of no impact on the determination of the scope of parties’ consent and consequently the tribunal’s jurisdiction over the counterclaims in that case.<sup>109</sup> The same approach was adopted in *Paushok v. Mongolia* where the tribunal invoked a similar dispute settlement provision in Article 6 of the Mongolia-Russian Federation BIT, applying to “[d]isputes between one of the Contracting Parties and an investor of the other Contracting Party”, to find that the parties’ consent was sufficiently broad to encompass Mongolia’s counterclaims.<sup>110</sup>

A minority view to the determination of the scope of consent was taken by Professor W. Michael Reisman in *Roussalis v. Romania* case which was decided under the ICSID Convention. Although the Greece-Romania BIT limited the tribunal’s jurisdiction only to disputes “*concerning an obligation of the [host State]*”, Professor Reisman disagreed with the majority decision that the counterclaims presented by Romania fell out of the parties’ consent under the BIT, advocating the need for procedural economy and cost saving.<sup>111</sup> The same opinion was articulated by the tribunal in *Goetz v. Burundi* which equally expressed its willingness to import the

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<sup>108</sup> *Saluka v. Czech Republic*, para. 39.

<sup>109</sup> Contractual counterclaims were dismissed because the parties to the contract were not identical to the parties to the dispute and due to the exclusive forum selection clause in the contract. Counterclaims arising under Czech banking regulations, commercial law and anti-trust law lacked close connection with primary claims. See *Saluka v. Czech Republic*, paras. 57 and 81.

<sup>110</sup> *Paushok v. Mongolia*, para. 689.

<sup>111</sup> *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Declaration of W. Michael Reisman, 28 November 2011.

consent component in Article 46 of the ICSID Convention into any ICSID arbitration, pointing to the inefficiency of parallel proceedings before different *fora*.<sup>112</sup>

Although the teleological interpretation could be justifiable, it runs contrary to the intention of the drafters of the ICSID Convention. As explained in the *travaux préparatoires*, Article 46 of the ICSID Convention was “*in no way intended to extend the jurisdiction of the arbitral tribunal.*”<sup>113</sup> In other words, the principle of procedural economy cannot substitute for the absence of consent to counterclaims under an IIA.

Unsurprisingly, the same view was defended in non-ICSID arbitrations. In *Oxus v. Uzbekistan* case, adjudicated under the 1976 UNCITRAL Arbitration Rules, the tribunal was established under the United Kingdom-Uzbekistan BIT which applied only to disputes concerning the obligations of Uzbekistan. In the light of such narrow wording, the tribunal stated:

As concerns Article 21(3) of the UNCITRAL Arbitration Rules, the Arbitral Tribunal does not consider that this provision creates a jurisdiction where there is none. All it does is stating that counterclaims are admissible and can be submitted to the extent that they already fall under the scope of jurisdiction of the Arbitral Tribunal.<sup>114</sup>

As a consequence, the lack of consent to counterclaims under an IIA is fatal and cannot be surpassed by a mere reference to arbitration rules. Despite being a part of the general consent, these procedural instruments may not on their own extend the scope of tribunal’s jurisdiction so as to cover counterclaims.

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<sup>112</sup> *Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi*, ICSID Case No. ARB/01/2, Award, 21 June 2012, paras. 279-280 (“*Goetz v. Burundi*”).

<sup>113</sup> ICSID (1968). *History of the ICSID Convention – Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Volume II-1* (<https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf>, last accessed on 30 March 2018), p. 422.

<sup>114</sup> *Oxus Gold v. Uzbekistan*, para. 944 (emphasis omitted).

### 3.4 Jurisdiction *ratione materiae*

The definition of a dispute which can be submitted to arbitration under an IIA has a direct impact on host state's right to bring counterclaims. In the context of investment treaty law, the scope of a dispute may be formulated in broad or narrow terms, determining the jurisdiction *ratione materiae*. In general, there are three types of provisions which are commonly used in IIAs for the purpose of defining the scope of disputes in arbitration.

The first type of dispute settlement clauses refers to “*all*” or “*any*” disputes relating to an investment. This is by far the broadest formulation which has made it possible for tribunals to accept jurisdiction over counterclaims. The first case to discuss this wording was *Saluka v. Czech Republic* where the tribunal was required to interpret Article 8 of the Czech Republic-Netherlands BIT:

(1) All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably.

(2) Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement.

Referring to the phrase “*all disputes*”, the tribunal rejected claimant's reasoning that it had not provided its consent to counterclaims, and proceeded with the analysis of the connexity between Saluka's primary claims and Czech Republic's counterclaims.<sup>115</sup> This approach was later followed in *Paushok v. Mongolia*,<sup>116</sup> *Inmaris Perestroika Sailing Maritime Services v. Ukraine*,<sup>117</sup> *Metal-Tech v. Uzbekistan*,<sup>118</sup> *Al Warraq v.*

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<sup>115</sup> *Saluka v. Czech Republic*, para. 39.

<sup>116</sup> Article 6 of the Mongolia-Russian Federation BIT provides for arbitration of “*disputes [...] arising in connection with realization of investments, including disputes concerning the amount, terms or method of payment of compensation [...]*.” See *Paushok v. Mongolia*, para. 689.

<sup>117</sup> Article 11 of the Germany-Ukraine BIT provides for arbitration of “*disputes concerning investments [...]*.” See *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, 1 March 2012, para. 432.

*Indonesia*<sup>119</sup> and *Urbaser v. Argentina*,<sup>120</sup> all of which were based on dispute settlement clauses with similar wording.

So far, there have been two exceptions to this pattern where tribunals decided to decline their jurisdiction in spite of the “counterclaim-friendly” language of the BITs. First, in the ICSID arbitration *Fraport v. Philippines*, Philippines raised twelve counterclaims related to the inoperability of an international airport tribunal in Manila.<sup>121</sup> Although Article 9 of the Germany-Philippines BIT provided for the settlement of “*all kinds of divergencies [...] concerning an investment*”, the tribunal refused to exercise jurisdiction over Philippines’ counterclaims, noting that Fraport’s claims lacked protection due to investor’s illegal conduct.<sup>122</sup> In this regard, the reasons for the dismissal of Philippines’ counterclaims were not associated with the wording of the BIT, but with the lack of jurisdiction over Fraport’s primary claims. Contrarily, in *Teinver v. Argentina* the tribunal refused to hear Argentina’s counterclaim mainly due to deficiencies in the respondent’s submission which failed to identify any legal right or obligation of Teinver. Pointing to the absence of the legal basis of Argentina’s counterclaim, the tribunal concluded that it fell out of the scope of consent to arbitrate.<sup>123</sup> As follows, the jurisdiction in both cases was rejected under specific circumstances unrelated to the language of the BITs.

The second type of dispute settlement clauses extends the scope of tribunal’s jurisdiction *ratione materiae* to disputes arising out of an investment agreement, investment authorization or a breach of rights under an IIA. For instance, Article 6 of the Estonia-United States BIT reads:

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<sup>118</sup> Article 8 of the Israel-Uzbekistan BIT provides for arbitration of “*any legal dispute [...] concerning an investment [...]*.” See *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 410 (“*Metal-Tech v. Uzbekistan*”).

<sup>119</sup> Article 17 of the OIC Treaty makes reference only to a general term “*disputes*”. See *Al Warraq v. Indonesia*, para. 661.

<sup>120</sup> Article 10 of the Argentina-Spain BIT provides for arbitration of “*disputes [...] in relation to investment within the meaning of this Agreement [...]*.” See *Urbaser v. Argentina*, para. 1147.

<sup>121</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 292 (“*Fraport v. Philippines II*”).

<sup>122</sup> *Fraport v. Philippines II*, para. 468.

<sup>123</sup> *Teinver v. Argentina*, para. 1066.

For the purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising of or relating to:

- (a) an investment agreement between that Party and such national or company;
- (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or
- (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

Although these provisions appeared in five cases, four tribunals did not discuss jurisdictional issues whatsoever and directly proceeded with the examination of merits.<sup>124</sup> In *Goetz v. Burundi*, the tribunal indeed analysed the requirement of consent to arbitrate counterclaims, however, it did so only in light of Article 46 of the ICSID Convention, not under the Belgium-Luxembourg-Burundi BIT.<sup>125</sup> In spite of the fact that no tribunal effectively addressed this clause, it can be reasonably argued that it is favourable to the filing of counterclaims by host states. By making reference to other sources of law, such as investment authorizations and contracts, it enables respondent states to overcome the problem with missing obligations of investors under IIAs.<sup>126</sup> For these reasons, such provisions could form a valid legal basis for the tribunals' jurisdiction over host states' counterclaims.

Turning to the third type of dispute settlement clauses, some IIAs contain narrower formulations, limiting the scope of arbitrable disputes to those arising out of

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<sup>124</sup> *Alex Genin v. Estonia; Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Extracts of Award, 9 February 2004; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*), Decision on Ecuador's Counterclaims, 7 February 2017.

<sup>125</sup> *Goetz v. Burundi*, paras. 278-280.

<sup>126</sup> ATANASOVA, Dafina, MARTINEZ BENOIT, Carlos A., OSTRÁNSKÝ, Josef (2012). *Counterclaims in Investor-State Dispute Settlement (ISDS) under International Investment Agreements (IIAs)*. The Graduate Institute of Geneva, Centre for Trade and Economic Integration, Trade and Investment Law Clinic Papers, p. 2.

non-fulfillment of obligations under an IIA. This wording is reflected, for example, in Article 8 of the United Kingdom-Uzbekistan BIT which provides:

Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification to a claim, be submitted to international arbitration if the national or company concerned so wishes.

Unless an IIA sets out any obligations for investors, such restrictive language of a dispute settlement clause would prevent the tribunal from exercising its jurisdiction over counterclaims.<sup>127</sup> This view was also advocated by the majority of tribunals, dealing with similar wording of IIAs.<sup>128</sup> So far, controversies have arisen only in *Hamester v. Ghana* where the tribunal agreed that Article 12 of the Germany-Ghana BIT permitted the bringing of counterclaims despite the narrow definition of disputes, limited to violations of host state's obligations under the treaty. Noting that the BIT recognized the right of an "aggrieved party" to refer disputes to arbitration, it concluded that it would be entitled to hear counterclaims, provided other conditions were fulfilled.<sup>129</sup> Put differently, the tribunal extended its jurisdiction *ratione materiae* through systematic interpretation of the BIT.

