

COUNTERCLAIMS IN INVESTOR-STATE DISPUTE
SETTLEMENT (ISDS) UNDER INTERNATIONAL
INVESTMENT AGREEMENTS (IIAs)

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Executive Summary

The present report deals with the issue of counterclaims in Investor-State Dispute Settlement (ISDS) under international investment agreements (IIAs). The contemporary regime of international investment dispute settlement is often considered as a 'one-way street', enabling foreign investors to file claims against host States, while these do not seem to enjoy this right to the same extent.

The main task of this project is to apprehend the current state of law and identify the basic criteria that counterclaims lodged by host States have to fulfil in order to be entertained by investment tribunals. Adjustments to the current regime that improve the possibility for host States to make successful counterclaims are drawn from this analysis.

The report is structured in four parts. Firstly, an introduction of the concept of counterclaims in international adjudication is made. In this part, the legal provisions that regulate counterclaims in the most relevant legal texts to investment arbitration are briefly overviewed. These include the International Court of Justice, the Iran-United States Claims Tribunal and the International Centre for Settlement of Investment Disputes among others.

Two fundamental conditions for the admissibility of counterclaims in investment treaty arbitration are analysed in the second part: the requirement of consent to counterclaims and the connectedness of the counterclaim with the primary claim. The core of this part consists of the analysis of the major types of dispute settlement provisions in IIAs, the case law of investment tribunals and the relevant doctrine. For comparative purposes, treatment of counterclaims in other international fora is also examined.

*With regards to **the requirement of consent**, the conclusion that the language of the offer to arbitrate in an IIA is highly determinative for the scope of possible host State's counterclaims is reached. Counterclaims are generally permitted if the IIA provides for settlement of 'any dispute concerning the investment.' When the IIA's arbitration offer is limited to disputes 'concerning the obligations of the host State under the IIA', to the contrary, it is hardly conceivable that a host State counterclaim will be allowed. The Possible impact of provisions dealing with the parties' locus standi and express references to counterclaims in IIAs is addressed subsequently. Options for the limitation or extension of the scope of the consent, as expressed in the offer to arbitrate in the IIA by the investor are also examined.*

*As far as **the connectedness criterion** is concerned, the case law does not offer a uniform view on the requirement. With the help of jurisprudence of other international bodies and the commentaries on the issue, various interpretations of the connectedness criterion for investment treaty arbitration are offered. The case law shows that counterclaims arising from general domestic law of the host State are not considered to have the necessary degree of connectedness to be admitted. Nevertheless, doctrinal opinions articulate a more lenient test of connectedness, which would allow host States to have such counterclaims entertained. This test,*

requiring for counterclaims to be linked to the investment considered in the original claim, seems more adapted to the investment-treaty arbitration context.

The third part focuses on the analysis of other limitations of the host states' possibility for filing counterclaims. *To this end, the relevant causes of action based on IIAs as well as other sources, i.e. investment contracts and host State's domestic law, are considered. The general conclusion is that under the current state of law it is virtually impossible for a host State to assert counterclaims which rely on the IIA or general international law as a cause of action, as the investor does not assume any obligations stemming from international law. The possible exceptions exist under the general principles of law such as good faith, as well as under the procedural provisions of IIAs. Conclusion with respect to the contractual causes of action and those based on the host State's domestic law are dependent on various aspects of the dispute and the applicable legal rules and remains fairly limited in practice. The issue of party identity on the part of investor and limitations on the counterclaims arising thereof is considered. In this regard, the major concern is a virtual impossibility of the host State to file a counterclaim against a local subsidiary that is neither party to the arbitration agreement nor a party to the proceedings, but might a party to the contracts concluded with the host State. Finally, contract-based counterclaims are subject to the additional challenge of conflicting for a, when the contract invoked contains its own exclusive dispute resolution mechanism.*

The forth and final part of the report presents potential adjustments and suggestions for future treaty drafting which would help to allow host states' to assert counterclaims. *These suggestions concern provisions dealing with jurisdiction of arbitral tribunal, express reference to a possibility of lodging counterclaims, the substantive treaty obligations for investors as well as the applicable law. Specific amendments also address the issues of party identity and umbrella clauses.*

Table of Contents

I. INTRODUCTION	1
A. General Introduction to Counterclaims in International Law	1
B. General Introduction to Counterclaims in Investment Treaty Arbitration	3
C. Legal Basis for Counterclaims.....	4
1. International Court of Justice.....	5
2. Iran – United States Claims Tribunal.....	6
3. ICSID	7
4. ICSID Additional Facility Rules.....	9
5. UNCITRAL Arbitration Rules	9
II. FUNDAMENTAL REQUIREMENTS FOR ADMISSION OF COUNTERCLAIMS IN INVESTMENT TREATY ARBITRATION	11
A. The Requirement of Consent to Counterclaims.....	12
1. The necessity of consent to counterclaims.....	12
2. The offer to arbitrate in IIAs.....	13
3. Possibility of modification or limitation of the scope of consent by the investor.....	21
B. The Connectedness Requirement between the Primary Claim and the Counterclaim	25
1. The connectedness requirement in other <i>fora</i>	25
2. The connectedness requirement in investment arbitration.....	29
3. Conclusion	37
III. ADDITIONAL LIMITATIONS REGARDING THE ASSERTION OF PARTICULAR CAUSES OF ACTION FOR HOST STATE'S COUNTERCLAIMS	38
A. Limited Causes of Action based on International Law Sources.....	39
1. Possible causes of action based on the investment treaty	39
2. Counterclaims based on international law, the utility of general principles of law	44
B. Additional Requirements for the Assertion of Counterclaims Arising out of National Law Sources.....	46
1. The effect of the applicable law provisions in IIAs to the dispute for the assertion of counterclaims.....	46
2. The ‘party identity’ requirement in investment arbitration context.....	50
3. Contract-based counterclaims in the perspective of conflicting <i>fora</i>	53

IV. LIMITS OF THE CURRENT SYSTEM AND SUGGESTIONS TO AMELIORATE THE CHANCES OF ASSERTING COUNTERCLAIMS.....	54
A. Jurisdiction– including counterclaims in the jurisdiction of the tribunal	56
1. First option: Broad definition of dispute and ample <i>locus standi</i>	56
2. Second option: Express inclusion of counterclaims	57
B. Jurisdiction– attribution of obligations to the investor party to the dispute	58
C. Substantive obligations of investors/investments in IIAs	58
1. Compliance with host State local laws	58
2. Respect of contract obligations (to be included when an umbrella clause is present in the relevant IIA)	59
D. Applicable law provisions in the IIA	59
BIBLIOGRAPHY	VI
ANNEXES	XII

COUNTERCLAIMS IN INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) UNDER INTERNATIONAL INVESTMENT AGREEMENTS (IIAS)

The analysis of the possibility and modalities for the assertion of counterclaims in investment treaty arbitration presents two main questions. On the one hand, what are the relevant requirements for the admission of such counterclaims from a procedural point of view? On the other, on what legal bases counterclaims thus admitted can be grounded and under what additional conditions?

The present report moves in four parts addressing those questions. First, a general presentation of counterclaims in international law and investment arbitration will be presented with a reference to the particular texts with are the grounds for the invocation of counterclaims in the systems examined (I.). In the second part the fundamental common requirements for the admission of counterclaims in investment treaty arbitration will be analysed (II.). Thereafter, the possible causes of action available to respondent States will be presented, taking into account the additional limitations thereto (III.). Finally the limitations to the current state of the law will be pointed out, with some humble suggestions as to manners in which to facilitate the presentation of counterclaims on the part of States in investment treaty arbitration (IV.).

I. INTRODUCTION

A. GENERAL INTRODUCTION TO COUNTERCLAIMS IN INTERNATIONAL LAW

A counterclaim is a claim presented by a defendant in opposition to the one advanced by the claimant. While advancing a counterclaim, the respondent is not exercising its right to defence, but exercises ‘...his right to bring an action’².

Counterclaims are generally admitted in all domestic legal systems. A certain degree of connectedness with the original claim is required in both civil and common-law legal systems. For example, in French civil procedural law, the counterclaim must be ‘attached to the original claim by a sufficient bond’.³ In the United States, it must arise ‘out of the transaction or occurrence that is the subject matter of the opposing party's claim’.⁴

Pendency of the original claim is a mandatory requirement. There must not be a judgment over the original claim. Still, in domestic legal systems, once the

² *International Encyclopedia of Comparative Law*, vol. XVI, Chapter 4, 62.

³ *Código de Procedure Civile* 1975, Article 70.

⁴ *Federal Rules of Civil Procedure*, Rule 13.

counterclaim is filed, ‘...the cross action [counterclaim] is independent of the later fate of plaintiff’s original action’.⁵

As a concept transposed from municipal law,⁶ the right to advance a counterclaim before an international court or tribunal ‘constitutes an acknowledgment of and response to the complex and multi-faceted nature of international disputes and the need to address it in a comprehensive and effective fashion.’⁷ Furthermore, counterclaims have been described as the ‘possibilities open to a party, which is from a procedural point of view in the position of defendant, to bring in the same proceedings a claim against the party in the position of plaintiff’.⁸ The rationale behind counterclaims is the principle of sound administration of justice and procedural economy. The purpose is to deal with all connected claims in single proceedings, avoiding unnecessary delays and costs related to double or multiple fact-finding, written submissions, oral proceedings, etc.⁹

The possibility to interpose such action has been available since the earliest accounts of inter-State arbitration. One of the earliest records of counterclaims in this respect is the *Behring Sea Seal Fishing* arbitration. The two disputing parties, the United States of America and the United Kingdom, established the arbitral tribunal by a Treaty of Arbitration in 1892. The United Kingdom brought a counterclaim against the United States claim of jurisdictional rights relying on Article VIII of the Treaty:

The High Contracting Parties having found themselves unable to agree upon a reference which shall include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it and being solicitous that this subordinate question should not interrupt or delay the submission and determination of the main question, do agree that they may submit to the Arbitrators any question of fact involved in said claims and ask for a finding (sic) thereon, the question of the liability of either Government upon the facts found to be the subject of further negotiation.¹⁰

⁵ *International Encyclopedia* (n 1) 64-65.

⁶ Judge A Cançado Trindade has referred to counterclaims as a ‘juridical institute historically transposed from domestic procedural law into international procedural law.’ *Jurisdictional Immunities of the State (Germany v Italy)*, Counter-Claim, Order of 6 July 2010, Dissenting Opinion Of Judge A A Cançado Trindade, para 4 <<http://www.icj-cij.org/docket/files/143/16031.pdf>> accessed 5 April 2012.

⁷ C Antonopoulos, *Counterclaims before the International Court of Justice* (T.M.C. Asser Press, 2011) 10.

⁸ J L Simpson and H Fox, *International Arbitration: Law and Practice* (Stevens and Sons Limited, 1959) 172.

⁹ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Counter-Claim, Order of 10 March 1998, Separate Opinion by Judge Oda, ICJ Reports 1998, para. 8.

¹⁰ *Recueil Général des Traités et Autres Acts Relatifs aux Rapports de Droit International*, vol. XVIII (Goettingue, 1893), 590 (Emphasis added).

The rules of the Anglo-Austrian, Anglo-Bulgarian and Anglo-Hungarian Tribunals, all established in the aftermath of World War I, provided expressly for the interposition of counterclaims:

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.¹¹

Other inter-State arbitral tribunals entertained counterclaims on a different basis. The Mexican-Venezuelan Claims Commission was authorized by and exchange of notes by both parties to ‘take jurisdiction, as against a single private claim presented by Mexico, of any counterclaims which might be presented by Venezuela.’¹²

The practice of allowing counterclaims was later codified in the rules of the Permanent Court of International Justice. Article 40 of the Rules of the Court of 1922 allowed the inclusion of counterclaims as long as they ‘[came] within the jurisdiction of the Court’.¹³

B. GENERAL INTRODUCTION TO COUNTERCLAIMS IN INVESTMENT TREATY ARBITRATION

Unlike traditional arbitration, which is generally based on consent given by both parties to a dispute in a single instrument, consent in investment treaty arbitration is often based on the acceptance by the investor of an offer to arbitrate made by the host State in an IIA.

The arbitration agreement is perfected in two steps. The host State ‘extends a generic offer of arbitration to foreign investors nationals of the other State Party or Parties to the treaty.’¹⁴ This offer remains without any effect until the investor accepts it. According to Article 25(1) of the ICSID Convention, a preferred venue for investment arbitration, this acceptance must be in writing. This may also be applied to *ad hoc* arbitration.

Institution of arbitral proceedings by the investor is today deemed sufficient to fulfil the requirements of consent. The first investment tribunal to establish jurisdiction in this way was *AAPL v Sri Lanka*.¹⁵ AAPL, a Hong Kong corporation, instituted arbitral proceedings based on Article 8(1) of the 1980 UK – Sri Lanka BIT:

¹¹ Rule 26 of the Anglo-Austrian, Anglo-Bulgarian and Anglo-Hungarian Mixed Arbitral Tribunals, cited in Simpson and Fox (n 8) 178.

¹² J Ralston, *The Law and Procedure of International Tribunals* (Stanford University Press, 1926) 211.

¹³ *The Permanent Court of International Justice: Statutes and Rules* (A. W. Sitjhoff’s Uitgeversmaatschappij, 1922) 98.

¹⁴ H Veenstra-Kjos, *Counterclaims by Host States in Investment Treaty Arbitration* 4 TDM 1 (2007) 12.

¹⁵ *Asian Agricultural Products Limited v Republic of Sri Lanka* (Resubmitted Case) (Award on merits, 27 June 1990) 4 ICSID Reports (1993) 246-295.

Each contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States (...) any legal disputes arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

Since then, it has become ‘established investment treaty practice, therefore, that an investor may accept a host country’s offer to arbitrate in an investment treaty simply by instituting arbitral proceedings.’¹⁶ Jan Paulsson regarded this as ‘arbitration without privity’. About its purpose, he stated that

The aim here is not to take anything away from States, but to help ensure that foreigners have faith in their promises. The objective is not arbitration that favors the foreigner, but one that simply favors neutrality.¹⁷

It has been argued that the interpretation of these treaties ‘in the light of their purpose of protecting investors creates [a ...] constraint for jurisdiction over counterclaims.’¹⁸ The host State and the investor might not be regarded to be on an equal footing. Thus, it is important that the wording of the offer made by the host State is wide enough as to allow the possibility for it to file counterclaims. Some IIAs characterize as disputes only those relating to breaches of the treaty by the host State, others may refer to all disputes arising out of an investment. Certain treaties may limit to some extent the possibility of the host State to act as claimant.

In addition IIAs usually do not create obligations to both parties to the dispute. They only create obligations for the host State towards the other contracting State and the investor. Therefore, even if the wording of the dispute settlement clause in the IIA is broad enough to allow counterclaims, this may not have any practical use, except if bases outside of the IIA itself – such as other sources of international law, contracts or domestic law – are admitted as bases for the host State’s counterclaim.

C. LEGAL BASIS FOR COUNTERCLAIMS

A brief overview of the legal provisions that regulate counterclaims in different *fora* is necessary. In this section, each provision is accompanied by a short explanation of its wording and rationale. Practical application of these provisions, where relevant for investment treaty arbitration, will be further analysed in subsequent sections of this report.

¹⁶ J Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010) 382.

¹⁷ J Paulsson, ‘Arbitration Without Privity’, 10 *Foreign Investment Law Journal* 2 (1995) 232, 256.

¹⁸ Y Kryvoi, ‘Counterclaims in Investor-State Arbitration’, *LSE Law, Society and Economy Working Papers* 8 (2011), 3.

1. International Court of Justice

There is no provision regarding counterclaims in the Statute of the International Court of Justice. According to Article 30(1) of the Statute, ‘the Court shall frame the rules for carrying out its functions. In particular, it shall lay down its rules of procedure.’ Counterclaims are viewed as a matter of procedure. Article 80 of the Rules of Court provides for the institution of counterclaims:

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

The provision establishes several conditions for the filing of a counterclaim. Firstly, it must be within the jurisdiction of the Court. Secondly, the counterclaim must have a direct connection with the applicant’s claim. Thirdly, the counterclaim must be presented in the counter-memorial. The applicant is entitled to have a right to present its views in writing regarding the counterclaim. This is meant to guarantee equality of arms between the parties.

In a majority decision,¹⁹ the ICJ made a general statement on the characteristics of counterclaims:

Whereas it is established that a counter-claim has a dual character in relation to the claim of the other party; whereas a counter-claim is independent of the principal claim in so far as it constitutes a separate "claim", that is to say an autonomous legal act the object of which is to submit a new claim to the Court; and whereas at the same time, it is linked to the principal claim, in so far as formulated as a "counter" claim it reacts to it: whereas the thrust of a counter-claim is thus to widen the original subject-matter of the dispute by

¹⁹ Judge Weeramantry appended a dissenting opinion where he expressed the view that the nature of the Genocide Convention obligations as *erga omnes* precludes submitting counterclaims. He supported this conclusion by making an analogy with municipal legal systems and the distinction between private and public/criminal law. Whereas, counterclaims are concept pertaining to the former, it is not possible to lodge them in the latter. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Order of 17 December, ICJ Reports 243, 1997 (Dissenting Opinion of Vice-President Weeramantry).

pursuing objectives other than the mere dismissal of the claim of the Applicant in the main proceedings.²⁰

The Court reinstated in that case that the idea behind the institution of counterclaims is the better administration of justice and procedural economy. For this reason claims that are generally to be submitted in separate proceedings might be admitted in a pending case in the form of incidental proceedings.²¹

The case law of the ICJ is very helpful to conceptualize the idea of counterclaims. It can be discerned that by filing a counterclaim the jurisdiction of the Court cannot be expanded. Counterclaims merely widen the subject matter of a pending case.

2. Iran – United States Claims Tribunal

Article II of the Algiers Accords permits the interposition of counterclaims by the governments of either party

1. An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position.²²

Counterclaims have to arise out of the same contract, transaction or occurrence of the national's claim. On 'official proceedings' between the United States and Iran counterclaims have also been admitted, notwithstanding the absence of an explicit provision for them in Article II.3.²³ Thus it can be inferred that an explicit reference to counterclaims is not always required for their admission.

²⁰ *Genocide Convention* case (n 19) para 27.

²¹ *Ibid.* para 30.

²² Emphasis added.

²³ Article II.3 reads '[t]he Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that declaration.'

3. ICSID

Article 46 of the ICSID Convention allows the filing of counterclaims in procedures under the Centre's jurisdiction:

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.

Parties to a dispute must explicitly express their will for the tribunal not to entertain counterclaims. In an IIA arbitration scenario, the host State may do so in the treaty. A unilateral decision by the investor to exclude counterclaims from the determination of the tribunal should not be deemed as an agreement by the parties to the dispute.

Firstly, the counterclaim must be connected with the claim. Connectedness of the counterclaim with the claim entails both factual and legal elements at the same time. Reference to the 'subject-matter of the dispute' entails a common fact pattern and a common legal link with original claim. About this, and in relation with the 1968 Arbitration Rules, it has been said that

The test to satisfy this condition is whether the factual connection between a claim and a counterclaim is so close as to require the adjudication of the latter in order to settle finally the dispute, the object being to dispose of all the grounds of dispute arising out of the same subject matter.²⁴

The second requirement is for the counterclaim to be within the consent of the parties to the dispute. It must not be understood as a reference to the general jurisdictional requirements of Article 25 of the ICSID Convention, but to the particular scope of the arbitration agreement, i.e. the offer to arbitrate made by the host State in the IIA as accepted by the investor. The Energy Charter Treaty (ECT), for example, has a narrow dispute settlement provision which covers only 'an alleged breach of an obligation of the former [host State] under Part III...'.²⁵ Other treaties, like the China – Cote d'Ivoire BIT have a broad provision that allows 'any legal dispute between an investor of a Contracting Party and the other Contracting Party in connection with an investment...' to be solved under it.²⁶

Finally, the provision makes reference to the general jurisdictional requirements of ICSID as established in Article 25. A counterclaim that meets the other requirements

²⁴ *Rules of Procedure for Arbitration Proceedings (Arbitration Rules), 1968*, 1 ICSID Reports (1993) 63, 100.

²⁵ Energy Charter Treaty (1994), Article 26(1).

²⁶ People's Republic of China – Republic of Cote d'Ivoire Agreement on the Promotion and Protection of Investments, Article 9(1).

set out previously in the provision, but does not arise out of an investment as defined by Article 25 is effectively outside the arbitral tribunal's jurisdiction. This is explained by the limited specialized jurisdictional ambit of the Centre and in practice creates an additional hurdle for the admission of counterclaims. They must satisfy the requirements of Article 25 of the Convention as much as the primary claim. In comparison, Article 80 of the Rules of the ICJ, a body with general jurisdiction *ratione materiae*, refers only to counterclaims as coming "within the jurisdiction of the Court."²⁷

To sum up, Article 46 can be envisaged as three concentric circles that a counterclaim must fit in for it to be entertained by an arbitral tribunal. The outermost circle mandates the counterclaim to fall under the jurisdiction of the Centre, described in Article 25 of the ICSID Convention; the following circle requires the counterclaim to be within the scope of the consent of the parties. Finally, the innermost circle requires the counterclaim to arise out of the same subject-matter of the dispute.

Rule 40 of the ICSID Arbitration Rules further develops Article 46:

(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and otherwise within the jurisdiction of the Centre.

(2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.

(3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.²⁸

Similarly as the UNCITRAL rules, counterclaims must be presented in the counter-memorial (equivalent to the 'statement of defence' described in the UNCITRAL Rules). An opportunity to file a counterclaim after this procedural stage is also provided, but the arbitral tribunal must consider objections made by the other party. This last requirement is not present on the UNCITRAL Rules.

The final paragraph mandates the arbitral tribunal to provide the other party an opportunity to present its observations regarding the counterclaim. Again, equality of arms between the parties is guaranteed.

²⁷ Similarly see UNCITRAL Arbitration Rules, version 2010, Article 21(3).

²⁸ Emphasis added.

4. ICSID Additional Facility Rules

The ICSID Additional Facility Rules were adopted in 1978 to administer disputes that fell outside the jurisdiction of the Centre as defined in Article 25 of the ICSID Convention. These rules are mainly used in investment arbitration proceedings under NAFTA Chapter 11. Although it provides for ICSID Arbitration, proceedings under the jurisdiction of the Centre are not possible, as long as Canada and Mexico remain non-signatories of the Washington Convention.

Counterclaims are also permitted under these Rules. Article 47 provides the following for ‘Ancillary Claims’

(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim, provided that such ancillary claim is within the scope of the arbitration agreement of the parties.

(2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the countermemorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.

The three-fold test of Article 46 of the Convention is not necessary here. It is tailored to meet the requirements of ICSID’s jurisdiction. As the disputes to which the Additional Facility Rules are applicable have to be outside the jurisdiction of the Centre, the test becomes irrelevant. Article 3 of the Additional Facility Rules confirms this:

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.

Article 47 deals with connectedness in the same way as Article 21(3) of the 2006 UNCITRAL Arbitration Rules. The arbitral tribunal itself will determine whether the counterclaims fall under its jurisdiction.

5. UNCITRAL Arbitration Rules

Besides the current edition of the UNCITRAL Arbitration Rules, it is pertinent to examine also its 1976 version. It is this edition that the vast majority of *ad hoc* investment treaty tribunals to date have applied.

Article 19(3) of the 1976 edition of the UNCITRAL Rules allows counterclaims in the following way

3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purposes of a set-off.²⁹

This wording has been regarded as ‘inappropriate to arbitration arising under international treaties’.³⁰ This issue was discussed during the sessions of UNCITRAL’s Working Group on Arbitration and Conciliation:

158. A suggestion was made that the provision should be modified so as to allow counter-claims that were substantially connected to (or arose out of) the initial claim. Another suggestion was either to omit the words “arising out of the same legal relationship, whether contractual or not” or that the provision should not require that there be a connection between the claim and the counter-claim or set-off, leaving to the arbitral tribunal the discretion to decide that question. In that context, the view was expressed that removal of any connection between the claim and the counter-claim or set-off might accommodate the needs of specific situations such as investment disputes involving States but might not sufficiently meet the needs of more general commercial disputes.³¹

After considering various options³², the present wording was adopted. Article 21(3) of the 2010 Rules, which replaced Article 19(3), reads as follows:

3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.³³

The present rule is silent regarding on the degree of connectedness that must exist between the claim and the counterclaim. It poses on the arbitral tribunal the discretion to assert jurisdiction over it taking into account the particular circumstances of each

²⁹ Emphasis added.

³⁰ J Paulsson and G Petrochilos, *Revision of the UNCITRAL Arbitration Rules: A Report* (2006), para 174 <http://www.uncitral.org/pdf/english/news/arbrules_report.pdf> accessed 8 April 2012.

³¹ United Nations Commission on International Trade Law, *Report of the Working Group on Arbitration and Conciliation on the work of its forty-sixth session (New York, 5-9 February 2007)* A/CN.9/619, para 158 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V07/818/18/PDF/V0781818.pdf?OpenElement>> accessed 8 April 2012.

³² United Nations Commission on International Trade Law, *Report of the Working Group on Arbitration and Conciliation on the work of its fiftieth session (New York, 9-13 February 2009)* A/CN.9/669, paras 27-32 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V09/813/43/PDF/V0981343.pdf?OpenElement>> accessed 8 April 2012.