Although the tribunal in *Hamester v. Ghana* eventually declined its jurisdiction over counterclaims,<sup>130</sup> it could have reached a more precise conclusion. For instance, in

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<sup>127</sup> KJOS, Hege E. (2007). *Counterclaims by Host States in Investment Treaty Arbitration*. Transnational Dispute Management, Vol. 4, No. 4 ([www.transnational-dispute-management.com/article.asp?key=1026](http://www.transnational-dispute-management.com/article.asp?key=1026), last accessed on 30 March 2018); KRYVOI, Yaroslau (2011). *Counterclaims in Investor-State Arbitration*. LSE, Law, Society and Economy Working Papers 8/2011 ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1891935](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1891935), last accessed on 30 March 2018), pp. 8-11; LALIVE, Pierre, HALONEN, Laura (2011). *On the Availability of Counterclaims in Investment Treaty Arbitration*. Czech Yearbook of International Law, Vol. 2, pp. 146-149.

<sup>128</sup> *Spyridon Roussalis v. Romania*, para. 869; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 333; *Oxus Gold v. Uzbekistan*, para. 948; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 627 ("*Rusoro Mining v. Venezuela*").

<sup>129</sup> *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, paras. 354-355 ("*Hamester v. Ghana*").

<sup>130</sup> Ghana brought a counterclaim, seeking damages for losses the Ghana Coco Board had allegedly sustained as a result of Hamester's conduct. The tribunal rejected the counterclaim since it did not

*Oxus Gold v. Uzbekistan*, the arbitration was initiated on the basis of the dispute settlement clause in the United Kingdom-Uzbekistan BIT, restricting the parties' consent to disputes related to breaches of host state's obligations. Pointing to the language of the provision, the tribunal dismissed Uzbekistan's counterclaims:

The wording of Article 8(1) of the BIT is for this Arbitral Tribunal a clear indication that the Parties' consent to arbitration under the BIT only cover claims from investors against the host State, but not claims from the host State against the investors [...].<sup>131</sup>

In conclusion, it is easier for host states to assert counterclaims in investment arbitration where the definition of a dispute between an investor and a host state is broad, irrespective of the fact whether the formulation is rather generic or refers to other instruments separate from the IIA.

### 3.5 *Locus standi*

Another factor affecting the scope of consent over counterclaims is the right of parties to the dispute to institute proceedings under an IIA. Since counterclaims are subject to the same jurisdictional requirements as primary claims in investment arbitration, limited *locus standi* would effectively bar the bringing of counterclaims by a host state.<sup>132</sup> To illustrate the importance of standing in investment arbitration, it is vital to examine its impact on the jurisdiction of tribunals in individual cases.

First, the right to submit a dispute to arbitration may be expressly conferred only upon investors as potential claimants. One of the examples is Article 11 of the Germany-Ukraine BIT which reserves standing only to nationals or companies of one of the host states, being a contracting party to the BIT. The narrow wording, however,

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arise out of the joint-venture agreement, upon which Hamester's claims were based, and because the Ghana Cocoa Board was neither a party to the arbitration nor an organ of the state. See *Hamester v. Ghana*, para. 356.

<sup>131</sup> *Oxus Gold v. Uzbekistan*, para. 948.

<sup>132</sup> ATANASOVA, Dafina; MARTINEZ BENOIT, Carlos A.; OSTRÁNSKÝ, Josef (2012). *Counterclaims in Investor-State Dispute Settlement (ISDS) under International Investment Agreements (IIAs)*. The Graduate Institute of Geneva, Centre for Trade and Economic Integration, Trade and Investment Law Clinic Papers, p. 15.

does not by itself restrict host state's own procedural rights. To the contrary, the emphasis on investor's right could be interpreted as an expression of host state's offer to arbitrate.<sup>133</sup> In other words, the one-sided *locus standi* is a mere reflection of the standard practice in investment treaty arbitration where an arbitration agreement culminates upon the acceptance of host state's offer.

This argument was also supported by the tribunal in *Metal-Tech v. Uzbekistan* which examined its jurisdiction in the light of the following dispute settlement provision:

If any such dispute should arise and cannot be resolved, amicably or otherwise, within three (3) months from written notification of the existence of the dispute, then the investor affected may institute conciliation or arbitration proceedings by addressing a request to that effect to the Secretary-General of the Centre, as provided in Article 28 or 36 respectively of the Convention.<sup>134</sup>

Although the Israel-Uzbekistan BIT expressly limits the standing to initiate proceedings only to investors, the tribunal was willing to accept jurisdiction over Uzbekistan's counterclaim due to broad definition of arbitrable disputes.<sup>135</sup> As follows, the limited *locus standi* is not on its own a decisive factor for the dismissal of counterclaims.

The same reasoning does not, nevertheless, apply to situations when one-sided standing is combined with narrow jurisdiction *ratione materiae*. In *Rusoro Mining v. Venezuela*, the tribunal extensively scrutinized the wording of the dispute settlement clause in Article 12 of the Canada-Venezuela BIT which allowed investors to institute arbitration for breaches of host state's obligations under the treaty. Finally, it declined to exercise its jurisdiction over Venezuela's counterclaim concerning Rusoro's obligations under a mine plan, making the following observation:

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<sup>133</sup> KJOS, Hege E. (2007). *Counterclaims by Host States in Investment Treaty Arbitration*. *Transnational Dispute Management*, Vol. 4, No. 4 ([www.transnational-dispute-management.com/article.asp?key=1026](http://www.transnational-dispute-management.com/article.asp?key=1026), last accessed on 30 March 2018).

<sup>134</sup> Israel-Uzbekistan BIT (1994), Art. 8.

<sup>135</sup> Jurisdiction over counterclaims was, eventually, rejected due to the dismissal of *Metal-Tech's* primary claims. See *Metal-Tech v. Uzbekistan*, paras. 410 and 413.

The literal wording of Art. XII does not leave room for doubt: the Treaty affords investors, and only investors, standing to file arbitrations against host States.<sup>136</sup>

As follows, the limited *locus standi* is one of the factors influencing the consideration of tribunals regarding the possibility to assert counterclaims. Nevertheless, in association with broadly worded offers to arbitrate with regards to the subject matter of the dispute, it does not represent an insurmountable obstacle to the tribunal's jurisdiction over counterclaims.

The second type of IIAs, contrarily, either identifies both parties as potential claimants or, in a more neutral manner, provides that any or all disputes may be submitted to international arbitration.<sup>137</sup> In combination with broad jurisdiction *ratione materiae*, such provisions leave little doubt as to whether host states may bring counterclaims before arbitral tribunals. This idea was articulated by the tribunal in *Urbaser v. Argentina*, which operated under the Argentina-Spain BIT. Pointing to the generous wording of the dispute settlement clause, it stated that the BIT entitled both parties to initiate proceedings, therefore, even the bringing of counterclaims could not be *a fortiori* ruled out.<sup>138</sup>

To sum up, host states find themselves in the most favourable position where they are confronted with a broad dispute settlement clause both in terms of *ratione materiae* and *ratione personae*. The limitation in the latter, however, is not fatal to counterclaims since it steps aside to the benefit of broad subject-matter jurisdiction.

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<sup>136</sup> *Rusoro Mining v. Venezuela*, para. 627.

<sup>137</sup> See for example Argentina-Canada BIT (1991), Art. 10; Argentina-Spain BIT (1991), Art. 10.

<sup>138</sup> *Urbaser v. Argentina*, paras. 1143-1144.

## 4 ADMISSIBILITY OF COUNTERCLAIMS

### 4.1 Legal and factual connection

Apart from the condition of consent, the next obstacle that host states have to contend with in relation to counterclaims in investment arbitration is the factual and legal connexity with a principal claim presented by an investor. This requirement is, in principle, applied by all adjudicative bodies before which counterclaims have been raised.<sup>139</sup> The reason is apparent; procedural economy and sound administration of justice cannot be achieved if the courts or tribunals were seised with any unrelated claims, submitted often with the purpose of prolonging the proceedings.<sup>140</sup>

The requirement of connection between a primary claim and a counterclaim is not regulated only by international instruments. Many national jurisdictions fixed this condition in their legal systems.<sup>141</sup> In this respect, the connexity between primary claims and counterclaims became a well-established principle in legal proceedings, including arbitration. In treaty-based investment disputes, the requirement may be incorporated in IIAs<sup>142</sup> or arbitration rules.<sup>143</sup> However, where any reference to the connexity of counterclaims is missing, the tribunals were willing to apply it as a general principle of law.<sup>144</sup>

In most investment arbitrations involving counterclaims, the question of requisite connection between a primary claim and a counterclaim has not been addressed. Counterclaims tend to be either dismissed due to the lack of consent or

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<sup>139</sup> PRASAD, Dharshini (2017). *The 'close connection' test and state counterclaims in investment arbitration – when is 'close' close enough?* Magna Charta, December 2017 ([http://www.wilmerhale.com/uploadedFiles/Shared\\_Content/Editorial/Publications/Documents/2017-12-18-the-close-connection-test-state-counterclaims-in-investment-arbitration.pdf](http://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2017-12-18-the-close-connection-test-state-counterclaims-in-investment-arbitration.pdf), last accessed on 30 March 2018), p. 10.

<sup>140</sup> KJOS, Hege E. (2013). *Applicable Law in Investor-State Arbitration* (Oxford: Oxford University Press), p. 147.

<sup>141</sup> See for example Swedish Code of Judicial Procedure (1942), Chapter 14, Section 3; Civil Procedure Code of the Azerbaijan Republic (1999), Art. 156; Civil Procedure Code of the Russian Federation (2002), Art. 137; Swiss Civil Procedure Code (2008), Art. 14.

<sup>142</sup> See for example Trans Pacific Partnership (2016), Art. 9.19(2).

<sup>143</sup> ICSID Convention, Art. 46.

<sup>144</sup> *Saluka v. Czech Republic*, para. 76. Similar reasoning was adopted also by the Iran/United States Claims Tribunal in *Westinghouse Electric Corp v. Islamic Republic of Iran*, Interlocutory Award No. ITL 67-389-2, 12 February 1987, 14 Iran-US CTR, para. 1.

because their close relation to primary claims of investors was deemed obvious to receive extensive attention. Only in several cases have arbitral tribunals expressly examined the admissibility of counterclaims, making specific observations as to their factual and legal connection to primary claims.<sup>145</sup> In their analysis, these tribunals often sought guidance on the issue of counterclaims in the jurisprudence of the ICJ, the Iran/United States Claims Tribunal or contract-based arbitrations. This section, however, puts forward a question whether such reliance is desirable in the specific context of treaty-based investment arbitration disputes.

#### 4.2 Distinction between jurisdiction and admissibility

Unlike consent, which is a jurisdictional requirement in nature, the connexity issue pertains rather to the admissibility of counterclaims in the proceedings.<sup>146</sup> Although this distinction may appear only theoretical, it has serious consequences for both parties to the dispute. Since both concepts have, in practice, lent themselves to considerable confusion, it is vital to examine their pivotal features.