³³ Emphasis added.

case. This wording was regarded as ‘broad enough to encompass a wide range of circumstances and did not require substantive definitions of the notions of claims for set-off and counterclaims’.³⁴

Article 21(3) establishes other conditions to be met for submitting counterclaims, which have remained untouched from Article 19(3). A counterclaim must be submitted with the statement of defence, in a similar fashion to the requirement set out on Article 80 of the Rules of the Court of the International Court of Justice. Nevertheless, the article gives the respondent the possibility to file a counterclaim at a later stage if it is justified, subject to the approval of the arbitral tribunal. In the Iran – US Claims Tribunal, whose proceeding is governed by a tailored version of the 1976 Rules, ‘later counter-claims have been frequently rejected for failure to show circumstances which would justify the delay’.³⁵

From the above survey, it can be acknowledged that there is a well-established practice for the possibility of assertion of counterclaims in international tribunals. Two core requirements for the admission of counterclaims are present in one way or another in all provisions examined:

- The international tribunal must have jurisdiction to decide over the counterclaim; and
- The counterclaim must be connected to the main claim.

II. FUNDAMENTAL REQUIREMENTS FOR ADMISSION OF COUNTERCLAIMS IN INVESTMENT TREATY ARBITRATION

From the introduction, it can be inferred that two major requirements are connected with the institution of the counterclaims in international adjudication in general, which are also safeguards against the abuse of this right.³⁶ They are the ones applicable also in investment treaty arbitration.

This part is, thus, divided in two sections. The first one analyses the requirement of the parties’ consent to counterclaims as understood in international investment law, as the main feature determining the jurisdiction of tribunals in investment arbitration. The second section analyses the condition of connectedness. To this end, the case law of the ICJ and the Iran – U.S. Claims Tribunal will be taken into account for comparative purposes.

³⁴ UNCITRAL, *Report* (n 30) para 31.

³⁵ D Caron, L Caplan and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, 2006) 410.

³⁶ *Genocide Convention* case (n 19) para 30.

A. THE REQUIREMENT OF CONSENT TO COUNTERCLAIMS

- The scope of the parties consent is important for the assertion of counterclaims. It delimitates the jurisdiction of the arbitration tribunals regarding claims, but also counterclaims;
- The scope of consent in investment arbitration is mainly determined by the text of the offer to arbitrate in IIAs. Its formulation determines the possibility to assert a counterclaim by respondent States;
- The investor cannot limit the scope of the offer to arbitrate provided in the IIA.

1. The necessity of consent to counterclaims

- Inclusion of counterclaims in the scope of the parties consent in investment treaty arbitration cannot be presumed only by the reference in the arbitration agreement to a particular set of arbitration rules

International dispute settlement is governed by consent and this principle applies to all adjudicatory bodies operating on the international plane.³⁷ Consent is the cornerstone of the jurisdiction of any arbitral tribunal and plays a major role also in investment treaty arbitration. With regards to counterclaims there is a general understanding that for them to be admitted they must fall within the jurisdiction of the particular tribunal, i.e. within the consent of the parties to arbitrate.

This requirement is expressly provided for in Article 46 of the ICSID Convention, as the admission of counterclaims is made subject to falling ‘within the scope of the consent of the parties’. Even though an express provision to this effect does not exist in the UNCITRAL Arbitration Rules, tribunals dealing with counterclaims brought under these rules have also consistently considered whether the advanced counterclaim entered in the parties’ scope of consent. Notably, the Iran-U.S. Claims Tribunal required for counterclaims to fulfil the conditions set in Article II.1. of the Algiers Accords, i.e. for them to be pendant by 1981.³⁸ Similarly, two tribunals dealing with investment treaty arbitral proceedings under the UNCITRAL Arbitration Rules (*Saluka v Czech Republic* and *Paushok v Mongolia*) assessed to what extent counterclaims entered within the scope of the parties consent.³⁹

In the context of investment treaty arbitration, an examination of the IIA basis for the initiated proceedings, as the instrument providing for the scope of the parties consent,

³⁷ See e.g. Article 36 Statute of the ICJ; Article 25 and 46 of ICSID Convention.

³⁸ A. Marossi, ‘Iran-United States Claims Tribunal, Claims, Counterclaims, Dual Nationality and Enforcement’ in 23(6) J. of Int. Arb (2006) 493, 497ff.

³⁹ *Saluka Investments B.V. v Czech Republic*, UNCITRAL, Decision on Jurisdiction Over the Czech Republic's Counterclaim, 7 May 2004, paras 37-39; *Sergei Paushok et al v, The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para 689.

is to be undertaken in order to assess the scope of the consent given. It can be stated that the vast majority of the case law of investment tribunals agrees that the counterclaims must fall within the scope of consent of the parties as expressed in their arbitration agreement, based on the relevant IIA.⁴⁰ There is a strong rationale behind such scrutiny on the part of tribunals, as an award rendered outside the scope of their jurisdiction would be susceptible of annulment and/or refusal of enforcement.

However, a minority view was articulated by Professor W. Michael Reisman in *Roussalis v Romania*, specifically regarding the ICSID framework. He expressed disagreement with the interpretation that counterclaims must fall within the scope of the parties consent based on an IIA, stating that when the States Parties to a BIT contingently consent, *inter alia*, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is *ipso facto* imported into any ICSID arbitration which an investor then elects to pursue.⁴¹

As the consent of the parties ultimately circumscribes the jurisdiction of any ICSID tribunal, the ‘consent component of Article 46’ cannot extend the jurisdiction of the tribunal beyond the scope of the original parties agreement. Professor Reisman's interpretation would mean that bringing a claim could in and of itself be construed as consent to counterclaims, and the prerequisite of consent under Article 46 ICSID Convention would lose its meaning.⁴²

Such interpretation, however, would be contrary to the intention of the creators of the ICSID Convention. As expressed in the *travaux préparatoires*, Article 46 was ‘in no way intended to extend the jurisdiction of the arbitral tribunal’.⁴³ It was even expressly stated by Aron Broches that ‘no issue could be brought before a tribunal unless the parties had agreed that it could be submitted to arbitration’.⁴⁴ It is submitted therefore that the policy and efficiency reasons advanced by Prof. Reismann weighing in favor of having a dispute decided in one forum cannot outweigh the legal rules of jurisdiction and consent explicitly provided for in the Convention. Therefore, this opinion would not be followed in the report and the consent of the parties, pursuant to the IIA will be examined.

2. The offer to arbitrate in IIAs

▪ ‘Disputes regarding obligations under the IIA’ v ‘all disputes’: A broad definition

⁴⁰ *Saluka v. Czech Republic* (n 41) para 39; *Paushok v. Mongolia* (n 41) para. 689; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, paras 865-869; *Gustav W. F. Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, paras. 353-354.

⁴¹ Dissenting opinion of Prof. M. Reisman in *Spyridon Roussalis v Romania* (n 42).

⁴² Veenstra-Kjos (n 14) 26.

⁴³ ‘Summary Record of Proceedings, Geneva Consultative Meeting of Legal Experts, February 17-22 1964’ in *History of the ICSID Convention*, Vol. 2 (ICSID 1970) 367, 422.

⁴⁴ ‘Chairman’s Report on the Regional Consultative Meetings of Legal Experts’ in *History* (n 45) 557, 573.

of the material scope of the dispute makes the assertion of counterclaims easier;

- ‘The investor’ v ‘either party’ has the right to start arbitral proceedings: A provision providing the State with standing to initiate the arbitral proceedings makes the assertion of counterclaims easier;
- An express permission or prohibition of the right to assert all or certain type of counterclaims influences the possibility to do so;
- These three features of the offer to arbitrate that influence the State’s possibility to lodge a counterclaim, should be considered in conjunction with one another and not as separate criteria (see Table No 1 for practical combinations).

i. The definition of the material scope of the consent

The definition of the disputes which can be submitted to arbitration provided for in the IIA has a direct influence on the possibility by a State party to bring counterclaims. It defines the scope of the tribunal’s jurisdiction *ratione materiae* on the dispute.

IIAs that limit the offer only to the ‘**obligations ... under the Agreement [i.e. IIA]**’,⁴⁵ make it difficult for States to assert counterclaims. The use of such restrictive language in the offer to arbitrate limits the tribunals’ jurisdiction only to disputes regarding the obligations under the IIA itself,⁴⁶ which in practice does not contain obligations for the investor. The view that the narrow language of the offer to arbitrate is an obstacle to the assertion of counterclaims on the part of the State was adopted by the majority in *Roussalis v Romania*⁴⁷ and is supported by the majority of scholars.⁴⁸

Other IIAs allow more easily for counterclaims on the part of the respondent State, as they refer to ‘**all disputes relating to the investment**’,⁴⁹ or even more generically to ‘any dispute’.⁵⁰ The tribunal in *Saluka v Czech Republic* admitted that the offer to arbitrate in the Netherlands – Czech Republic BIT was broad enough to encompass counterclaims, stating that the fact that the offer to arbitrate referred to ‘all disputes’ ‘is wide enough to include disputes giving rise to counterclaims’.⁵¹ This view was

⁴⁵ Agreement between the Government of the Republic of France and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investments, 1998, Article 9.

⁴⁶ *Spyridon Roussalis v. Romania* (n 42) para 869.

⁴⁷ *Spyridon Roussalis v. Romania* (n 42) paras 866-869.

⁴⁸ P Lalive and L Halonen, ‘On the Availability of Counterclaims in Investment Treaty Arbitration’, *Czech Yearbook of International Law* Vol. II (2011) 141, 146-149; Veenstra-Kjos (n 14) 14-19; Kryvoi (n 18) 8-11.

⁴⁹ Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic, 1991, Article 8.

⁵⁰ Agreement between the Government of New Zealand and the Government of the Republic of Chile (sic) the Promotion and Protection of Investment, 1999, Article 10.

⁵¹ Netherlands – Czech and Slovak Republics BIT (n 51) Article 8. See *Saluka v Czech Republic* (n 41) para 39.

also later adopted in *Paushok v Mongolia*.

Finally, some treaties, especially the U.S. BITs, follow a more detailed solution, providing that the claimant may submit a claim regarding ‘**an obligation under Article 3 to 10 [substantive host State's obligations], ... an investment authorization or an investment agreement**’⁵² to arbitration. Even though no arbitral tribunal has yet examined such a clause, it can be reasonably inferred that a counterclaim on the part of the State could be lodged on its basis. The tribunal’s jurisdiction would not be limited only to the IIA, but would also encompass investment authorizations and agreements, which as a rule contain investor obligations as well. Nevertheless, it seems that counterclaims presented on the basis of the investment’s host State’s domestic law, pertaining to other matters, would fall outside of the jurisdiction of the tribunal.

In conclusion, it would be easier on the part of respondent States to assert counterclaims when the definition given in IIAs of the subject-matter of the disputes susceptible of being brought to arbitration is broader, independent of the fact whether it is a generic one referring to all disputes or a more detailed one, which still includes instruments separate from the IIA as possible bases for a party’s claim.

ii. The party having the right to initiate the proceedings

Another part of the provision containing the State’s offer to arbitrate which has been taken into account by both tribunals⁵³ and scholars⁵⁴ when examining the possibility of asserting counterclaims is the right for both parties to the dispute or only to the investor to institute proceedings pursuant to the offer. As it is generally understood that in international arbitration counterclaims are to be regarded as primary claims for the purposes of asserting jurisdiction, limited standing to initiate proceedings would, without indication to the contrary, bar counterclaims as much as claims on the part of the State party to the dispute.

As an illustration of the importance of different *locus standi* provisions for the purposes of counterclaims, the Iran-U.S. Claims Tribunal’s view on official counterclaims (between States – Article II.2)⁵⁵, as opposed to counterclaims brought against individuals (pursuant to Article II.1.) is of great interest. In *Iran-United States* case, the U.S. as a respondent argued that there is a general customary international law right to counterclaim as far as disputes between States are concerned. The Tribunal ruled that official counterclaims are allowed as a general rule, assuming that the other conditions are met. The tribunal argued that even though counterclaims are

⁵² US Model BIT 2004, Article 24(1)(a)(i) <<http://italaw.com/documents/USmodelbitnov04.pdf>> accessed 24 Mar 2012.

⁵³ *Saluka v Czech Republic* (n 41) para. 39; *Hamester v Ghana* (n 42) para 354.

⁵⁴ Veenstra-Kjos (n 14) 19-22.

⁵⁵ ‘The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.’

not specifically mentioned in the provision, the States under Article II.2. are on equal footing as any of them can always initiate new proceedings. Thus, counterclaims are allowed as a matter of efficiency and fairness. The need for an explicit mention of counterclaims in Article II.1 is explained, on the other hand, by the fact that it is only an individual or an entity that can bring a main claim under this provision.⁵⁶

There are IIAs that identify only the investor as a potential claimant, such as the Energy Charter Treaty, which states that ‘**the Investor party** to the dispute may choose to submit [the dispute to arbitration]’. Another example is the United States – Uruguay BIT, which gives the right to initiate arbitral proceedings to the ‘claimant’, defined as ‘an investor... party to an investment dispute’.⁵⁷ In this case, it has been argued that in the absence of an indication in the offer to arbitrate itself pointing to the admission of counterclaims, it would seem that they would fall outside the parties’ scope of consent.⁵⁸

Nevertheless, it is noteworthy that arguments have been advanced to the effect that such one-sided *locus standi* might be only an expression of the host State’s firm offer to arbitrate.⁵⁹ It is also plausible to imagine that such wording is the reflection of the practical functioning of investment treaty arbitration, i.e. the investor perfects the arbitration agreement, usually when he brings a claim against the State. Even more so since the limited *locus standi* provision is sometimes found even in broadly worded offers to arbitrate with regards to the subject matter of the dispute. Thus, a limited standing provision cannot be seen, in the context of investment treaty arbitration, as an insurmountable obstacle, but rather as one of many factors influencing the possibility to assert a counterclaim.

The second types of IIAs, to the contrary, state that: ‘**either Party to the dispute may initiate arbitration**’. It provides expressly both parties to the dispute with *locus standi* to initiate the arbitral proceedings and thus identifies both the investor and the State as potential claimants, placing them at equal footing. The possibility for a State party to the dispute to act as claimant *a fortiori* gives to it the right to counterclaim.⁶⁰

In the same manner, neutrally worded IIAs, providing simply that ‘**all disputes ... shall be submitted to arbitration**’ can be reasonably included in the category that does not pose particular problems for the assertion of counterclaims on the part of the State. As was affirmed in *Saluka v Czech Republic*, such a neutral wording ‘carries with it no implication that [the offer to arbitrate] applies only to disputes in which it is

⁵⁶ *Iran-United States*, Case No. B1, Interlocutory Award, 9 September 2004, para 89; further see e.g. *Iran v US*, Case No.A/2 Decision of 13 January 1982, para II.B.

⁵⁷ Treaty between United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, 2005, Article 1.

⁵⁸ Veenstra-Kjos (n 14) 21; A Asgarkhani, ‘Compromise and Cooperation at the Iran-United States Claims Tribunal’, 19(2) *Arb. Int’l* (2003) 149, 163.

⁵⁹ Veenstra-Kjos (n 14) 21.

⁶⁰ Veenstra-Kjos (n 14) 20.

an investor which initiates claims'.⁶¹ Moreover, the equality of parties in arbitral proceedings, including their right to initiate the proceedings, is a core principle of arbitration and civil procedure in general. Therefore it cannot be simply presumed that a party does not have the right to present a claim.

iii. Express references to counterclaims in the IIA

An express reference to counterclaims in the provision containing the offer to arbitrate investment disputes can turn the balance in favour of asserting jurisdiction over a counterclaim, as illustrated by the case of the Iran-U.S. Claims Tribunal.⁶² To our best knowledge there is only one IIA that expressly grants to the host State of the investment the right to assert counterclaims, namely the COMESA Investment Agreement of 2007. Article 28(9) of this Agreement provides:

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

Although provisions like this one have not been considered until now by tribunals, they have a certain impact on the interpretation of an IIA's offer to arbitrate as including counterclaims by the State party to the dispute. The existence of consent to the counterclaims specified therein is beyond doubt. Nevertheless, in such a scenario only counterclaims expressly mentioned in the particular provision would seem to be admissible.

There are other treaties that address the issue of counterclaims in a more implicit manner – by excluding a particular type of counterclaim. Typically the counterclaims excluded are the ones based on the recovery of the investor's loss through a guarantee or insurance agreement. An example of such exclusion is Article 24 (7) of the US – Uruguay BIT, which provides:

A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.⁶³

It is arguable that such a provision interpreted *a contrario* would lead to the

⁶¹ *Saluka v. Czech Republic* (n 41) para 39.

⁶² See discussion on Article II.1 of the Algier Agreement *supra*; *Gould Marketing, Inc. v. Ministry of National Defense*, Case 49, Award ITL 24-49-2, reprinted in *Iran – US CTR*, vol. 3, 151–152.

⁶³ Emphasis added.

conclusion that other types of counterclaims are admissible under the particular IIA.⁶⁴ Even though such a provision of itself would not be capable of overcoming an otherwise narrowly worded offer to arbitrate,⁶⁵ it can be used as an argument in favour of the admission of counterclaims in case of doubt.

Table No. 1
Different Wordings of the ‘Offer to Arbitrate’ in IIAs or how the presented criteria interact in practice

No	IIA	Text of the provision (Relevant parts)	Possibility to assert counterclaims
	France – Mexico BIT, 1998, Article 9	1. This Article [entitled “Settlement of disputes between an investor of one Contracting Party and the other Contracting Party”] only applies to disputes between a Contracting Party and an investor of the other contracting Party concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or its investment.	Not possible to assert counterclaims , as the investor’s obligations are not within scope of the offer to arbitrate, which specifically limits its scope of application by using the term “ <i>only applies to</i> ”.
	Energy Charter Treaty, 1994, Article 26	(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall , if possible, be settled amicably. (2) If such disputes can not be settled according to the provisions of paragraph (1) [...], the Investor party to the dispute may choose to submit it for resolution: [...] (c) in accordance with the following paragraphs of this Article. [providing for arbitration under ICSID, ICSID – Additional Facility, <i>ad hoc</i> arbitration in accordance with the UNCITRAL Rules and SCC arbitration]	Not possible to assert counterclaims , as: only obligations of the State are included in the offer to arbitrate and the investor is the only one having <i>locus standi</i> to initiate the proceedings
	Germany – Ghana BIT, 1995, Article 9	1. Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Treaty in relation to an investment of the former shall as far as possible be settled amicably between the parties to the dispute. 2. If the dispute cannot be settled within	Virtually possible to assert counterclaims, but problematic legal basis for them as: right to initiate the proceedings is given to both parties and the State is identified as a possible

⁶⁴ W Ben Hamida, 'L'arbitrage Etat-investisseur cherche son équilibre perdu : Dans quelle mesure l'Etat peut introduire des demandes reconventionnelles contre l'investisseur privé?' in International Law FORUM du droit international 7 (2005) 261, 270..

⁶⁵ Veenstra-Kjos, (n 14) 27.

No	IIA	Text of the provision (Relevant parts)	Possibility to assert counterclaims
		<p>six months of the date of written notification by one of the parties to the dispute, it shall be submitted for arbitration if either party to the dispute so requests.</p> <p>3. Unless the parties agree otherwise, the aggrieved party shall have the right to refer the dispute to: [international arbitration]</p>	<p>aggrieved party, but narrow scope of the tribunal's jurisdiction <i>ratione materiae</i>.⁶⁶</p>
	<p>COMESA Investment Agreement 2007, Article 28</p>	<p>1. In the event that a dispute between a COMESA investor and a Member State has not been resolved pursuant to good faith efforts in accordance with Article 26, a COMESA investor may submit to arbitration under this Agreement a claim that the Member State in whose territory it has made an investment has breached an obligation under Part Two of this Agreement and that the investment has incurred loss or damage by reason of, or arising out of that breach by submitting that claim to any one of the following fora at a time:</p> <p>[...]</p> <p>(c) to international arbitration: [...]</p> <p>9. A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures⁶⁷ or that it has not taken all reasonable steps to mitigate possible damages.</p>	<p>Possible to assert counterclaims, as:</p> <ul style="list-style-type: none"> - the right to assert counterclaims is specifically provided for in the IIA - but only for the types of counterclaims specifically mentioned in para. 9. <p>Counterclaims allowed regarding:</p> <ul style="list-style-type: none"> - obligations of the investor under the Investment Agreement (other than compliance with domestic measures) - obligation of the investor to 'comply with all applicable domestic measures' - failure to take steps to mitigate its loss.
	<p>United States Uruguay BIT, 2005, Article 24</p>	<p>1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:</p> <p>(a) the claimant⁶⁸, on its own behalf, may submit to arbitration under this Section a claim</p> <p>(i) that the respondent has breached</p> <p>(A) an obligation under Articles 3 through 10,</p>	<p>Reasonably possible to assert counterclaims, as:</p> <ul style="list-style-type: none"> - there is no definition of the subject matter of the dispute in the BIT; - even though <i>locus standi</i> is reserved to the investor; - use of the

⁶⁶ Regarding the interpretation of this treaty, see *Hamester v Ghana*, (n 42) para 354.

⁶⁷ Article 13 of the COMESA Investment Agreement states 'COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made.'

⁶⁸ 'Claimant' is defined under Article 1 of the BIT, as 'an investor... party to an investment dispute'.

Counterclaims in Investor-State Dispute Settlement (ISDS) under International Investment Agreements (IIAs)

No	IIA	Text of the provision (Relevant parts)	Possibility to assert counterclaims
		<p>(B) an investment authorization, or (C) an investment agreement; and</p> <p>1. that the claimant has incurred loss or damage by reason of, or arising out of, that breach.</p> <p>7. A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.</p>	<p>exclusion of particular types of counterclaims, to infer that other counterclaims are envisaged under the BIT.</p> <p>Counterclaims allowed regarding:</p> <p>a. an obligation of the investor under an investment authorization, b. an obligation of the investor under an investment agreement</p>
	<p>United States Estonia BIT, 1994, Article VI</p>	<p>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 out of or relating to:</p> <p>(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.</p> <p>[...] If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution: [...]</p> <p>(c) in accordance with the terms of paragraph 3 [to arbitration].</p> <p>[...] (b) Once the national or company concerned has so consented, either Party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.</p> <p>(6) In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.</p>	<p>Possible to assert counterclaims, as:</p> <p>- there is a definition of the subject matter of the dispute in the BIT which includes other sources than the BIT itself; - <i>locus standi</i> is expressly given to States to assert a claim; and - a provision excluding particular types of counterclaims is present.</p> <p>Counterclaims allowed regarding:</p> <p>a. an obligation of the investor under an investment authorization, b. an obligation of the investor under an investment agreement</p>
	<p>New Zealand – Chile BIT,</p>	<p>Any dispute between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled</p>	<p>Uncertain if possible to assert counterclaims, as:</p> <p>- there is a very</p>

No	IIA	Text of the provision (Relevant parts)	Possibility to assert counterclaims
	1999, Article 10	amicably through negotiations between the parties to the dispute. If these negotiations do not result in a solution within six months from the date of request for negotiations, the investor may submit the dispute either: to the competent court or tribunal of the Contracting Party in whose territory the investment was made or to international arbitration .	broad definition of the subject matter of the dispute in the BIT; - <i>locus standi</i> is reserved to the investor. Counterclaims allowed regarding: Virtually every type of claim linked with the primary dispute.
	Netherlands-Slovakia BIT, 1992, Article	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.	Possible to assert counterclaims , as: - there is a broad definition of the subject matter of the dispute; and - there is a neutral wording regarding <i>locus standi</i> . Counterclaims allowed regarding: Every type of claim linked with the primary dispute and an investment of the particular investor.
	France – Dominican Republic BIT, 1999, Article 7	(2) Any dispute concerning investments between one of the contracting parties and a national or company of the other contracting party is settled amicably between the two parties concerned. If such a dispute was not settled within a delay of six months starting from the moment when it was brought by one or the other party to the dispute, it is submitted by request of one or the other of the parties , [to arbitration]. ⁶⁹	Possible to assert counterclaims , as: - there is a broad definition of the subject matter of the dispute; and - <i>locus standi</i> is expressly given to States to assert a claim. Counterclaims allowed regarding: Every type of claim linked with the primary dispute and ‘concerning investments’.

3. Possibility of modification or limitation of the scope of consent by the investor

- An investor’s acceptance of the offer to arbitrate in the IIA’s importance for the scope of consent of the parties is not clearly established in investment treaty

⁶⁹ Unofficial translation.

arbitration. It is desirable to adopt an approach that does not allow the investor to narrow the scope of its consent by accepting it only with regards to the subject matter of the claim advanced by it;

- When a counterclaim is asserted by the host State and the investor does not object to it in due time, this silence can be considered as an acceptance of the tribunal's jurisdiction over the counterclaim and therefore an extension of the scope of consent of the parties to include counterclaims.

i. Limitation of consent to counterclaims by institution of arbitral proceedings by the investor

The limitation of the scope consent given by the host State in an IIA by its acceptance by the investor is not a settled issue in investment treaty arbitration. It has been argued that the investor accepts the host State offer to arbitrate as an indivisible whole, and no limitation is possible.⁷⁰ The acceptance of it, in whichever form it is made, mirrors the host State offer; the IIA is not 'an *à la carte* selection of provisions among which the investor can choose',⁷¹ and cannot decide to arbitrate only the claims they put forward. In *ICS Inspection and Control Services Limited v Argentina*, a tribunal under the UNCITRAL Rules, explained it in the following way

272. 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. As opposed to a dispute resolution provision in a concession contract between an investor and a host State where subsequent events or circumstances arising may be taken into account to determine the effect to be given to earlier negotiated terms, the investment treaty presents a "take it or leave it" situation at the time the dispute and the investor's circumstances are already known.⁷²

Acceptance by the investor, which is a private person's act, can be analysed by general contract theory. On this view, the investor's limitation of the host State's offer is deemed impossible, as 'any response by which a private person modifies the scope of the offer initially determined by the public party should be analysed, not as an acceptance, but as a refusal of acceptance accompanied by a counteroffer of

⁷⁰ Lalive and Halonen (n 50) 150; Ben Hamida, (n 66) 269.