In general terms, jurisdiction may be defined as “*the power of the tribunal to hear the case.*”<sup>147</sup> As explained, the competence of tribunals is based on the parties’ consent which is, in turn, derived from the applicable IIA. In contradiction, admissibility is related to the power of a tribunal to hear a case at a particular point in time. In other words, admissibility concerns the suitability of a claim for adjudication by

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<sup>145</sup> The connection test has been to some extent applied in the following cases: *Saluka v. Czech Republic*, paras. 61-81; *Hamester v. Ghana*, para. 356; *Paushok v. Mongolia*, paras. 689-697; *Goetz v. Burundi*, paras. 282-285; *Oxus Gold v. Uzbekistan*, paras. 952-957; *Al Warraq v. Indonesia*, paras. 667-670 and *Urbaser v. Argentina*, para. 1151.

<sup>146</sup> The tribunals are divided as to whether the requisite connection between a primary claim and a counterclaim is a jurisdictional issue or a question of admissibility. The former approach was advocated in *Saluka v. Czech Republic*, paras. 79-80 or *Paushok v. Mongolia*, para. 693. On the other hand, recent tribunals characterized the requirement as the issue of admissibility. See *Goetz v. Burundi*, para. 285 or *Urbaser v. Argentina*, para. 1155. The doctrine agrees that the criterion of close connection is conceptually better viewed as the issue of admissibility. See KJOS, Hege E. (2013). *Applicable Law in Investor-State Arbitration* (Oxford: Oxford University Press), p. 147; LALIVE, Pierre, HALONEN, Laura (2011). *On the Availability of Counterclaims in Investment Treaty Arbitration*. Czech Yearbook of International Law, Vol. 2, p. 144; ATANASOVA, Dafina, MARTINEZ BENOIT, Adrian, OSTŘANSKÝ, Josef (2014). *The Legal Framework for Counterclaims in Investment Treaty Arbitration*. Journal of International Arbitration, Vol. 31, No. 3, p. 379.

<sup>147</sup> See *Waste Management v. Mexico*, ICSID Case No. ARB(AF)/98/2, Dissenting Opinion of Keith Highet of 8 May 2000 to Award of 2 June 2000, para. 58.

a tribunal on the merits.<sup>148</sup> The lack of any of these requirements by itself must lead to a dismissal of claims in their entirety, irrespective of the merits of the case.<sup>149</sup> At the same time, there are substantial differences in their impact on further course of the proceedings.

First, the critical date for establishing the tribunal's jurisdiction is the date of the claimant's request for arbitration, therefore, no later events may be taken into account for the purpose of jurisdictional analysis. In the event of the lack of compliance with jurisdictional conditions, tribunals are required to terminate the proceedings at their initial stage. By contrast, the analysis of admissibility of claims is not limited to facts existing at the beginning of the arbitration.<sup>150</sup> Tribunals have greater flexibility with regard to inadmissible claims since they may only suspend the proceedings to allow the parties to meet the admissibility requirements.<sup>151</sup> Furthermore, while admissibility comes into question only after the jurisdiction was firmly established, tribunals have broad latitude as to when they should assess admissibility issues. In this regard, the decision may be addressed together either in the jurisdictional stage or incorporated into an award on merits of the case.

Second, a finding on jurisdiction is final, creating a *res judicata* obstacle. This implies that the decisions of arbitral tribunals concerning jurisdiction can be, in principle, reviewed by supervisory bodies, such as the ICSID annulment committee. On the other hand, a finding on admissibility does not prevent parties from re-litigating their case before an arbitral tribunal at a later stage when the temporary constraints are cured.<sup>152</sup> For instance, inadmissibility of investor's claims due to its failure to comply with the waiting period before filing a request for arbitration is no bar to a new

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<sup>148</sup> DOUGLAS, Zachary (2009). *The International Law of Investment Claims* (Cambridge: Cambridge University Press), p. 148.

<sup>149</sup> WEHLAND, Hanno (2017). *Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules*. In: BALTAG, Crina, *ICSID Convention after 50 Years: Unsettled Issues* (Alphen aan den Rijn: Kluwer Law International), p. 232.

<sup>150</sup> WAIBEL, Michael (2014). *Investment Arbitration: Jurisdiction and Admissibility*. Legal Studies Research Paper Series, Paper No. 9/2014, University of Cambridge ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2391789](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2391789), last accessed on 30 March 2018), p. 69.

<sup>151</sup> *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order, 16 March 2006.

<sup>152</sup> ATANASOVA, Dafina, MARTINEZ BENOIT, Adrian, OSTŘANSKÝ, Josef (2014). *The Legal Framework for Counterclaims in Investment Treaty Arbitration*. *Journal of International Arbitration*, Vol. 31, No. 3, p. 379.

arbitration once such period has expired.<sup>153</sup> As a consequence, decisions regarding admissibility of claims cannot be subject to an annulment review, unless supervisory bodies reclassify an issue as one affecting jurisdiction.<sup>154</sup>

Despite the theoretical differences, arbitral tribunals have shown little interest in the strict delimitation of both concepts, blurring lines in relation to their content. Indeed, objections to jurisdiction and admissibility are frequently addressed together under the section of preliminary objections in the initial stage of proceedings, before the analysis of the merits of the case. The distinction can be, however, clearly determined based on a simple test. Where the respective party files objection in connection with the tribunal, the question is jurisdictional. On the other hand, if the objection refers to the claims that they cannot be heard by the tribunal at all, it should be properly characterized as the issue of admissibility.<sup>155</sup> Such analysis gains even greater importance in relation to counterclaims which are often dismissed due to the missing connexity with primary claims presented by investors.<sup>156</sup> As Jan Paulsson stressed, wrong classification of jurisdiction or admissibility may result in an unreasonable extension of the scope for challenging awards, “*frustrating the parties’ expectation that their dispute be decided by the chosen neutral tribunal.*”<sup>157</sup>

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<sup>153</sup> SCHREUER, Christoph (2004). *Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road*. Journal of World Investment and Trade, Vol. 5, No. 2, p. 239.

<sup>154</sup> WAIBEL, Michael (2014). *Investment Arbitration: Jurisdiction and Admissibility*. Legal Studies Research Paper Series, Paper No. 9/2014, University of Cambridge ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2391789](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2391789), last accessed on 30 March 2018), p. 69.

<sup>155</sup> PAULSSON, Jan (2005). *Jurisdiction and Admissibility*. Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner, ICC Publishing, p. 601.

<sup>156</sup> Host states failed to satisfy the connection test in the following cases: *Saluka v. Czech Republic*, para. 81; *Hamester v. Ghana*, para. 356; *Paushok v. Mongolia*, paras. 694-697; *Oxus Gold v. Uzbekistan*, paras. 955-956.

<sup>157</sup> PAULSSON, Jan (2005). *Jurisdiction and Admissibility*. Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner, ICC Publishing, p. 601.

### 4.3 Connection test in international litigation

#### 4.3.1 Case law of the ICJ

The conditions for bringing counterclaims before the ICJ are enshrined in Article 80 of its Rules which provides that counterclaims can be entertained if they are “*directly connected with the subject-matter of the claim*”.<sup>158</sup> Their admission does not expand the ICJ’s jurisdiction but merely extends the scope of the subject-matter of the dispute.<sup>159</sup> Put differently, the connection with a primary claim is an additional requirement, unrelated to the ICJ’s jurisdiction. The ICJ Rules deliberately lack any definition of direct connection, leaving the ICJ with a wide margin of discretion for its appreciation in individual cases.<sup>160</sup> This approach was confirmed in the *Oil Platforms* case, where the United States submitted counterclaims asserting that its attacks were countermeasures to Iran’s previous illegal conduct.<sup>161</sup> Having established its jurisdiction, the ICJ rejected Iran’s argument that there was no direct connection because US claims were too general.<sup>162</sup> Instead, it declared that the determination of the legal and factual link of counterclaims was in its sole discretion, ultimately finding US counterclaims admissible.<sup>163</sup>

As follows from its jurisprudence, the ICJ has applied a broad approach to identify the factual link. With regard to connection in fact, it does not require that the facts underlying both claims and counterclaims are identical as this would substantially

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<sup>158</sup> The requirement of direct connection reflects older versions of the Rules, especially the PCIJ Rules modified in 1936 which made clear that the counterclaims could be put forward if they were directly connected with the subject of the application and came within the jurisdiction of the Court. See PCIJ, Series D: Acts and Documents Concerning the Organisation of the Court. *Fourth Addendum to No. 2: Elaboration of the Rules of Court of March 11th, 1936*, p. 266.

<sup>159</sup> ATANASOVA, Dafina, MARTINEZ BENOIT, Adrian, OSTŘANSKÝ, Josef (2014). *The Legal Framework for Counterclaims in Investment Treaty Arbitration*. *Journal of International Arbitration*, Vol. 31, No. 3, p. 361.

<sup>160</sup> SALERNO, Francesco (1999). *La Demande Reconventionnelle dans la Procédure de la Cour Internationale de Justice*. *Revue générale de droit international public*, Vol. 103, p. 351.

<sup>161</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v United State of America)*, Judgment, ICJ Reports 2003, para. 29.

<sup>162</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v United State of America)*, Counter-Claim Order, 10 March 1998, para. 16.

<sup>163</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v United State of America)*, Counter-Claim Order, 10 March 1998, paras. 37 and 46.

narrow the right to file counterclaims in the proceedings.<sup>164</sup> By contrast, the ICJ is willing to declare counterclaims admissible provided the facts are of the same nature and arise out of the same factual matrix.<sup>165</sup> As for the former condition, it seeks for events which fall into the same type of conduct or situation, irrespective of the identity of involved actors. In the *Bosnian Genocide* case, Bosnia objected that the facts which formed the basis of Yugoslavia's counterclaim concerned the acts of genocide related to specific perpetrators and victims.<sup>166</sup> The ICJ did not accept Bosnia's argument, pointing to the same type of alleged conduct, namely the violation of the Genocide Convention, and found Yugoslavia's counterclaim admissible.<sup>167</sup> Turning to the requirement of the same factual matrix, the ICJ insisted that the facts giving rise to claims and counterclaims must have taken place in the same temporal and territorial context.<sup>168</sup> Therefore, in the *Cameroon v. Nigeria* case, it found the complex of facts in the incidents along the borders of the two states over an extensive period of time.<sup>169</sup> Equally, in the *Oil Platforms* case, both claims and counterclaims were grounded in the events of the Iran-Iraq war of 1980-1988, more specifically its maritime phase in the Persian Gulf.<sup>170</sup>

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<sup>164</sup> LOPES PEGNA, Olivia (1998). *Counter-claims and Obligations erga omnes before the International Court of Justice*. European Journal of International Law, Vol. 9, p. 735.