⁷¹ Lalive and Halonen (n 50) 150.

⁷² *ICS Inspection and Control Services Limited (United Kingdom) v Republic of Argentina*, PCA Case No. 2010-9 (Award on Jurisdiction) (10 February 2012) para 272 <http://italaw.com/documents/ICS_v_Argentina_AwardJurisdiction_10Feb2012_En.pdf> accessed 11 April 2012.

arbitration at the intention of the State.’⁷³

The contrary view does not lack support, however. A limiting effect is given to the investor’s acceptance, as it ‘defines the scope of the tribunal’s subject matter jurisdiction both over primary claims and counterclaims.’⁷⁴ Prof. Schreuer, in the ICSID arbitration context, has stated that

Consent will be restricted to the extent of the investor’s acceptance of the offer. If the investor accepts the offer only in respect of its specific claim, consent will be restricted by the terms of the acceptance. If the investor accepts the offer of jurisdiction by instituting proceedings, consent exists only to the extent necessary to deal with the investor’s request. But if a counterclaim of the State is closely connected to the investor’s complaint, it is arguable that it will be covered by the mutual consent of the parties.⁷⁵

Upholding the same view, Shihata and Parra have stated that ‘[t]here would normally be no reason for the consent of the investor to be broader than is necessary to enable the investor’s grievance against the State to be submitted to arbitration under the Convention.’⁷⁶

The acceptance of this approach would turn investment treaty arbitration into ‘an adjudicative mechanism to control the exercise of public authority affecting the assets of a foreign investor.’⁷⁷ Limiting the scope of the consent only to the claim advanced by the claimant would deprive the host State of its right to advance counterclaims that fall inside the offer to arbitrate the contracting States convened to include in the treaty. The acceptance of such view is neither desirable, nor reasonable.

ii. Extension of investor’s consent by not objecting to arbitral tribunal jurisdiction over counterclaim

The failure of the investor to contest jurisdiction over counterclaims advanced by the host State may be interpreted as an extension of the tribunal’s jurisdiction to entertain them. Some tribunals have endorsed this approach. In the resubmitted case of *Amco v Indonesia*, the tribunal stated that

“A dispute” in arbitration is to be understood not merely as subject matter within the scope of jurisdiction that is contested, nor even arguments that have been advanced in oral hearings and responded to. (...) A dispute is defined by claims formally asserted and responded to in a claim and defence, or in

⁷³ Ben Hamida (n 66) 269. [Unofficial translation]

⁷⁴ Kryvoi (n 18) 9.

⁷⁵ Schreuer (n 35) 756.

⁷⁶ I F I Shihata and A Parra, ‘The Experience of the International Centre for Settlement of Investment Disputes’ 14 ICSID Review – FILJ (1999) 299, 320.

⁷⁷ G Van Harten and M Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’ 17 EJIL (2006) 121, 143.

counterclaim and reply to counterclaim – in other words, the causes of action.⁷⁸

In *Klöckner v Cameroon*, the tribunal held that consent to ICSID may be furthermore expressed afterwards the dispute is ongoing:

Once the Centre has been validly seized (as it was in this case by Klöckner's Request), consent as to the "*ratione materiae*" extent of the Tribunal's jurisdiction may be expressed at any time, even in the written submissions to the Tribunal ("*forum prorogatum*").⁷⁹

In the context of ICSID, the counterclaim will still have to meet the mandatory requirements of Article 46. Extension of consent in this form may only suffice that the counterclaim is 'within the scope of the consent of the parties'. The tribunal should assess objectively if it is 'within the jurisdiction of the Centre'.

However the lack of discussion on jurisdiction on counterclaims in several of the older investment treaty based cases which deal with the question, included under the auspices of ICSID, may be explained by an extension of jurisdiction through the waiver by the investor of its right to challenge the jurisdiction of the tribunal regarding the asserted counterclaim.

The arbitral rules most used in investment arbitration provide a time frame under which these objections may be raised. ICSID's Rule 41(1) provides that objections to jurisdiction over ancillary claims are to be raised 'as soon as possible' and in any case 'no later than the expiration (...) for the filing of the rejoinder...'. Parties may exceptionally object the tribunal's jurisdiction after this procedural phase if it is based on facts 'unknown to the party at that time.'

For arbitral proceedings under the UNCITRAL Rules, Article 21(3) of the 1976 Rules requires objections to jurisdiction over counterclaims to be raised 'no later than (...) in the reply to the counterclaim. Article 23(2) of the 2010 Rules, allows a party to also raise 'a plea that the tribunal is exceeding the scope of its authority as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.'

Thus after the time limits for the presentation for such objections on jurisdiction regarding counterclaims have passed, it can be reasonably assumed that the investor has consented to the tribunals' jurisdiction over the counterclaims in question.

It has been seen, also, in practice that investors are in particular circumstances willing

⁷⁸ *Amco Asia Corporation and others v The Republic of Indonesia*, Resubmitted Case, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 10 May 1988, 1 ICSID Reports (1993) 543, 567.

⁷⁹ *Klöckner Industrie-Anlagen GmbH and others v Republic of Cameroon and Société Camerounaise des Engrais SA*, ICSID Case No. ARB/81/2, Award, 21 October 1983, 2 ICSID Reports (1994) 9, 14.

to give their consent to counterclaims, where the State party to the dispute rejects such a possibility. This situation presented itself to the tribunal in *SGS v. Pakistan*.⁸⁰ The tribunal did not rule on this matter, however, in such cases it would be preferable to see the acceptance of counterclaims on the part of the investor as an offer to include counterclaims in the scope of the arbitration agreement towards the host State, rather than as an automatic extension of the agreement, due to the consensual nature of arbitration agreements.

B. THE CONNECTEDNESS REQUIREMENT BETWEEN THE PRIMARY CLAIM AND THE COUNTERCLAIM

- The requirement of connectedness is conceptually an admissibility requirement. Once not satisfied the respondent may still file a separate claim, assuming other requirements (especially consent) are met. Tribunals' decisions on admissibility are reviewable to a limited extent as opposed to decisions on jurisdiction;
- Assessment of the requirement is carried out on a case-by-case basis, taking into account both facts and law;
- Assessment of the requirement in investment treaty arbitration is restrictive for it relies on the earlier contract-based case law and the jurisprudence of the Iran-U.S. Claims Tribunal, which arise from a different legal context;
- In the context of ICSID, assessment of connectedness under Article 46 is not treated in the same way when applied to counterclaims as opposed to additional claims, although the same requirement and provision applies to both;
- Assessment of the connectedness based on the investment in dispute shows to be the most appropriate in the context of investment treaty arbitration and thus suggested as one which tribunals should adopt in the future.

This chapter analyses the requirement of connectedness between the principal claim and the counterclaim, which is the second fundamental condition generally, recognized in international law for a counterclaim to be admitted. As will be shown hereinafter, virtually every international adjudicatory body dealing with counterclaims considers this criterion.

1. The connectedness requirement in other *fora*

i. Direct connection requirement in the PCIJ/ICJ Case Law

The provision related to counterclaims is to be found in Section D of the Rules of the International Court of Justice (“Incidental proceedings”), Subsection 3. Counter-Claims, Article 80. Its relevant part on the type of connectedness required for the

⁸⁰ *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, 18 ICSID Review – FILJ (2003) para 108.

admission of counterclaims states that a counterclaim may be entertained if it ‘is directly connected with the subject-matter of the claim’.⁸¹ Admission of a counterclaim does not expand the jurisdiction of the Court. It merely extends the subject-matter of the dispute. The requirement of direct connection is listed in addition to the jurisdiction over the counterclaim. The older provisions of the Rules, especially the version of PCIJ adopted on 1936, makes it clear that the counter-claims can be put forward as a claim in separate proceedings if they fall within the jurisdiction of the Court but are not directly connected with the primary claim.⁸²

The first reference in the case law can be found in the *Chorzow Factory 1926*, where the Court applied the Rules which were still silent on the requirement of direct connection to a counterclaim presented by Poland. Even though an express requirement was absent in the Rules at that time, the Court stated in an *obiter dicta* that as it observes that the counterclaim is based on the Treaty of Versailles, it is also juridically connected to the principal claim.⁸³

In the *Oil Platforms 1998* case, the United States submitted the counterclaims claiming that Iran's conduct previous to the U.S.' alleged wrongful acts was a violation of international law and that the U.S.' measures were in fact counter-measures.⁸⁴ Iran claimed the lack of jurisdiction as the U.S.' attacks could not be considered as related to the commerce and navigation, which was the subject-matter of the treaty invoked as a jurisdictional title by Iran. Moreover, it contended the counterclaims were too general, thus there were no direct connection. The ICJ

⁸¹ Emphasis added. This wording of the provision applies since 1 February 2001. The older version stated: ‘1. A counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court. 2. A counter-claim shall be made in the Counter-Memorial of the party presenting it, and shall appear as part of the submissions of that party. 3. In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party the Court shall, after hearing the parties, decide whether or not the question thus presented shall be joined to the original proceedings.’

⁸² The PCIJ Rules, provided originally in the Article 40(4) which dealt with the content of counter-cases (statement of defense) that the counter-cases ‘may include counter-claims, in so far as [they] come within the jurisdiction of the Court.’ The PCIJ Rules were subsequently modified in 1936 when explicit provision on counterclaims was added: ‘When proceedings have been instituted by means of an application, a counter-claim may be presented in the submissions of the Counter-Memorial, provided that such counter-claim is directly connected with the subject of the application and that it comes within the jurisdiction of the Court. Any claim which is not directly connected with the subject of the original application must be put forward by means of a separate application and may form the subject of distinct proceedings or be joined by the Court to the original proceedings.’

⁸³ *Case concerning the Factory at Chorzow (Germany v. Poland)*, Claim for Indemnity, Merits, Judgment of 13 September 1928, PCIJ Series A, No. 17 (1928) 38. Germany did not dispute that the counterclaim comes within the jurisdiction of the court.

⁸⁴ Above the cases analyzed hereinafter, the ICJ ruled on counterclaims also in *Asylum case (Colombia v. Peru)*, Judgment of 20 November 1950, ICJ Reports 1950, 265; *Rights of Nationals of the United States of America in Morocco (France v. U.S.)*, Judgment of 27 August 1952, ICJ Reports 1952, 176. The most recent case, the only one to date applying the 2001 version of the Rules, *Jurisdictional Immunities of the State* (n 6), did not proceed to the analysis of the close connection requirement as the ICJ held it lacked jurisdiction over the Italian counterclaims.

majority order held the counterclaims admissible as it considered the freedom of commerce and navigation to be broad enough to encompass anything which might inhibit it. With respect to the direct connection, the Court stated that due to the lack of definition of “direct connection” in the Rules it is for the Court in its sole discretion, to determine on a case-by-case basis, both in facts and in law, whether such connection exists.⁸⁵ The aspects taken into account relate to the spacial and temporal factual features of the counterclaim as well as to the legal aims.⁸⁶ As the counterclaims submitted by the U.S. related to the same factual complex, arose at about the same time within the same area and, finally, pursue the same legal aim – establishment of a violation of the Treaty of Amity 1955 – the Court found them to be admissible.⁸⁷

A similar holding as the majority in the *Oil Platforms* is found in the earlier case of *Genocide Convention, Bosnia and Herzegovina v. Serbia and Montenegro*.⁸⁸ As to the assessment of the close connection, the Court in it laid down virtually the same test as the one described above used later in the *Oil Platforms* case.⁸⁹ The ICJ case law shows that the close connection requirement is a matter of admissibility. If it is not satisfied but the counterclaim is within the jurisdiction of the ICJ, it can be object of a separate application. The satisfaction of direct connection is evaluated on a case-by-case basis in facts (space and time of the complained acts) and in law (the legal instrument invoked and the legal aim)⁹⁰

⁸⁵ *Oil Platforms* case (n 9) para 37.