<sup>165</sup> ANTONOPOULOS, Constantine (2011). *Counterclaims before the International Court of Justice* (The Hague: T. M. C. Asser Press), p. 132.

<sup>166</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Counter-Claims, Order of 17 December 1997, ICJ Reports 1997, para. 11.

<sup>167</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Counter-Claims, Order of 17 December 1997, ICJ Reports 1997, paras. 35 and 37.

<sup>168</sup> ROSENNE, Shabtai (2000). *Counter-claims in the International Court of Justice Revisited*. In: ARMAS BAREA, Calixto A. et al. (eds.), *Liber Amicorum 'In Memoriam' of Judge José María Ruda* (The Hague: Kluwer Law International), p. 476.

<sup>169</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Order of 30 June 1999, ICJ Reports 1999, p. 985.

<sup>170</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v United State of America)*, Counter-Claim, Order of 10 March 1998, para. 38.

Concerning the condition of connection in law, the jurisprudence of the ICJ makes clear that it is established where the parties pursue the same legal aim.<sup>171</sup> At the same time, the ICJ was cautious about not adopting an overly extensive interpretation, emphasizing that the responsibility for violations giving rise to claims and counterclaims must be grounded in the same legal source of obligations, be it an international treaty or rule of customary law.<sup>172</sup> In light of this reasoning, it rejected the third counterclaim presented by Uganda in the *Congo v. Uganda* case as the allegations of the breach of Congo's obligations arose under the Lusaka Agreement, whereas Congo's original claim sought to establish Uganda's responsibility for violations of the prohibition of the use of force.<sup>173</sup>

To sum up, the direct connection has been evaluated by the ICJ on a strictly case-by-case basis both in facts and in law. While it was quite flexible in the application of the connexity test, it refused to accept a too broad definition of counterclaims, reflecting the warning of Judge Oda in the *Oil Platforms* case that such approach could lead to the following situation:

[W]e put what may have originally been somewhat distinct matters into one melting-pot without making careful examination of the essential character of [the] claim[s].<sup>174</sup>

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<sup>171</sup> ANTONOPOULOS, Constantine (2011). *Counterclaims before the International Court of Justice* (The Hague: T. M. C. Asser Press), p. 133.

<sup>172</sup> A dissenting opinion on this issue was articulated by Judge Higgins who suggested that “*it is not essential that the basis of jurisdiction in the claim and counter-claim be identical. It is sufficient that there is jurisdiction. (Indeed, were it otherwise, counter-claims in, for example, tort could never be brought, as they routinely are, to actions initiated in contract.*” See *Case Concerning Oil Platforms (Islamic Republic of Iran v United State of America)*, Counter-Claim, Order of 10 March 1998, Separate Opinion of Judge Higgins, ICJ Reports 1998, p. 218.

<sup>173</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Order of 29 November 2001, ICJ Reports 2001, para. 42.

<sup>174</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v United State of America)*, Counter-Claim Order, 10 March 1998, Separate Opinion of Judge Oda, ICJ Reports 1998, para. 8.

#### 4.3.2 Case law of the Iran/United States Claims Tribunal

The Iran/United States Claims Tribunal was established under the Algiers Declarations to settle disputes in the context of their mutual relations stemming from the 1979 hostage crisis and subsequent freezing of assets by the United States. According to Article II(1) of the Algiers Accords, the Iran/United States Claims Tribunal was entitled to hear counterclaims which “*arise out of the same contract, transaction or occurrence that constitutes the subject matter of national’s claim.*”<sup>175</sup> In view of the substantial attention paid to the issue of counterclaims, its jurisprudence was often cited in the awards of investment tribunals in treaty-based arbitrations.

In the majority of cases, the analysis of whether a counterclaim arises out of the same contract as the primary claim is rather straightforward and unproblematic. By contrast, a more sophisticated question is whether counterclaims are admissible on separate contracts from those invoked in relation to primary claims. The first decision of such kind was the *American Bell v. Iran* which dealt with three different contracts concluded to cover successive periods of time of continued performance of the same type of work within a single project. While the original claims relied on the second and third contract in question, the counterclaims themselves were presented in light of the first contract concluded for an interim period of three months. In its decision, the Iran/United States Claims Tribunal emphasized the specific circumstances under which all contracts were entered into and opined that all of them formed one single transaction for the purpose of admissibility of the counterclaims.<sup>176</sup>

A similar reasoning was endorsed in the seminal decision in the *Westinghouse Electric Corp. v. Iran* where the primary claims arose out of four contracts concerning the development of an Integrated Electronics Depot for the repair and maintenance of weapon and electronic systems while the counterclaims related to the Depot, yet were formed on the basis of separate contracts. Noting that there was a strong factual connection and the contracts were part of the same transaction, the Iran/United States

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<sup>175</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, Art. II.

<sup>176</sup> *American Bell International, Inc. v. The Islamic Republic of Iran*, Interlocutory Award No. ITL 41-48-3, 11 June 1984, 6 Iran-US CTR, pp. 74 and 83-84.

Claims Tribunal concluded that the counterclaims were admissible to be heard on merits.<sup>177</sup>

In its jurisprudence, the Iran/United States Claims Tribunal, furthermore, made a clear distinction between counterclaims arising out of a contract and those arising from general domestic law. In principle, where any person or entity could have fulfilled the obligations under national law, irrespective of the existence of any specific contractual relationship, the counterclaim was deemed not to arise out of a contract and was consequently inadmissible. Contrarily, where a contract laid down specific obligations which did not exist in the domestic legislation, such rule did not apply.<sup>178</sup>

As follows, the case law of the Iran/United States Claims Tribunal on counterclaims is substantially influenced by the existence of contracts between the parties to the dispute. This relation was reflected also in the wording of the Algiers Accords as such. While there is little doubt that these findings can be proportionately applied in the context of contract-based investment arbitrations, their value in treaty-based disputes should be rather limited. However, the practice of treaty-based tribunals shows otherwise.

#### **4.4 Connection test in investment arbitration**

In the majority of cases brought before treaty-based tribunals, the connexity requirement has played a marginal role, being often omitted from the analysis of counterclaims.<sup>179</sup> Its occasional application in investment arbitration has not been, however, uniform either. As the case law suggests, arbitral tribunals have adopted two distinct approaches. In the first category, they strictly followed the reasoning presented in the disputes decided by the Iran/United States Claims Tribunal and contract-based tribunals, putting equal emphasis on the factual and legal connection between primary claims and counterclaims. Since the tribunals required that counterclaims arose out of

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<sup>177</sup> *Westinghouse Electric Corp. v. The Islamic Republic of Iran*, Interlocutory Award No. ITL 67-389-2, 12 February 1987, 14 Iran-US CTR, paras. 6-7.

<sup>178</sup> CARON, David D., CAPLAN, Lee M., PELLONPAA, Marri (2006). *The UNCITRAL Arbitration Rules: A Commentary* (Oxford: Oxford University Press), p. 415.

<sup>179</sup> ATANASOVA, Dafina, MARTINEZ BENOIT, Adrian, OSTŘANSKÝ, Josef (2014). *The Legal Framework for Counterclaims in Investment Treaty Arbitration*. *Journal of International Arbitration*, Vol. 31, No. 3, p. 381.

the same legal source as investor's primary claims, namely the respective IIA, host states were unsuccessful in these cases.

The first award of this kind was rendered by the UNCITRAL tribunal in *Saluka v. Czech Republic*, a case decided under the Czech Republic-Netherlands BIT. In a partial privatisation, Saluka secured a minority shareholding in a state-owned bank which, due to a series of controversial measures, became insolvent and was put into involuntary administration and later sold.<sup>180</sup> The Czech Republic submitted two types of counterclaims,<sup>181</sup> one of them alleging violations of general domestic law by the investor. The tribunal first held that it could exercise jurisdiction over such counterclaim by virtue of a broad dispute settlement clause, nevertheless, the counterclaim was subsequently dismissed due to the lack of requisite connection.<sup>182</sup>

Pointing to the lack of universal criteria of the test, the tribunal drew heavily from the reasoning of the Iran/United States Claims Tribunal in *Westinghouse Electric Corp* and *American Bell* and the ICSID contract-based tribunal in *Klöckner*.<sup>183</sup> It explained that since the counterclaim reflected non-compliance with the general law of the Czech Republic and not the rights and obligations of the BIT, the legal link with Saluka's primary claim was missing. According to the tribunal, disputes related to breaches of national laws in principle fall to be decided "*through the appropriate procedures of Czech law*"<sup>184</sup> and not through the protection procedure under the BIT. As a consequence, such counterclaims cannot constitute an indivisible whole with investor's primary claims under an IIA.<sup>185</sup>

The decision has been approached with certain degree of criticism, rejecting the high threshold for legal connection set by the tribunal.<sup>186</sup> In general, there are two weak

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<sup>180</sup> *Saluka v. Czech Republic*, paras. 9-10.

<sup>181</sup> The second counterclaim which arose under the share purchase agreement was dismissed because the parties to the agreement were not identical as the parties to the arbitration and the contract contained its own dispute settlement clause. See *Saluka v. Czech Republic*, paras. 49 and 56-58.

<sup>182</sup> *Saluka v. Czech Republic*, paras. 39 and 81.

<sup>183</sup> *Saluka v. Czech Republic*, paras. 65-69.

<sup>184</sup> *Saluka v. Czech Republic*, para. 79.

<sup>185</sup> *Saluka v. Czech Republic*, para. 79.

<sup>186</sup> LALIVE, Pierre, HALONEN, Laura (2011). *On the Availability of Counterclaims in Investment Treaty Arbitration*. Czech Yearbook of International Law, Vol. 2, p. 154.

points which deserve further comments. First, the requirement of legal symmetry does not respect the unique aspects of investment disputes under IIAs which only rarely provide for any obligations of investors upon which counterclaims could be based.<sup>187</sup> In this regard, the insistence on the identity of legal sources and the function of operational unity is highly detrimental as it effectively excludes the admissibility of counterclaims where primary claims are derived from violations of an IIA.<sup>188</sup> Second, the exclusive application of case law on contract-based counterclaims is misplaced due to different wording of arbitration rules. In relation to the Iran/United States Claims Tribunal, the Algiers Accords accepted only counterclaims arising “*out of the same contract, transaction or occurrence that constitutes the subject matter*”<sup>189</sup> of the primary claim. By contrast, the Czech Republic-Netherlands BIT contained a broad dispute settlement clause, referring to “*all disputes [...] concerning an investment*”,<sup>190</sup> without further restrictions as to the legal source. Since a host state may not often have any direct contractual relationship with an investor in a treaty-based arbitration, the limitation of counterclaims to those arising under an IIA creates an insurmountable obstacle.<sup>191</sup>

Despite the deficient reasoning, the case *Saluka v. Czech Republic* was cited with approval in the UNCITRAL dispute *Paushok v. Mongolia*.<sup>192</sup> The claimant, a Russian investor who owned gold mines, initiated arbitration due to Mongolia’s alleged breaches of the Mongolia-Russian Federation BIT by introducing a windfall profit tax and a fee on foreign workers.<sup>193</sup> In response, Mongolia advanced seven counterclaims,

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<sup>187</sup> BOTTINI, Gabriel (2015). *Extending Responsibilities in International Investment Law*. International Centre for Trade and Sustainable Development, E15 Task Force on Investment Policy, September 2015 (<http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Bottini-Final.pdf>, last accessed on 30 March 2018).