⁸⁶ *Ibid.*

⁸⁷ *Ibid* para 38. The decision was accompanied by two separate opinions and one dissent. Judge Oda expressed his concern that while admitting counterclaims not connected with the primary claim, the applicant would be seriously prejudiced. He stated that ‘[w]hile an applicant State is not itself allowed to bring additional claims, why then may a respondent State be permitted to bring a new claim if this (counter-)claim is not directly connected with the subject-matter of the Applicant's claim?’ (Separate Opinion of Judge Oda (n 9) paras 8-9). For this reason he criticized that the Court did not allow the parties to properly exchange their views on the issue and did not make a thorough examination of facts and submissions as it has done in its previous cases on counterclaims (*Asylum* (n 86), *US Nationals in Morocco* (n 86)). Judge Higgins criticized the majority because it did not assess the jurisdictional basis of the U.S.’ counterclaims, although it seemed that the majority had assumed the counterclaims may be permitted only in so far as they have the same jurisdictional basis. She stated there is nothing in the Statute or the Rules that would require the same jurisdictional nexus (*Oil Platforms* (n 9), Separate Opinion of Judge Higgins, 32). She stated that ‘[w]hat matters in a counter-claim is the jurisdiction mutually recognized by the parties under the Treaty - not the jurisdiction established by the Court in respect of particular facts initially alleged by the claimant.’ (*Ibid* 34). Judge *ad hoc* Rigaux appended a dissenting opinion and criticized that the Court ruled on the existence of the requisite level connection only on a summary examination without hearing the parties. Dissenting Opinion of Judge *Ad Hoc* Rigaux, para 49. Although relating to the both requirements under Article 80, Judge Cançado in his dissenting opinion in *State Immunities, Germany v. Italy* (n 6), expressed a similar concern. He saw the lack of a hearing with the parties as a violation of the principle of adversary hearing. As the counterclaims are considered as autonomous claims, they deserve the same attention as the original claims.

⁸⁸ *Genocide Convention* case (n 19).

⁸⁹ *Ibid*, para 27.

⁹⁰ The term of legal aim can be best paralleled with the concept of cause of action, although the latter is not used by the Court.

ii. Connectedness requirement in the Iran-U.S. Claims Tribunal

The Article II.1 of the Algiers Accords spells out several requirements for any counterclaim to be entertained by the Tribunal.⁹¹ One of them is that a counterclaim must ‘**arise out of the same contract, transaction or occurrence that constitutes the subject matter of [the] national's claim.**’ Therefore any counterclaims must be connected in a qualified manner with the principal claim.

Since its inception the Tribunal has had many opportunities to interpret what can be regarded as rather concrete criteria for determining the necessary level of connection, both regarding counterclaims arising from a separate contract than the one invoked by the claimant in the proceedings, and arising out of domestic law.⁹²

The seminal decision on admissibility of counterclaims regarding a separate contract can be found in *Westinghouse Electric Corp. v Iran, Case No. 389, 12 February 1987, Award*. The principal claims were based on contracts concerning the development of Integrated Electronics Depot (weapon system), and counterclaims related to different contracts, which nevertheless involved the depot, were made by the respondent. The tribunal in the case started with a general statement that counterclaims in international adjudication are a matter of elementary fairness, but procedural practice of international tribunals only permitted counterclaims when directly connected to the subject-matter of the principal claim.⁹³ These limits were found to be applicable in a similar manner to the Tribunal. As the counterclaims are based on contracts legally separate and distinct from the original claim, the tribunal had to focus its analysis on the term “transaction” used in Article II(1).⁹⁴ It stated that significant factual interrelationships existed between the two sets of contracts. Although there was no obligation or right to work beyond the scope of the concluded contracts, the project as a whole went forward as a joint effort of the parties.⁹⁵

The Tribunal also pointed out to, at the time, the only decision admitting counterclaims which were related to a different contract than the one which the principal claims in dispute were founded on.⁹⁶ In that case, *American Bell v Iran*,

⁹¹ The other types are found in the subsequent paragraphs of the Article 2. Namely, a) so called official claims between the 2 sovereign states regarding their contractual relations regarding the sales of goods and services (Article II(2), b) disputes on interpretation of the Algiers Accords (Article II(3), disputes relating to the U.S.' obligation to return the property of the former Shah of Iran, Reza Pahlavi (General Declaration, Article 16).

⁹² Rules on the Tribunal adopts to its text modified UNCITRAL Arbitration Rules, version 1976. Article 19(3) was inserted without modification. The Tribunal, however, has interpreted in the light of Article II.1 of the Settlement Declaration.

⁹³ *Westinghouse Electric Corp. v Islamic Republic of Iran, Case No. 389, 12 February 1987, Award 6 Iran-US CTR II (1984) para 1.*

⁹⁴ *Ibid* para 6.

⁹⁵ *Ibid* para 7.

⁹⁶ *American Bell International Inc. v Islamic Republic of Iran, Case No. 48, Award, 31 May 1984, 6 Iran-US CTR II (1984) 83.* Another important conclusion of the Tribunal in the concerns the identity of

there were three successive contracts concluded within a certain period of time covering the same work on a single project and the counterclaims were submitted on the basis of the third contract, however, the principal claims were founded on the first two contracts. As in the *American Bell*, the *Westinghouse* Tribunal ultimately upheld the admissibility of the counterclaims and pointed out that there had been no reasonable opportunity to obtain the services in question from Claimant's competitors and, thus, the counterclaims had arisen out of the same transaction.⁹⁷

Further conclusions on the issue of connectedness before the Iran-U.S. Claims Tribunal may be inferred from the decisions on counterclaims arising out of general domestic law, such as tax law, social security law, custom duties, penal law etc. The position of the Tribunal on admissibility of such counterclaims is clear, they are not admissible. The main reason is that any person or entity may find itself in a position to fulfil these obligations, notwithstanding an existence of any specific contractual or otherwise relationship with the State. Therefore, these counterclaims do not fulfil the requirements of Article II.1.⁹⁸

2. The connectedness requirement in investment arbitration

iii. ICSID case law

Article 46 of the ICSID Convention provides among the other necessary conditions that counterclaims are admissible only if 'arising directly out of the subject-matter of the dispute'. Evidently, the wording of Article 46 is closer to the requirement of Article 80 of the ICJ Rules than to Article II.1 of the Algiers Accords. Investment tribunals operating under the auspices of the ICSID dealing with this provision addressed the requirement of connectedness in rather a cursory way. The ensuing paragraphs analyse approaches to the condition by various investment tribunals.

(a) Contract-based arbitrations

In *Benevenuti and Bonfant v. Congo*, the claimants requested compensation for non-payment of dividends, for value of their shareholding, non-fulfilment of certain contractual obligations, seizure of the company, which had been set up for manufacturing of plastic bottles and for production of mineral water and sought also other relief (moral damages). The respondent held 60% of the shares in the company and was involved in other joint projects with the claimants. Respondent filed

the parties against which a counterclaim can be lodged. Iran attempted to counterclaim against the parent company of American Bell – AT&T, which was not claimant in the proceedings. The tribunal ruled that 'Respondents are barred from asserting counterclaims against any person or entity other than Claimant itself.'

⁹⁷ *Westinghouse Electric Corp.*(n 95) 11.

⁹⁸ See e.g. *American Bell v. Iran* (n 98) 84; *T.C.S.B., Inc. v Iran*, Award No. 114-140-2, 6 Iran-US CTR II (1984) 160; *Harris International Telecommunications, Inc. v. Iran*, Partial Award of 2 November 1987; 17 Iran-US CTR, 3; Marossi (n 40) 493-519; G H Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Clarendon Press 1996) 166.

counterclaims for damages for non-payment of duties and taxes on imported goods, for alleged overpricing of raw materials, for alleged defects on the construction of the plant and also for moral damages. In the Award, the tribunal did not once refer to Article 46, but instead focused on the time limits under Rule 40 and on its competence as laid down in the ICSID arbitration agreement in the contract. The tribunal got away with nothing more than a tautological statement that ‘[c]onsidering that the counterclaim relates directly to the object of the dispute, that the competence of the Tribunal has not been disputed and that it is within the competence of the Centre, the Tribunal considers, therefore, that it is bound to uphold its competence.’⁹⁹ The counterclaims were eventually dismissed in its entirety on merits.

The original award of 1984 in *Amco and Others v. Indonesia* includes no explicit discussion on Article 46 and fulfilment of its requirements whatsoever. The claimants sought damages for seizure of their investment and cancellation of the investment license based on expropriation, breach of contract and unjust enrichment. Indonesia formulated its counterclaim in a way that it was justified to revoke the license due to claimant's breaches of the license and other violations of applicable rules and thus, PT Amco (a locally incorporated subsidiary) was obliged to return the amount of all tax and other concession granted to it.¹⁰⁰ The tribunal merely stated that, as the revocation of the license was illicit, the revocation of the tax holidays was illicit as a consequence. The counterclaim was rejected.¹⁰¹ The finding of the tribunal on the illegality of the revocation of the license was subsequently annulled, as was, as a result, the ruling on the counterclaims.

In the resubmitted case, Indonesia reiterated its counterclaims under the heading of tax fraud with some added contentions. Claimants argued that these constituted new counterclaims not presented in the original proceedings, and therefore could not be adjudicated by the tribunal. In the resubmitted case, the tribunal firstly found that the tax fraud was a new claim, not raised in the first proceedings. Then it stated that obligations arising as an operation of general law, such as tax obligations, do not even fall within the jurisdiction of the Centre under Article 25 as they do not arise directly out of the investment.¹⁰² The award on merits on the resubmitted original counterclaim was similarly unsuccessful, as the revocation was held illegal also in the resubmitted case.¹⁰³

In *Klöckner v Cameroon*, the claimant was seeking compensation for outstanding

⁹⁹ *S.A.R.L. Benevenuti & Bonfant v. Congo*, ICSID Case No. ARB/77/2, 1 ICSID Reports, p. 362, para. 4.104.

¹⁰⁰ *Amco Asia Corporation, Pan American Development Limited, PT Amco Indonesia v Republic of Indonesia*, Award of 20 November 1984, 1 ICSID Rep, para. 145.

¹⁰¹ *Ibid* para 287.

¹⁰² *Amco*, Resubmitted case, Decision on Jurisdiction, (n 80). The tribunal however pointed out that certain tax issues might be considered, e.g. those which are specifically contracted with the investor such as specific tax exceptions.

¹⁰³ *Amco* Resubmitted case, Award on Merits (n 15), para 161-162.

balance of the price for supplying a fertilizer factory. Respondent's counterclaims were for all the losses the State had incurred in the abandoned project. The discussion on the connectedness in this case led to an obvious result. As all the claims and counterclaims related to the three same contracts connected with the project of fertilizer factory which were the basis of the claimant's claim, the tribunal stated that claims and counterclaims were "an indivisible whole".¹⁰⁴ Although, the Tribunal concurred with claimant's assertion that there is no jurisdiction over disputes arising out of the Management Contract due to the specific exclusive ICC arbitration clause, it stated that it had jurisdiction to rule over the issues of 'technical and commercial management' of the factory under Article 9 of the Protocol of Establishment Agreement (the contract containing ICSID arbitration clause).¹⁰⁵ The Tribunal upheld that there had been a direct connection between the counterclaim and the primary claims, although it did not refer to Article 46. The counterclaims and the original claims were reciprocal obligations which had a "common origin, identical sources, and an operational unity. They were assumed for the accomplishment of a single goal and [were] thus interdependent."¹⁰⁶ Ultimately, the counterclaims were rejected on the merits.

Although the described cases contain almost no discussion on the requirements of Article 46, the reasoning in *AMCO v Indonesia* and *Klockner v Cameroon* are the ones which tribunals dealing with investment treaty arbitrations have readily used. The approach to the connectedness criterion in treaty-based arbitration, however, warrants a different methodology, as the legal context is different as explained hereinafter.

(b) *Treaty-based arbitrations*

In treaty-based arbitrations, the question of connectedness between counterclaims and primary claims deserves a more thorough analysis by tribunals. The host State might not have any direct legal relationship with the investor, contractual or otherwise, on which it would base its counterclaim. Given the general absence of investor's obligations in IIAs, there might be hardly any legal instrument except for general domestic law to ground a counterclaim on. In such scenarios, it is a major task for a tribunal, assuming other requirements for counterclaims are met, to explain whether in the absence of a direct legal relationship the connectedness between the two sets of claims can be deemed to exist. The few cases dealing with counterclaims under ICSID do not shed sufficient light on the nature of the close connection in a treaty-based arbitration and do not provide any articulate methodology for its assessment. In none of them can we find a discussion on close connection requirement in Article 46. It is, nevertheless, helpful to scrutinize how the tribunals dealt with the matter.

¹⁰⁴ *Klökner v Cameroon* (n 81) 17.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid* 65.

In *Alex Genin v Estonia* the claimant demanded damages for revocation of banking license given to Estonian bank under control of the claimant. Besides denying the claims, Respondent requested damages for losses incurred due to various illicit transactions of the claimants. According to Respondent, Claimants illegally diverted money from the bank in question. The arbitral tribunal had held counterclaims admissible but rejected them on the merits after a brief analysis of the arguments presented, without even once mentioning Article 46 of the Convention or Rule 40 of the Arbitration rules.¹⁰⁷

In *Desert Line v Yemen*, the core of the primary claims were contractual breaches of a road construction contract which were subject of a subsequent settlement agreement and later decided in favour of the claimant in a domestic arbitration. Respondent requested, firstly, a set-off of the payments already received by the claimant and, secondly, damages for violations of claimant's undertakings under the settlement agreement and non-fulfilment of its obligations arising from the domestic award. The tribunal accepted the set-off claim in the calculation of the damages to be awarded. But it rejected the counterclaim on the merits based on the doctrine of estoppel. No discussion on admissibility of the counterclaims under Article 46 made.¹⁰⁸

In *Hamester v Ghana*, we can find the first more detailed discussion on Article 46 in an ICSID treaty-based arbitration, however without discussing the relevant connectedness requirement. Hamester alleged that Ghana breached and repudiated a joint venture contract for an establishment and operation of a cocoa production plants and, thus, it violated several provisions of the BIT. Respondent requested damages for losses it had incurred as a result of the claimant's conduct without specifying the cause of action for the counterclaim. The Tribunal noted that Ghana did not develop the arguments for Claimant's violation any further and neither did it specify a basis for the jurisdiction of the Tribunal over its counterclaims.