<sup>188</sup> ATANASOVA, Dafina, MARTINEZ BENOIT, Adrian, OSTŘANSKÝ, Josef (2014). *The Legal Framework for Counterclaims in Investment Treaty Arbitration*. *Journal of International Arbitration*, Vol. 31, No. 3, p. 383.

<sup>189</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, Art. II.

<sup>190</sup> Czech Republic-Netherlands BIT (1991), Art. 8(1).

<sup>191</sup> DOUGLAS, Zachary (2009). *The International Law of Investment Claims* (Cambridge: Cambridge University Press), p. 261.

<sup>192</sup> *Paushok v. Mongolia*, paras. 688-690.

<sup>193</sup> *Paushok v. Mongolia*, paras. 104 and 109.

some of them on the grounds of general domestic law.<sup>194</sup> The tribunal strictly adhered to the conclusions in *Saluka v. Czech Republic* and declared such counterclaims inadmissible, noting:

All these issues squarely fall within the scope of the exclusive jurisdiction of Mongolian courts and are governed by Mongolian public law, and cannot be considered as constituting an indivisible part of the Claimant's claims based on the BIT and international law or as creating a reasonable nexus between the Claimant's claims and the Counterclaims [...].<sup>195</sup>

An alternative approach was adopted by the second category of tribunals which declared counterclaims of host states admissible for being heard on the merits. In *Goetz v. Burundi*, the investor claimed damages for alleged expropriatory measures against the African Bank of Commerce, in which it held shares, that ultimately led to the paralysis of the banking activities and culminated in the bank's closure in 2000.<sup>196</sup> Burundi submitted counterclaims on the basis that the African Bank of Commerce did not respect the conditions of its operating certificate and that its exercise of the free zone economic licence amounted to unfair competition.<sup>197</sup> After asserting jurisdiction over Burundi's counterclaims, the tribunal made the following observations:

The main dispute relating to ABC concerned the lawfulness of the suspension of the free enterprise zone certificate and the resulting closure of the bank as a result of breaches of its obligations. The counterclaim relates to prejudice said to have been suffered by Burundi because of those same breaches. It therefore relates directly to the subject matter of the dispute, and it follows that it is admissible.<sup>198</sup>

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<sup>194</sup> *Paushok v. Mongolia*, para. 678.

<sup>195</sup> *Paushok v. Mongolia*, para. 694.

<sup>196</sup> *Goetz v. Burundi*, para. 83.

<sup>197</sup> *Goetz v. Burundi*, para. 267.

<sup>198</sup> *Goetz v. Burundi*, para. 285 (own translation).

As follows, in *Goetz v. Burundi* the tribunal departed from the reasoning of previous tribunals, finding as admissible counterclaims based on the violation of domestic law of Burundi while the investor's primary claims arose out of breaches of the BIT.

While the brevity of the decision on counterclaims in *Goetz v. Burundi* did not provide insight into the tribunal's incentives for such departure, a more detailed explanation may be found in the recent award in *Urbaser v. Argentina*. The dispute arose out of the agreement on concession for water and sewerage services concluded between Argentina and a Spanish investor. Argentina advanced a counterclaim alleging that Urbaser failed to realize necessary investment, violating its obligations related to the human right to water.<sup>199</sup> Interestingly, Argentina did not invoke provisions of its domestic law but relied on international human rights treaties, such as the ICESCR, instead.<sup>200</sup> The tribunal first elaborated the factual link of Argentina's counterclaim and concluded that similarly to the principal claims, it concerned the lack of sufficient investment in relation to the same concession.<sup>201</sup> Having established the factual ties, it went on to analyse the legal connection, however, it did so in the light of the object of the primary claims, that is the Urbaser's investment itself and its purpose. The tribunal explicitly noted that:

[t]he legal connection is also established to the extent the Counterclaim is not alleged as a matter based on domestic law only. Respondent argues indeed that Claimants' failure to provide the necessary investments caused a violation of the fundamental right for access to water, which was the very purpose of the investment agreed upon in the Regulatory Framework and the Concession Contract and embodied in the protection scheme of the BIT.<sup>202</sup>

To sum up, the tribunal in *Urbaser v. Argentina* sidelined the requirement of legal symmetry and adopted a broader interpretation of the connexity test, lowering the

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<sup>199</sup> *Urbaser v. Argentina*, para. 1156.

<sup>200</sup> *Urbaser v. Argentina*, paras. 1158-1160.

<sup>201</sup> *Urbaser v. Argentina*, para. 1151.

<sup>202</sup> *Urbaser v. Argentina*, para. 1151.

threshold for the admissibility of counterclaims in investment arbitration. While it still remains to be seen whether future tribunals will be willing to follow this path, the emphasis on the link between a counterclaim and an investment forming the object of the principal claim is advocated by numerous scholars. In their opinion, tribunals with a broad jurisdictional clause should be entitled to hear counterclaims, even where they do not arise out of the same legal source as primary claims.<sup>203</sup> According to Lalive and Halonen, such modification of the connexity test is indispensable in light of the lack of rights and obligations of investors, be they individuals or private entities, under IIAs, or international law in general.<sup>204</sup>

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<sup>203</sup> ATANASOVA, Dafina, MARTINEZ BENOIT, Adrian, OSTŘANSKÝ, Josef (2014). *The Legal Framework for Counterclaims in Investment Treaty Arbitration*. *Journal of International Arbitration*, Vol. 31, No. 3, p. 387; DOUGLAS, Zachary (2009). *The International Law of Investment Claims* (Cambridge: Cambridge University Press), p. 263.

<sup>204</sup> LALIVE, Pierre, HALONEN, Laura (2011). *On the Availability of Counterclaims in Investment Treaty Arbitration*. *Czech Yearbook of International Law*, Vol. 2, p. 154.

## 5 CAUSES OF ACTION

Since IIAs themselves rarely provide for obligations of investors, host states must seek alternative legal basis for their counterclaims in treaty-based investment arbitration. In principle, investors' obligations are most often derived either from contracts or municipal law, however, both sources on their own encounter connectedness problems if the strict test proposed by *Saluka v. Czech Republic* is to be applied.

As a result, it is crucial to identify provisions in IIAs which would either elevate purely contractual claims or claims for violations of domestic law to treaty claims or enable tribunals, at least, to consider these sources of obligations as law applicable to the dispute. While such effects can be easily attributed to some dispute settlement provisions, listing individual sources of obligations under which disputes may arise, the following analysis examines whether substantive provisions in IIAs may also operate in the same manner.

### 5.1 Provisions requiring compliance with domestic laws of the host state

In their introductory provisions, some IIAs may insist that an investment be made in compliance with the host state's legislation.<sup>205</sup> This requirement is most often incorporated directly in the definition of investment protected under the respective IIA. For instance, Article 1 of the Belarus-Yemen BIT provides that an investment means:

every kind of assets invested by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter.

Since such wording restricts the host state's offer to arbitrate so as to pertain only to protected investments under an IIA, investments made in violation of host state's law

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<sup>205</sup> Exceptionally, respondent states tried to persuade tribunals that such clauses require that the investment must comply with the features of an investment under host state's domestic law to benefit from the protection under an IIA. This argument was, nevertheless, accepted only in *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 30 July 2004, para. 56.

will fall outside the jurisdiction of an investment tribunal.<sup>206</sup> This conclusion was applied, for instance, in *Fraport v. Philippines* where the investor sought protection under the Germany-Philippines BIT, however, the tribunal dismissed its claims already at the jurisdictional stage due to the breaches of Philippine domestic law, limiting foreign investors' ability to intervene in the management and operation of a public utility.<sup>207</sup>

The requirement of compliance with domestic laws and regulations is able to trigger the dismissal of investor's claims in their entirety. It is disputable, however, whether it could serve as a cause of action for bringing a counterclaim. Most IIAs require that investors observe domestic law of the host state only at the moment when they make an investment in its territory.<sup>208</sup> This implies that illegal conduct of an investor after the investment was admitted could be only a defense to claimed substantive violations of an IIA, but not a legal basis for the decline of jurisdiction of investor's claims,<sup>209</sup> let alone a cause of action for the filing of counterclaims.<sup>210</sup>

The same might not, however, necessarily apply to situations when these clauses are amended so as to cover not only the admission of investments but also their operation in the territory of a host state. While such provisions are still rare, they were integrated in numerous modern IIAs concluded in recent years. The requirement to

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<sup>206</sup> DOUGLAS, Zachary (2014). *The Plea of Illegality in Investment Treaty Arbitration*. ICSID Review, Vol. 29, No. 1, pp. 155-156; MOLOO, Rahim, KHACHATURIAN, Alex (2011). *The Compliance with the Law Requirement in International Investment Law*. Fordham International Law Journal, Vol. 34, No. 6, pp. 1474-1475. Identical reasoning was advocated, for example, by tribunals in the following cases: *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 86; *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, paras. 155, 252 and 258-264; *Phoenix Action Ltd v Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 101-105; *Quiborax SA and Non-Metallic Minerals SA v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 266; *Ambiente Ufficio SpA and others v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 517.

<sup>207</sup> *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, paras. 396-401 ("*Fraport v. Philippines I*").

<sup>208</sup> MOLOO, Rahim, KHACHATURIAN, Alex (2011). *The Compliance with the Law Requirement in International Investment Law*. Fordham International Law Journal, Vol. 34, No. 6, pp. 1474-1475.

<sup>209</sup> *Fraport v. Philippines I*, para. 345; *Hamester v. Ghana*, para. 125.

<sup>210</sup> This argument was explicitly raised in *Urbaser v. Argentina* where the tribunal agreed with the investor that the purpose of any references to domestic law within the definition of an investment is to determine the scope of application of the Argentina-Spain BIT, not to set obligations for investors to comply with host states' legislation for the period of investment performance. See *Urbaser v. Argentina*, para. 1185.

comply with host state's laws and regulations during the performance of an investment is, nevertheless, not part of its definition but forms a separate provision. A general rule of this kind is present, for example, in Article 13 of the COMESA Investment Agreement of 2007 which obliges investors as well as their investments to “*comply with all applicable domestic measures of the Member State*”. The treaty further provides that the term “measures” refers to “*any legal, administrative, judicial or policy decision that is taken by a Member State*”.<sup>211</sup> Some IIAs further elaborate the requirement, citing specific areas of law as non-exhaustive examples. In this respect, Article 12 of the Ghana Model BIT of 2008 provides:

Nationals and companies of one Contracting Party in the territory of the other Contracting Party shall be bound by the laws and regulations in force in the host State, including its laws and regulations on labour, health and the environment.

In the light of these provisions, some scholars argue that the requirement to observe domestic law throughout the whole life-cycle of investment could increase the chances of host states to submit successful counterclaims in arbitral proceedings.<sup>212</sup> When such an obligation is incorporated into an IIA, host states would be able to satisfy more easily the connexity test for counterclaims arising out of domestic law.

The scholars' opinions were expressly confirmed in the case of *Al Warraq v. Indonesia* which was adjudicated under the OIC Treaty. Although the instrument was concluded already in 1981, the signatory states incorporated provisions rebalancing the asymmetry between the rights and obligations of investors. In this dispute, Mr. Al Warraq presented claims related to his criminal investigation by Indonesian authorities which was initiated in response to the allegations of misuse of bailout funds of an Indonesian bank into which he had invested.<sup>213</sup> Indonesia, however, brought a

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<sup>211</sup> COMESA Investment Agreement (2007), Art. 1(10).

<sup>212</sup> ATANASOVA, Dafina, MARTINEZ BENOIT, Carlos A., OSTRÁNSKÝ, Josef (2012). *Counterclaims in Investor-State Dispute Settlement (ISDS) under International Investment Agreements (IIAs)*. The Graduate Institute of Geneva, Centre for Trade and Economic Integration, Trade and Investment Law Clinic Papers, p. 40; KRYVOI, Yaraslau (2011). *Counterclaims in Investor-State Arbitration*. LSE, Law, Society and Economy Working Papers 8/2011 ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1891935](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1891935), last accessed on 30 March 2018), p. 27.

<sup>213</sup> *Al Warraq v. Indonesia*, paras. 88, 99 and 106.

counterclaim, accusing Mr. Al Warraq of unjust enrichment by misusing the bank's assets that had been entrusted to him.<sup>214</sup>

Based on a broad dispute settlement clause, the tribunal upheld its jurisdiction and proceeded with the analysis of the treaty provisions to establish the source of investors' obligations.<sup>215</sup> It noted that Article 9 of the OIC Treaty required investors to abide by the laws and regulations of the host state, creating positive obligations for investors on the treaty level.<sup>216</sup> For these reasons, the tribunal concluded:

An investor of course has a general obligation to obey the law of the host state, but Article 9 raises this obligation from the plane of domestic law (and jurisdiction of domestic tribunals) to a treaty obligation binding on the investor in an investor state arbitration.<sup>217</sup>

As the ruling in the case of *Al Warraq v. Indonesia* suggests, provisions requiring compliance with host states laws and regulations for the period of investment performance may potentially facilitate the filing of counterclaims, provided that the tribunals find jurisdiction. While such opportunity does not usually exist in the majority of IIAs, some modern IIAs appear to be more favourable to rebalancing the inequalities between host states and investors in international investment law.

## **5.2 Provisions expressly incorporating investors' obligations**

In contrast to narrow IIAs, some recent agreements or model treaties take the road of expanding ISDS by including specific obligations for investors, typically in the area of human rights, environment protection or labour law, as well as the right of host states to present counterclaims. In principle, it is accepted that these provisions directly regulate investors' conduct on treaty level, therefore, it is pertinent to analyse whether they could provide a legal basis for host state's counterclaims in investment arbitration proceedings. There are three types of such provisions in current IIAs.

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<sup>214</sup> *Al Warraq v. Indonesia*, para. 460.

<sup>215</sup> *Al Warraq v. Indonesia*, para. 664.

<sup>216</sup> *Al Warraq v. Indonesia*, para. 663.

<sup>217</sup> *Al Warraq v. Indonesia*, para. 663.

First, the intention to set out rules for investors' behaviour may be reflected in the preamble of an IIA. While the preamble itself, unlike the substantive provisions, does not lay down any obligations, it serves as a context for the interpretation of the respective treaty.<sup>218</sup> Indeed, this interpretative rule is enshrined not only in Article 31 of the VCLT but has been also widely accepted by arbitral tribunals.<sup>219</sup> Its non-binding character, however, prevents the preamble from becoming a proper cause of action for invoking counterclaims.<sup>220</sup>

Second, some IIAs contain more sophisticated provisions which lay down the right of host states to regulate investors' conduct in areas of public interest.<sup>221</sup> The structure of such provisions is two-part. The introductory part acknowledged the fact that the encouragement of investments should not lead to the lowering of legal standards in the territories of host states. In this regard, the introduction is addressed to states and does not pose any limitations to investors as such. The following part of these provisions is an interpretative note to the respective treaty that entitles the parties to adopt or enforce any measures to maintain the legal standards in their territories. This approach is exemplified, for instance, in the United States-Uruguay BIT which draws upon the 2005 United States Model BIT. The treaty was designed to address host states' concerns in the area of environmental protection and labour law. In this regard, Article 12 of the United States-Uruguay BIT sets out:

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<sup>218</sup> DOLZER, Rudolf, SCHREUER, Christoph (2008). *Principles of International Investment Law* (Oxford: Oxford University Press), p. 32; SORNARAJAH, M. (2010). *The International Law on Foreign Investment* (Cambridge: Cambridge University Press), p. 190.

<sup>219</sup> In the context of treaty-based investment arbitration, tribunals relied on preambles to determine the object and purpose of the IIAs in question. See for instance *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 81; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 230; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, para. 116.

<sup>220</sup> ATANASOVA, Dafina, MARTINEZ BENOIT, Carlos A., OSTRÁNSKÝ, Josef (2012). *Counterclaims in Investor-State Dispute Settlement (ISDS) under International Investment Agreements (IIAs)*. The Graduate Institute of Geneva, Centre for Trade and Economic Integration, Trade and Investment Law Clinic Papers, p. 41.

<sup>221</sup> See for instance Israel-Japan BIT (2017), Art. 20; Colombia-United Arab Emirates BIT (2017), Art. 10.

1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

2. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

On plain reading, it is difficult to discern any concrete restrictions of investors' conduct. By contrast, the language seems to be rather a confirmation of host states' right to exercise their regulatory powers over investments in environment related matters. Although no tribunal has expressed an opinion on the effects of similar provisions, it is highly doubtful that they could result in an enforceable obligation on the part of investors.

The prospects of filing successful counterclaims for breaches of obligations arising directly out of IIAs have emerged only in the context of recent model BITs. Unlike their predecessors, these BITs do not only affirm the host states' authority to regulate investors' conduct through their domestic law, but include concrete obligations without making further reference to other legal sources. The 2012 Model BIT of the SADC is an example of this trend. Besides a requirement to comply with domestic law of the host state for the whole period of investment life cycle, Part III of the treaty

contains a number of obligations for investors, including the prohibition of corruption or compliance with environmental, human rights and labour standards.<sup>222</sup>

Equally, the 2015 Model BIT designed by India further contributes to the rebalancing of positions of host states and investors in investment arbitration by incorporating obligations related to transparency and taxation.<sup>223</sup> While these IIAs could undoubtedly serve as causes of action for successful counterclaims, they have not yet been reflected in any BITs in force. For the time being, the IIAs as such are, therefore, deprived of practical utility for the assertion of counterclaims.

### 5.3 Umbrella clauses

Another source of obligations for investors which is frequently invoked by host states as the legal basis for their counterclaims are contracts concluded between an investor and a respondent state. In practice, investment contracts do not need to provide directly for investment arbitration as the dispute settlement mechanism. In such a case, contractual breaches may only benefit from the protection under an IIA where the treaty contains a specific provision elevating contractual breaches to treaty breaches.<sup>224</sup> In principle, these provisions, commonly named umbrella clauses, oblige host states to observe any obligations which they had undertaken with respect to an investment.<sup>225</sup> Without going into a detailed discussion about the diverging views of proper effect of such clauses, these provisions serve as a treaty-based cause of action for investors to seek damages for contractual violations by a respondent state.<sup>226</sup>

Standard umbrella clauses, however, do not have the same effect for the bringing of counterclaims in arbitral proceedings. In *Spyridon Roussalis v. Romania*, Romania argued that its counterclaims fell within the tribunal's jurisdiction as the contractual

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<sup>222</sup> Model BIT of the SADC (2012), Arts. 10-16 and 18.

<sup>223</sup> Model BIT of India (2015), Arts. 9-12.

<sup>224</sup> ŠTURMA, Pavel, BALAŠ, Vladimír (2012). *Ochrana mezinárodních investic v kontextu obecného mezinárodního práva*. Studie z mezinárodního práva č. 3 (Praha: Univerzita Karlova v Praze, Právnická fakulta), p. 28.

<sup>225</sup> DOLZER, Rudolf, SCHREUER, Christoph (2008). *Principles of International Investment Law* (Oxford: Oxford University Press), p. 153.

<sup>226</sup> SUBEDI, Surya P. (2008). *International Investment Law: Reconciling Policy and Principle* (Oxford: Hart Publishing), p. 104.

obligations under a privatization agreement became arbitrable by virtue of the umbrella clause in Article 2(6) of the Greece-Romania BIT.<sup>227</sup> The tribunal did not agree with Romania, pointing to the language of the umbrella clause under which only host states committed themselves to comply with obligations they had entered into.<sup>228</sup>

As follows, host states would be able to advance their contractual counterclaims where the wording of an umbrella clause would not be restricted only to the enforcement of their own obligations. In theory, such provisions are referred to as reverse umbrella clauses since they bind investors to observe their obligations towards the host state.<sup>229</sup> To date, this type of umbrella clauses is not included in any IIA. On the other hand, their presence could arguably make little difference because the jurisdiction of an arbitral tribunal over a contract-based counterclaim might be precluded by an exclusive forum selection clause in the contract itself.

The fact that an investment contract provides for its own dispute settlement mechanism has been interpreted by numerous tribunals as an obstacle for the jurisdiction over or admissibility of contract-based claims submitted by investors. The rationale of this approach is the principle of *pacta sunt servanda* and the respect for the intention of contracting parties.<sup>230</sup> Identical reasoning was expressly adopted also by tribunals dealing with contract-based counterclaims. In *Saluka v. Czech Republic*, the Czech Republic presented a counterclaim on the grounds of a share purchase agreement which contained its own mandatory arbitration provision. Citing the annulment decision in *Vivendi v. Argentina*, the tribunal concluded that the contract constituted a special agreement relating to Saluka's investment and for these reasons, it superseded the tribunal's jurisdiction in the proceedings.<sup>231</sup> Equally, in *Oxus Gold v. Uzbekistan*,

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<sup>227</sup> *Spyridon Roussalis v. Romania*, para. 781.