(c) Additional claims under ICSID and the close connection requirement

The condition of connectedness is applicable also to any other ancillary claims mentioned in Article 46. Thus, the cases on additional claims can help to shed some light on the nature of the connection needed as the requirement of close connection applies in the same way. In this context the *Itera v Georgia* case is of particular interest.

In *Itera v Georgia*, the Claimant submitted an additional claim during the proceedings

¹⁰⁷ *Alex Genin and others v. Estonia*, ICSID Case No. ARB/99/2, Award of 25 June 2001, paras. 376-378.

¹⁰⁸ *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17 , Award of 6 February 2008, paras 222-225.

and the Tribunal had to rule on whether this claim could be considered close enough to the original claim in order to be admitted in the same proceedings. The first set of claims, the so-called Azot dispute, related to the privatization of Claimant's company Azot. Itera was to use outstanding Azot tax debts to operate a set-off with some of the debts owed to Itera by Georgian public sector organizations and State-owned companies. This dispute concerned the monies covered by the Azot Debt Set-Off Agreement. The other set of claims, the so-called Sistema Dispute, by contrast, concerned a separate series of agreements involving Sistema for repayment through Sistema of energy debts of Georgian public sector organizations and State-owned companies to Itera.¹⁰⁹ The tribunal concluded that the two disputes, although having some common links (repayment of Georgian State debts to Itera), were basically relating to separate investment projects. The State agents dealing with each of the projects were different, as well as the contracts involved or the method of repayment chosen. The tribunal held these ancillary claims inadmissible.¹¹⁰ The tribunal also distinguished this case from other cases where additional claims were admitted.¹¹¹ It stated that in the present case, the claimant's additional claims were related to a different investment, thus they were inadmissible. Therefore, the tribunal implicitly concluded that additional claims must be directly connected to the same investment, being the subject-matter of the primary claim.

The decision was accompanied by a dissenting opinion of Prof. Orrego Vicuña, who saw the two set of claims sufficiently linked. He opined that the two disputes could not be viewed in separation and that an experienced investor would not have undertaken the Azot purchase as a separate business in the circumstances.¹¹² The dissenting arbitrator viewed the two set of claims as aspects of the same dispute and relating to the same investment. The *Itera* case, thus, shows the difficulty of defining the investment in dispute.

iv. Case law under the UNCITRAL Arbitration Rules

It should be emphasized, that the UNCITRAL investment tribunals have addressed the issue with far greater attention than the ICSID tribunals have done.

According to the 1976 version of the Rules, Article 19(3) for a counterclaim to be admitted it should '[arise] out of the same contract' as the primary claim. It is patent from the language used, that UNCITRAL Rules are designed primarily for the purposes of commercial arbitration, when an arbitration clause used as a basis of the

¹⁰⁹ *Itera International Energy LLC and Itera Group NV v. Georgia*, ICSID Case No. ARB/08/7, Decision on Admissibility of Ancillary Claims, 4 December 2009, paras. 67-73.

¹¹⁰ *Ibid* paras 93-99, 103.

¹¹¹ *CMS Gas Transmission Co. v. the Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Objections to Jurisdiction, 17 July 2003, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. the Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Objections to Jurisdiction, 30 April 2004, *Enron Corporation and Ponderosa Assets L.P. v. the Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction (Ancillary Claim), 2 August 2004.

¹¹² *Ibid* Dissenting opinion of Prof. Orrego Vicuña

tribunal's jurisdiction is present a contract between the two parties to the dispute. It is clear that the 'same contract' does not refer to the arbitration agreement; it refers to the contract upon which the primary claim is based.¹¹³ Any other contracts, notwithstanding how closely related they can be, were not intended to be covered by the provision.¹¹⁴ It has been argued that what should be decisive is the scope of the arbitration agreement which may cover more than one contract and, thus, a counterclaim based on one of the other contracts or even to tort can be admitted, even when it was not relied upon in the primary claim.¹¹⁵ The Commentators on the UNCITRAL rules suggest modifying Article 19(3) by mutual agreement of the parties in order to allow closely connected counterclaims to be heard.¹¹⁶

Saluka v Czech Republic can be considered a leading case in treaty-based arbitration as far as counterclaims are concerned. The tribunal had to deal with eleven separate counterclaims presented by the Czech Republic. The principal claims in the arbitration brought by Saluka were connected with allegedly unfair and expropriatory forced administration and subsequent sale of assets of one of the Czech partially State-owned banks in which the claimant held shares. Respondent's counterclaims were aimed at claimant's non-observance of the Share Purchase Agreement ("SPA") in question and also at violations of general domestic law. The Tribunal separately dismissed both of the sets of counterclaims.

With respect to the counterclaims based on the SPA it was held that the parties to the agreement are not identical as the parties to the arbitration.¹¹⁷ More importantly, the tribunal pronounced, relying on the holding of the *Vivendi* annulment decision, its lack of jurisdiction over this set of counterclaims because the SPA contained a separate exclusive arbitration clause.¹¹⁸

The connectedness requirement came under a close scrutiny with respect to the other set of counterclaims, those based on mandatory provisions of Czech banking regulations, commercial law and anti-trust law.¹¹⁹ After holding that the counterclaim falls within the jurisdiction of the tribunal as they can be characterized as a 'dispute concerning investment', it stated that it must satisfy the conditions that 'customarily govern the relationship between a counterclaim and the primary claim to which it is a response.' That is a 'close connexion' requirement.¹²⁰

¹¹³ Caron, Caplan and Pellonpää (n 34) 409.

¹¹⁴ Report of UNCITRAL, 8th Session, Summary of Discussion of the Preliminary Draft, UN Doc A/10017 (1975) paras 136-137. Such claims were intended to be put forward in separate request and if possible, subsequently consolidated.

¹¹⁵ Caron, Caplan and Pellonpää (n 34) 414.

¹¹⁶ *Ibid.*

¹¹⁷ *Saluka v. Czech Republic* (n 41) para 49.

¹¹⁸ *Ibid* paras. 56-58.

¹¹⁹ *Ibid* para 59.

¹²⁰ *Ibid* para 61.

The tribunal stated that no universal attempt to define this requirement is likely to be successful. Rather it suggested to take into account the facts of the case as well as the relevant treaty provisions and other applicable texts.¹²¹ It then moved forward to analyse the previous case law of the ICSID tribunals (*Klöckner; Amco*) and Iran-U.S. Claims Tribunal (*American Bell; Westinghouse; Harris International* and others). It reached the conclusion that notwithstanding the differences between the language in applicable instruments (UNCITRAL Rules, Article 19(3); ICSID, Article 46; Claims Settlement Declaration, Article II.1), a general legal principle on the close connection can be discerned.¹²²

Then the tribunal continued to an application of this principle to the case at hand. Drawing heavily on the language of the *Klöckner* award, it stated that the rest of the counterclaims cannot be seen as an indivisible whole, they lack an operational unity with the primary claims, neither are related to a single goal. These counterclaims shall be in principle decided according to general procedures under the Czech law. Thus, it found itself without jurisdiction to hear them.¹²³

In another UNCITRAL arbitration, *Paushok v Mongolia*, the tribunal also carried a more detailed analysis of law on counterclaims and on connectedness. The case concerned the complaint about the legal measures that negatively affected the claimant's mineral extraction investment activities. Mongolia asserted counterclaims on various grounds – tax evasion, claims to pay back of worker fees, illicit inter-group transfers leading to further tax and levies evasion, violation of a license agreement obliging the Claimant to extract gold in a certain manner leading to further loss in taxes and revenues, violation of environmental law and allegations of gold smuggling.¹²⁴

The tribunal referred back to the *Saluka* case. It stressed particularly two citations of the previous case law and doctrine made by *Saluka* the already quoted phrase from *Amco* stating that legal disputes concerning general domestic law are not disputes arising directly out of an investment under Article 25¹²⁵ and the well-settled case law of Iran-U.S. Claims Tribunal on inadmissibility of counterclaims relating to general domestic law.¹²⁶ Subsequently, the tribunal pronounced the test that it applied in the following terms:

In considering whether the Tribunal has jurisdiction to consider the counterclaims, it must therefore decide whether there is a close connection between them and the primary claim from which they arose or whether the counterclaims are matters that are otherwise covered by the general law of

¹²¹ *Ibid* para 63.

¹²² *Ibid* para 76.

¹²³ *Ibid* paras 79-80.

¹²⁴ *Paushok v Mongolia* (n 41) para 678.

¹²⁵ *Amco*, Resubmitted case, Decision on Jurisdiction (n 80) 565.

¹²⁶ See *supra* p 34.

Respondent.¹²⁷

The quote denies that matters covered by general law can be closely connected, thus views the issue in a mutually exclusive binary perspective. The tribunal, therefore, in effect reformulated the test on admissibility of counterclaims by adding a criterion – the counterclaims cannot arise out of general domestic law. The tribunal further noted that Article 19(3) of the Rules does not explicitly cover these claims. As to the counterclaims relating to Mongolian tax law it opined that:

All these issues squarely fall within the scope of the exclusive jurisdiction of Mongolian courts, are matters governed by Mongolian public law, and cannot be considered as constituting an indivisible part of the Claimants' claims based on the BIT and international law or as creating a reasonable nexus between the Claimants' claims and the Counterclaims justifying their joint consideration by an arbitral tribunal exclusively vested with jurisdiction under the BIT.¹²⁸

This holding stretched to its consequences makes counterclaims arising from anything else than international law or a BIT impossible. The tribunal further ruled that any decision to the contrary would in effect mean allowing unacceptable extraterritorial enforcement of public laws.¹²⁹ With respect to other non-public-law-based counterclaims, the tribunal in a cursory manner dealt with them by stating that they lack the close connection.¹³⁰

Commentators have criticized the holding of *Saluka*, which found its way into the subsequent awards for being too strict and not sensitive enough to the specificities of treaty-based investment arbitration. Pierre Lalive and Laura Halonen have expressed the view that *Saluka's* reliance on *Klöckner* is misplaced in the context of the treaty arbitration. As in the latter, the reference to “accomplishment of a single goal” and “interdependence” is unhelpful for the primary claims do not arise out of a contract.¹³¹ They also criticize the undue emphasis on the ‘legal basis’ of the primary claim; as for an IIA claim, the State has no counterpart.¹³² They suggest reading the reference to the ‘same contract’ in Article 19(3) of the UNCITRAL rules as being understood as relating to the ‘same investment.’¹³³ Prof. Douglas makes a similar suggestion when he expresses the view that Article 19(3) refers to the object of the original claim. In the context of investment treaty arbitration such object is a particular investment. He opines that such demanding understanding of the close connection as the one in

¹²⁷ *Paushok v Mongolia* (n 41) para 693.

¹²⁸ *Ibid* para 694.

¹²⁹ *Paushok v Mongolia* (n 41) para 695.

¹³⁰ *Ibid* paras 696-699.

¹³¹ Lalive and Halonen (n 50) 153.

¹³² Similarly see A Vohryzek-Griest, *State Counterclaims in Investor-State Disputes: a History of 30 Years of Failure*, 15 *International Law, Revista Colombiana de Derecho Internacional* (2009) 85, 115.

¹³³ *Ibid* 154.

Saluka 'indirectly undermines a broadly formulated consent to arbitration; 'all disputes' concerning an investment is surely capable of including counterclaims directly relating to that investment even where the claimant investor has elected to sue on the basis of an investment treaty obligation.'¹³⁴

The same commentators suggest this conclusion to be applicable also to the treatment of counterclaims under the auspices of the ICSID. A relative closeness of the counterclaim to the investment in question should be satisfactory for the fulfilment of this condition.

3. Conclusion

In the ICSID context, when the counterclaims in treaty arbitrations were rejected, this has been done on the basis of not satisfying one of the other conditions of the Article 46, namely because the counterclaims were not within the scope of the parties' consent.¹³⁵ The other requirements of Article 46 than the requirement of close connection, i.e. within the consent of the parties and otherwise within the jurisdiction of the Centre, are considered jurisdictional requirements. Even if there exists no ICSID case when the tribunal held a counterclaim inadmissible for the lack of close connection, non-satisfying this requirement is better viewed as an issue of admissibility. It would be non-sensical to hold that even if the counterclaim *is* within the consent of the parties and jurisdiction of the Centre, a tribunal does not have jurisdiction over it. Therefore, the requirement of the close connection is conceptually best to be viewed as an admissibility requirement.