<sup>228</sup> *Spyridon Roussalis v. Romania*, para. 874.

<sup>229</sup> LABORDE, Gustavo (2010). *The Case for Host State Claims in Investment Arbitration*. Journal of International Dispute Settlement, Vol. 1, No. 1, pp. 111-112; BONNITCHA, Jonathan, SKOVGAARD POULSEN, Lauge N., WAIBEL, Michael (2017). *The Political Economy of the Investment Treaty Regime* (Oxford: Oxford University Press), p. 258.

<sup>230</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 155; *Vivendi Universal S.A. and Compañía de Aguas de Aconquija v. Argentina Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 98.

<sup>231</sup> *Saluka v. Czech Republic*, para. 56-57.

Uzbekistan requested the tribunal to adjudicate on counterclaims based on a special dividend agreement concluded between the Ministry of Finance of Uzbekistan and an Uzbek joint-stock company owned by the claimant. The tribunal found that Uzbekistan's counterclaim was closely connected to claimant's primary claims, however, it refused to exercise jurisdiction with reference to the express choice for dispute settlement by Uzbek courts in the contract.<sup>232</sup>

This reasoning has not been, nevertheless, accepted with unanimity.<sup>233</sup> Lalive and Halonen suggest that the refusal to entertain similar counterclaims in arbitral proceedings contradicts the principle of fairness and procedural economy.<sup>234</sup> As it was confirmed in *SGS v. Pakistan*, litigating related claims in two different *fora* would result in inequalities where investors are allowed to pursue their claims before investment tribunals while referring host states to domestic courts.<sup>235</sup>

In conclusion, although there is no uniform interpretation of the effects of conflicting dispute resolution clauses in investment arbitration, it is arguable that future tribunals might find persuasive the reasoning applied in previous cases addressing contract-based counterclaims.<sup>236</sup> It is, therefore, preferable for the successful bringing of such counterclaims that the underlying contracts do not comprise an exclusive *forum* selection clause.

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<sup>232</sup> *Oxus Gold v. Uzbekistan*, paras. 957-958.

<sup>233</sup> *Agua del Tunari v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, paras. 115-118; *SGS v. Pakistan*, para. 302.

<sup>234</sup> LALIVE, Pierre, HALONEN, Laura (2011). *On the Availability of Counterclaims in Investment Treaty Arbitration*. Czech Yearbook of International Law, Vol. 2, p. 152.

<sup>235</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2, 16 October 2002, para. 302.

<sup>236</sup> Although arbitral awards are binding only on the parties to the particular dispute, tribunals tend to take into account previous decisions, especially where they are confronted with similar legal and factual background. For the discussion on emerging case law in investment arbitration, see ŠTURMA, Pavel, BALAŠ, Vladimír (2013). *Mezinárodní ekonomické právo* (Praha: C.H. Beck), pp. 344-345.

## 5.4 Applicable law provisions

Before the analysis of the merits of each case, tribunals are required to identify the law that will govern the resolution of the dispute at hand.<sup>237</sup> In the light of the principle of party autonomy in investment arbitration, arbitrators' inquiry is primarily focused on the provisions that contain an express choice of law as agreed by the state parties to the respective IIA.<sup>238</sup> The problem arises where the IIA is silent on this issue and the arbitrators are obliged to find an implicit choice of law or otherwise fill the legal vacuum in accordance with the prohibition of *non liquet*.<sup>239</sup>

In treaty-based investment arbitration, express applicable law provisions were examined in two cases to find the legal basis of host state's counterclaims that could serve as a proper cause of action. The decisions of both tribunals are eloquent of the influence that the wording of such clauses might have on the successful assertion of counterclaims in arbitral proceedings. In *Amto v. Ukraine*, the investor advanced claims for breaches of the ECT in connection with the winding up of a state-owned nuclear power plant, accusing the debtor, a state-owned company Energoatom, of collusion with one of the creditors, DonetskOblEnergo. In response to these allegations, Ukraine filed a counterclaim for non-material injury to its reputation.<sup>240</sup> Without discussing the jurisdiction separately, the tribunal dismissed Ukraine's counterclaim, making a reference to the applicable law under the ECT:

Article 26(6) ECT provides that the applicable law to an ECT dispute is the Treaty itself and 'the applicable rules and principles of international law'. The Respondent has not presented any basis in this applicable law

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<sup>237</sup> BANIFATEMI, Yas (2010). *The Law Applicable in Investment Treaty Arbitration*. In: YANNACA-SMALL, K. (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford: Oxford University Press), p. 191.

<sup>238</sup> THOMAS, J. Christopher, DHILLON, Harpreet K. (2014). *Applicable Law under International Investment Treaties*. Singapore Academy of Law Journal, Vol. 26, pp. 976-977.

<sup>239</sup> TAWIL, Guido S. (2003). *Applicable Law*. UNCTAD, Dispute Settlement ([http://unctad.org/en/docs/edmmisc232add5\\_en.pdf](http://unctad.org/en/docs/edmmisc232add5_en.pdf), last accessed on 30 March 2018), p. 17.

<sup>240</sup> *Amto v. Ukraine*, para. 116.

for a claim of nonmaterial injury to reputation based on the allegations made before an Arbitral Tribunal.<sup>241</sup>

In this regard, the award in *Amto v. Ukraine* exemplifies how restrictive language of applicable law provisions may limit the host state's chances to entertain counterclaims in investment arbitration. On the other hand, many IIAs offer wider range of legal sources to be applied to the disputes arising under the respective treaty, without prescribing their strict hierarchy.<sup>242</sup> Apart from the rules in the treaty itself, the tribunals are usually allowed to consider other sources of international law, general principles of law, domestic law of host states and occasionally also the terms of a contract concluded regarding the investment.<sup>243</sup>

A broader applicable law clause was invoked as the legal basis for a counterclaim in the recent dispute of *Urbaser v. Argentina* related to investors' obligations under the concession contract for water and sewerage services in the Province of Greater Buenos Aires. In this case, Argentina presented a counterclaim, alleging that by failing to make the agreed investments, investors breached the principle of good faith and *pacta sunt servanda* under both Argentine and international law and, at the same time, violated international human rights obligation, namely the right to

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<sup>241</sup> *Amto v. Ukraine*, para. 118.

<sup>242</sup> ŠTURMA, Pavel, BALAŠ, Vladimír (2013). *Mezinárodní ekonomické právo* (Praha: C.H. Beck), p. 437.

<sup>243</sup> An example of such frequent wording of applicable law provisions is Article 9 of the Bulgaria-Thailand BIT (2003) which reads:  
“*The arbitral tribunal established under this Article shall reach its decision on the basis of national laws and regulations of the Contracting Party, which is a party to the dispute, the provisions of the present Agreement, as well as applicable rules of international law.*”  
Controversies, nevertheless, arise with regard to the application of rules set out in contracts concluded between an investor and a host state regarding an investment. First, investment contracts may be explicitly cited in the applicable law provisions, as it is demonstrated in Article 7 of the Dominican Republic-France BIT (1999):  
“*The arbitration is rendered on the basis of the present agreement, of the terms of eventual particular agreements concluded regarding the investment, as well as of the rules and principles of international law on the matter.*”  
Alternatively, some authors argue that contractual counterclaims could be easily admitted where domestic law forms part of the applicable law under the IIA. See ATANASOVA, Dafina, MARTINEZ BENOIT, Carlos A., OSTŘANSKÝ, Josef (2012). *Counterclaims in Investor-State Dispute Settlement (ISDS) under International Investment Agreements (IIAs)*. The Graduate Institute of Geneva, Centre for Trade and Economic Integration, Trade and Investment Law Clinic Papers, p. 48.

water and sanitation.<sup>244</sup> The tribunal rejected claimants' argument that the Argentina-Spain BIT had to be examined as a stand-alone agreement, pointing to Article X(5) of the BIT which lists general principles of international law as well as other treaties concluded by Argentina and Spain as the law applicable to the dispute.<sup>245</sup> In light of the interpretation rules enshrined in the VCLT, the tribunal emphasized that every treaty provision had to be construed "*in respect of its purpose as a rule with an effective meaning*" and concluded that international law, cited in Article X(5) of the BIT, as such could form a valid legal basis of Argentina's counterclaim.<sup>246</sup>

As follows, explicit choice of law in IIAs may increase host state's chance to assert successful counterclaims in arbitral proceedings, particularly when it refers to a number of legal sources, such as international law, national law of host states or general legal principles. By contrast, restrictive language of these clauses may be fatal to the bringing of counterclaims other than those based on the IIA itself or international law.

In conclusion, the remaining question concerns the legal basis of counterclaims in the absence of an express provision on applicable law. In the context of investment treaty arbitration, the selected arbitration rules provide further guidance on this issue, albeit rather general. Although the respective rules are drafted in a very different manner, they all leave the tribunals with a wide discretion on the choice of law to the merits of the disputes.<sup>247</sup> In other words, the tribunals would be allowed to apply both international law as well as domestic law of host states.<sup>248</sup> Therefore, the missing choice of law in an IIA might not have a restrictive effect on the legal basis of counterclaims upon which they can be raised.<sup>249</sup>

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<sup>244</sup> *Urbaser v. Argentina*, paras. 1156 and 1158-1160.

<sup>245</sup> *Urbaser v. Argentina*, para. 1188.

<sup>246</sup> *Urbaser v. Argentina*, paras. 1190 and 1192.

<sup>247</sup> ICSID Convention, Art. 42; Additional Facility Rules, Art. 54; 2010 UNCITRAL Arbitration Rules, Art. 35; ICC Arbitration Rules, Art. 21; 2017 SCC Arbitration Rules, Art. 27.

<sup>248</sup> BANIFATEMI, Yas (2010). *The Law Applicable in Investment Treaty Arbitration*. In: YANNACA-SMALL, K. (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford: Oxford University Press), p. 205.

<sup>249</sup> ATANASOVA, Dafina, MARTINEZ BENOIT, Carlos A., OSTRANSKÝ, Josef (2012). *Counterclaims in Investor-State Dispute Settlement (ISDS) under International Investment Agreements (IIAs)*. The Graduate Institute of Geneva, Centre for Trade and Economic Integration, Trade and Investment Law Clinic Papers, p. 50.

## CONCLUSION

While counterclaims may, to certain degree, redress the illegal conduct of investors in the territory of host states, including the violations of human rights, the current legal regime poses many obstacles to their successful assertion in the arbitral proceedings. The majority of IIAs which are presently in force do not provide for obligations of investors for the period of investment performance directly on treaty level or the bringing of counterclaims as such. In this regard, host states are in the position of perpetual respondents who must find alternative ways of enforcing the compliance with their laws and regulations or binding rules of international law by investors.

These imbalances are being increasingly addressed in the modern IIAs that could enable host states to adopt an offensive tactics in the proceedings and preserve their public interests in a more efficient manner. Renegotiation of international treaties, is however, a complicated process which is highly dependent on the political will of individual states. For these reasons, the aim of this paper was to analyse the wording of existing IIAs and the practice of investment tribunals to infer whether host states are able to advance successful counterclaims under the current state of international investment law.

Unlike in contract-based arbitration, host states face numerous obstacles both on procedural and substantive grounds when they bring counterclaims before tribunals established under IIAs. In this context, tribunals are only able to hear counterclaims if the issues of jurisdiction, admissibility and cause of action are successfully resolved. In Chapter 1, this paper poses three research questions to deal with each of these issues separately. Based on the analysis of available arbitral awards which provide reasoning on the filing of counterclaims by host states in investment arbitration, the following conclusions can be formulated.

*Research question 1: What is the required wording of dispute settlement clauses in IIAs permitting arbitral tribunals to establish their jurisdiction over counterclaims?*

In treaty-based arbitration, the consent is the cornerstone for the course of the whole proceedings. Unlike in arbitrations initiated on the grounds of an investment contract concluded between an investor and a host state, the consent to arbitrate a dispute under an IIA is perfected in two steps. First, host states make their offer to arbitrate in an international treaty, delimiting the scope of disputes to be resolved by

investment tribunals. Second, this offer must be accepted by individual investors, usually by filing a request to arbitrate a specific dispute which arose in relation to alleged breaches of such treaty.

Before the tribunals may turn to the examination of the merits of counterclaims, they must first establish that the counterclaims fall within the scope of consent expressed in the IIA. According to the case law, tribunals primarily determined their jurisdiction over counterclaims in the light of the scope of arbitrable disputes, irrespective of the limitations on the *locus standi* under the IIAs. With regard to jurisdiction *ratione materiae*, tribunals dismissed counterclaims where the dispute settlement provisions were restricted to disputes arising only out of violations of host states' obligations. By contrast, jurisdiction was unanimously accepted in cases where the IIAs in question provided for the settlement of "all" or "any" disputes, despite the narrow wording concerning the right to submit disputes for resolution. Finally, the doctrine suggests that counterclaims would fall within the tribunals' jurisdiction where the consent to arbitrate covers disputes under listed legal sources. Although no tribunal has yet interpreted such clauses, this conclusion is acceptable due to their broad formulation which would have also a significant impact on the causes of action to be invoked by host states as a legal basis for their counterclaims.

*Research question 2: How should arbitral tribunals interpret the requirement of legal and factual connection between a primary claim and a counterclaim?*

Unlike the issue of jurisdiction which is to be strictly governed by the language of individual IIAs, the question of admissibility of counterclaims is left to the interpretation of arbitral tribunals. The condition of close factual and legal connection is applied in various forms both by national and international courts or tribunals. With respect to investment arbitration, the first tribunals seised with host states' counterclaims drew inspiration from the case law of the ICJ and the Iran/United States Claims Tribunal which required that presented counterclaims arise out of the same factual matrix and the same legal source, be it an international treaty, customary international law or a contract.

In the context of treaty-based investment arbitration, the application of this strict test for the legal link between a primary claim and a counterclaim, however, resulted in the dismissal of the latter due to the differences in their legal basis. The lack of legal

symmetry is yet inherent to disputes arising under an IIA which rarely contains any obligations for investors, making the host states obliged to seek alternative sources of obligations, such as national law, general legal principles or contracts.

In view of the specific features of treaty-based arbitration, some tribunals applied a modified test examining the link between a counterclaim and an investment forming the object of the principal claim. This is both a factual and a legal inquiry because the term “investment” is a legal concept defined in every IIA. Indeed, the focus on the investment rather than on the identity of legal sources better reflects the nature of treaty-based arbitration where investors and host states do not have to be in any direct legal relationship with each other.

*Research question 3: Which provisions in IIAs could enable host states to invoke substantive obligations of investors under various legal sources?*

The issue of causes of action forming the legal basis of counterclaims is heavily dependent on the form of the connexity test applied by the arbitral tribunal. Should a tribunal follow the requirement of legal symmetry, a counterclaim will be successful only if the host state can rely on the same legal basis out of which investor’s claims arise. In other words, where an investor seeks damages for the breaches of an IIA, a host state could successfully advance only counterclaims with the same legal basis. As follows from the analysis, such counterclaims could rely on numerous provisions: clauses requiring the compliance with domestic laws and regulations for the period of investment performance, reverse umbrella clauses or provisions directly incorporating investors’ obligations on treaty level. These provisions are, nevertheless, present mostly in modern IIAs and constitute, therefore, rather exceptions in the context of current international investment law.

On the contrary, such restrictions would not apply if a tribunal adopts a modified connexity test requiring a link between a counterclaim and an investment as defined under an IIA. Under these circumstances, host states would not have to rely only on the respective IIA but could also invoke other sources of obligations, such as contracts, domestic law or other international treaties, provided that these sources were connected to the disputed investment and formed applicable law in the dispute. Put differently, in such cases the successful assertion of counterclaims would be subject only to the scope of applicable law provisions.

As for future research, this paper has not addressed all issues related to the bringing of counterclaims for violations of human rights by investors. In the light of the recent award in *Urbaser v. Argentina*, many questions emerge with regard to the type of human rights obligations which can be attributed to investors as private entities in the context of public international law or the damages to be awarded for their breaches as well as their distribution to the victims. Since none of these questions has been extensively examined by arbitral tribunals, the value of such research will depend on the future development of case law on counterclaims.

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## ABSTRAKT

Mezinárodní investiční arbitráž je dlouhodobě kritizována za svou strukturální předpojatost vůči hostitelským státům ve prospěch ochrany zájmů investorů. Jednostranná povaha tohoto způsobu řešení sporů byla v nedávné době nicméně zpochybněna řadou případů, v nichž se rozhodci zabývali protinároky hostitelských států na odškodnění za nezákonné chování investorů.

Za účelem úspěšného uplatnění svých protinároků v rozhodčím řízení se však musí hostitelské státy vypořádat s četnými překážkami. Předložení sporu rozhodčímu tribunálu je v první řadě závislé na souhlasu jak ze strany investora, tak ze strany hostitelského státu. Rozsah tohoto souhlasu je přitom dán zněním rozhodčích doložek v dvoustranných dohodách o ochraně investic či mnohostranných smlouvách. Zatímco tyto instrumenty všeobecně umožňují investorům vznést širokou škálu nároků týkajících se jejich investic, protinároky hostitelských států spadají do pravomoci rozhodčích tribunálů pouze v případě, že příslušné dvoustranné dohody či mnohostranné smlouvy obsahují zároveň široce formulovanou rozhodčí doložku.

Druhou podmínkou, která se již týká přípustnosti samotných protinároků hostitelských států, je jejich úzká souvislost s nároky vznesenými investory. Tento požadavek je v různé formě prosazován nejen národními, ale také mezinárodními soudy a tribunály za účelem zajištění efektivity a hospodárnosti řízení. Ačkoliv se některé rozhodčí tribunály výrazně inspirovaly judikaturou související se spory vznikajícími na základě investičních dohod, tento přístup neodráží specifický charakter investiční arbitráže založené na dvoustranných dohodách o ochraně investic či mnohostranných smlouvách, kdy mezi investory a hostitelskými státy nemusí existovat žádný přímý smluvní vztah. Z těchto důvodů by měly rozhodčí tribunály ke zjištění faktické a právní souvislosti mezi protinároky hostitelských států a nároky investorů používat modifikovaný test.

Vzhledem k tomu, že dvoustranné dohody o ochraně investic či mnohostranné smlouvy jen zřídka obsahují povinnosti přímo pro investory, hostitelské státy musí často odkazovat na jiné prameny, jako je národní právo nebo investiční dohody uzavřené mezi investorem a hostitelským státem. Rozhodčí tribunály ve své analýze přitom podobné protinároky často zamítaly, protože tyto alternativní zdroje povinností pro investory nemohly aplikovat. Zatímco v případě široce formulovaných rozhodčích doložek nejsou pochybnosti, že mohou rozhodčím tribunálům tuto pravomoc

poskytnout, nedávná rozhodnutí rozhodčích tribunálů ukazují, že podobné účinky mohou mít i některá hmotněprávní ustanovení dvoustranných dohod o ochraně investic či mnohostranných smluv.

## **KLÍČOVÁ SLOVA**

protinárok, investiční arbitráž, dvoustranné dohody o ochraně investic

## **ABSTRACT**

International investment arbitration has been long criticized for its structural bias against host states in favour of the defence of the interests of investors. The one-way character of this dispute settlement mechanism has been, however, recently challenged in the light of numerous cases in which arbitrators were confronted with counterclaims of host states, requesting damages for investors' illegal conduct.

To successfully assert counterclaims in arbitral proceedings, host states have to deal with a series of difficulties. The submission of a dispute to an arbitral tribunal first requires consent both on the part of an investor and a host state. Its scope is determined by the language of dispute settlement provisions in international investment agreements. While these instruments generally accept a wide range of investors' claims related to their investments, counterclaims of host states fall within the jurisdiction of tribunals only if the international investment agreements contain a dispute settlement clause with broad wording.

The second condition which concerns the admissibility of host states' counterclaims is their close connection with the primary claims advanced by investors. This requirement has been in various forms applied not only by national but also international courts or tribunals to ensure efficiency and procedural economy at the same time. While some investment tribunals heavily drew upon the case law related to contract-based disputes, this approach does not reflect the specific nature of treaty-based investment arbitration where investors and host states do not have to enter into any direct contractual relationship. For these reasons, the tribunals should adopt a modified test to find the requisite factual and legal connection between host states' counterclaims and investors' primary claims.

Finally, since international investment agreements themselves rarely provide for obligations of investors, host states must often refer to other sources, such as their domestic law or contracts concluded between an investor and a host state. In their analyses, arbitral tribunals frequently dismissed counterclaims due to their inability to apply these alternative sources of obligations for investors. While there are little doubts that broad dispute settlement provisions may provide tribunals with such competence, recent case law of investment tribunals has pointed out that some substantive provisions in international investment agreements may have the same effect.

## **KEYWORDS**

counterclaim, investment arbitration, bilateral investment treaties