Using the analogy with the case law of the ICJ, the Court on many occasions emphasized that if there is a jurisdiction over the counterclaims but these counterclaims are not directly connected with the subject-matter of the dispute, the State can always file a separate application. Although in the case of treaty arbitration the possibility of the host State to act as a claimant is almost never used in practice, due to the usual lack of the investor's consent to arbitrate before the dispute arises, this option is theoretically possible.

Moreover, qualifying an issue as a matter of jurisdiction or admissibility may have an impact on the burden of proof. Tribunals on their own motion scrutinize jurisdictional issues; meanwhile, questions of admissibility are to be raised by the parties.¹³⁶ Further consequence of viewing the close connection as a requirement of admissibility is the scope of possible review of the tribunal's decision. The jurisdictional decisions are reviewable, however decisions on admissibility (which presuppose the existence of

¹³⁴ Z Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 260.

¹³⁵ *Hamester v Ghana* (n 42) para 362(ii); *Roussalis v Romania* (n 42) operative part a).

¹³⁶ J Pauwelyn & L E Salles, 'Forum Shopping Before International Courts: (Real) Concerns, (Im)Possible Solutions', 42 *Cornell Int'l L J* (2009) 77, 96.

jurisdiction) are generally not.¹³⁷

As to the actual assessment of the connectedness, it is assessed on a case-by-case basis, both in facts and in law. The investment treaty case law seems to rely mostly on older contract-based cases and the jurisprudence of Iran-U.S. Claims Tribunal. Given the fact that this older cases arose under different circumstances, of essentially contractual disputes, it can be questioned if it is not the time to consider more creative solutions to the issue of connectedness in investment treaty arbitration. In this context a distinction between the Iran-U.S. Claims Tribunal and investment tribunals is particularly relevant, as investment disputes involve by definition matters going beyond a mere commercial transaction and require sometimes the scrutiny of domestic law measures in various fields of public law. It is submitted that policy reasons, the idea of sound administration of justice, procedural efficiency and the principle of finality of dispute settlement weigh in favour of using the test based on the investment in dispute. That is to say, to treat the requirement of connectedness in investment treaty arbitrations in a more lenient fashion than as it was treated in *Saluka* and *Paushok*.

The test based on the investment in dispute is therefore seen as the most suitable one for the purposes of investment treaty arbitration. It is submitted that the test is not too broad as to cause any prejudice to the claimant. Rather it avoids dealing with several aspects of the dispute before different *fora*. In addition, in the ICSID context the test of close connection based on the investment in the dispute is not a new test as it is used by case law on additional claims, which applies the same provision, i.e. Article 46.

Finally, the broad scope of consent under some IIAs, which empowers the tribunal to deal with ‘all disputes concerning an investment’, supports the conclusion that the investment in dispute should be treated as the subject-matter of an IIA dispute.

III. ADDITIONAL LIMITATIONS REGARDING THE ASSERTION OF PARTICULAR CAUSES OF ACTION FOR HOST STATE'S COUNTERCLAIMS

- There are only a limited number of obligations of investors based on international law sources, which is the natural law applicable to investment treaty arbitration;
- There are also possible limitation to invoke domestic law or contract law based counterclaims, linked to the requirement of ‘party identity’ (i.e. the need to assert the counterclaim against the proper debtor of the substantive obligation invoked), as well as to the possible restrictive applicable law provisions contained in some IIAs;

¹³⁷J Paulsson, 'Jurisdiction and Admissibility', in G Aksen, K H Böckstiegel et al (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing 2005) 601.

- The existence of a contractually agreed exclusive dispute settlement mechanism in the contract serving as basis to the counterclaim can finally also constitute a hurdle for the assertion of a successful counterclaim.

A. LIMITED CAUSES OF ACTION BASED ON INTERNATIONAL LAW SOURCES

1. Possible causes of action based on the investment treaty

- Causes of action based on substantive standards are rare and relate to an express obligation of the investor to respect the host State's domestic laws. It may be a broad respect to domestic legislation or limited to specific areas. However a connectedness problem remains regarding those obligations;
- Based on the agreement to arbitrate, its breach can be a basis for a counterclaim. This has limited practical interest due to the nature of investment arbitration.

i. Substantive provisions of IIAs as possible causes of action for counterclaims

There are two types of substantive IIA provisions which address, directly or not, investors conduct or issues susceptible of restricting investors rights granted in the IIA itself, thus making them provisions of choice for to examine in the context of possible treaty based causes of action for a counterclaim on the part of the State. On the one hand provisions requiring compliance with the host State of the investment's domestic laws, and on the other provisions addressing human rights and environmental protection. To this lot, the so called umbrella clause should be added, as it is the one which has been invoked by respondent States as a basis for the admission of counterclaims in some of the cases dealing with the issue.

(a) Provisions requiring compliance with domestic law of the host State

Some IIAs require an investment to be made in respect of the host State's law. This requirement usually forms part of the definition of protected investment under the IIA in question. The New Zealand-Chile BIT, for example, provides that investment 'means any kind of asset or rights related to it provided that the investment has been made in accordance with the laws and regulations of the Contracting Party receiving it'.¹³⁸ As the State's standing offer only comprises the investments protected under the IIA, when such provisions are included the offer to arbitrate would not regard investments made in violation of the host State's law. Tribunals have used these provisions to deny jurisdiction over claims regarding investments made in violation of the host State's domestic law. The reference to such provisions is helpful for the dismissal altogether of investor's claims. It cannot, however, serve as cause of action for a counterclaim.

¹³⁸ Chile-New Zealand BIT (n 52) Article 1 (Emphasis added).

To our best knowledge there is only a limited number of IIAs, all of them within the context of the African Regional Integration Organisation, that provide for a clear obligation upon investors also at the performance stage of their investment.¹³⁹ This is also included in Ghana's Model BIT of 2008.¹⁴⁰ Most of them require the compliance of investors and investments with the host State's 'laws and regulations',¹⁴¹ sometimes with the emphasis of certain particular provisions linked with the environment, labour and human rights.¹⁴²

Article 13 of the COMESA Investment Agreement of 2007, obliges investors, as well as their investments, to act in compliance with 'all applicable domestic measures' of the host State of the investment. According to the definition of the term 'measures' in the treaty it encompasses 'any legal, administrative, judicial or policy decision that is taken by a Member State, directly relating to and affecting an investment in its territory'.¹⁴³ It can be inferred from the broad language used in this definition that the nature of the provision is one of compliance of the investors and their investments with all domestic laws relating to investments.

It has been argued by scholars that such inclusion of reference to domestic law provisions in the IIA place them within the scope of the treaty, making it easier to assert counterclaims on their basis.¹⁴⁴ When such an obligation is provided for in an IIA, it seems that the connectedness requirement would be more easily satisfied for counterclaims based on domestic law provisions ensuring the respect of the above mentioned standards.

It remains to be seen how this reasoning is to be accommodated with the analysis made by the Iran-U.S. Claims Tribunal. It holds that even when mentioned in a particular contract, obligations arising from the general law of State remain based on domestic law. Investment tribunals have embraced this approach.¹⁴⁵ A solution for this problem might be the express mention of foreign investors or of the relevant IIA in the enacted domestic legislation, when it is linked to sectors where investors are often present.

(b) Provisions providing for human rights and environment protection

Some recent IIAs include provisions aiming at the inclusion of the protection of human rights - mainly labour rights, as well as the environment protection in the

¹³⁹ Protocol on Finance and Investment of the SADC, Annex 1, Article 10; ECOWAS Supplementary Act, Article 11, COMESA Investment Agreement, 2007, Article 13.

¹⁴⁰ Republic of Ghana, Model BIT 2008, Article 12.

¹⁴¹ Protocol on Finance and Investment of the SADC, Annex 1, Article 10; ECOWAS Supplementary Act, Article 11; Republic of Ghana, Model BIT, 2008, Article 12.

¹⁴² Republic of Ghana, Model BIT 2008, Article 12.

¹⁴³ Article 1, para 10.

¹⁴⁴ Kryvoi (n 18) 27.

¹⁴⁵ See *supra* p 34 for discussion on relevant case law.

scope of investment treaties.¹⁴⁶ Those provisions have been referred to as ones permitting to account for investors behaviour, thus, it is pertinent to examine to what extent, when present, such provisions can serve as a basis for a host State's counterclaim. There can be identified three types of provisions that address issues of this order in IIAs.

The first and weakest one is the inclusion in the preamble of the treaty. In this case, the provision does not form part of the operative body of the treaty's provisions and may only be used as a guideline to the proper interpretation to be given to the operative provisions. Thus, they are not capable of serving as a counterclaim's legal basis.

A more sophisticated manner of addressing human rights and environmental concerns is exemplified in the 2005 US Model BIT, mirrored in some BITs already in force, such as the US-Uruguay BIT. In this treaty, Articles 12 and 13 have been included which are entitled respectively 'Investment and Environment' and 'Investment and Labour'. The structure of the two is similar¹⁴⁷.

The first part recognizes the fact that it is inappropriate for the parties to the BIT to attract investment by lowering environmental and labour protection in their respective territories and setting the objective not to do so (using a not obligatory language of the term 'strive'). This first part of the provisions is, therefore, specifically addressed to States, not providing for any particular limitation of investors rights, let alone obligation upon the latter.

The second part of the provisions constitutes an interpretative note of the parties to the BIT, which allows the parties to the same to 'adopt, maintain or enforce' any measure 'ensur[ing] that investment activity in its territory is undertaken in a manner sensitive to labor/[environmental] concerns', 'otherwise consistent with [the] Treaty'. The language used in the last provisions analyzed is not surprisingly referred to as 'fuzzy',¹⁴⁸ as it is difficult to give to them a concrete interpretation as to whether there is a real restriction of the investors rights by the regulatory power of the host State of their investment in labour and environment related matters. Nevertheless, it is certain that the provisions in question are not of a nature to result in an obligation susceptible to enforcement through arbitration on the part of investors.

Lastly, even the recently concluded EU-CARIFORUM States EPA,¹⁴⁹ which

¹⁴⁶ US-Uruguay BIT (n 59); Austria Model BIT 2008.

¹⁴⁷ Reservation being made with respect to paragraph 2 of Article 13, which provides for a definition of the term 'labor laws', whereas no similar definition paragraph for the term 'domestic environmental laws' is present.

¹⁴⁸ M Toral and T Schultz, 'The State as a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations' in M. Waibel, A. Kaushal, et al. (eds), *The Backlash Against Investment Arbitration* (Kluwer Law International 2010) 585

¹⁴⁹ The EPA is discussed only with reference to the specific provision of Articles 71 and 72. The EPA does not contain an investor-State dispute resolution mechanism.

identifies investors' obligations clearly, still so imposes them only through the intermediary of the host and home States of the investors and investments,¹⁵⁰ as the treaty language reveals itself

The EC Party and the Signatory CARIFORUM States shall cooperate and take, within their own respective territories, such measures as may be necessary, inter alia, through domestic legislation, to ensure [respect of the investors obligations].¹⁵¹

Therefore, while such provisions might be helpful for tribunals for assessing the existence of a breach of the relevant treaty by the host State, or may be relevant for the possible invocation of breaches of its domestic laws by the State as a cause of action for a counterclaim, they fail to impose clear obligations on investors which would allow State parties to investment arbitration to counterclaim on the basis of the treaty's substantive standards. Thus all of the types of provisions examined above seem to be deprived of practical utility for the assertion of counterclaims on the part of the host State.

(c) *The umbrella clause*

The commonly named umbrella clauses – if worded broadly enough – are typically understood to oblige the State parties to an IIA to observe particular obligations they have undertaken with respect to an investment. Without going in detail in the doctrinal and case law controversies on the proper effect to be given to such clauses, it will be assumed for the present purposes that umbrella clauses provide for a treaty based cause of action for investors to invoke contractual breaches on the part of the State party to the proceedings. Such a clause, as providing for a bridge between contract and treaty claims, was invoked by Romania in the *Roussalis v Romania* case as a basis for the extension of investment treaty tribunals' jurisdiction over contractual claims.¹⁵²

However such use of the umbrella clause, is rather a misunderstanding of its functioning. Under an umbrella clause, it is the States, parties to the relevant IIA alone who undertake obligations and not investors. As it was stated by the tribunal in *Roussalis* pursuant to the umbrella clause examined:

(...) the host State commits itself to comply with obligations it has entered into with regard to investments of investors. It [the clause] does not permit that claims be brought about obligations of the investor.¹⁵³ Thus, at the present state of law the

¹⁵⁰ European Union and Member States – CARIFORUM States Economic Partnership Agreement, Article 72 (Emphasis added).

¹⁵¹ *Ibid* (Emphasis added).

¹⁵² *Spyridon Roussalis v Romania* (n 42) paras 781-782.

¹⁵³ *Ibid* para 875.

conclusion imposes itself that no substantive standard included in an IIA can be used as a legal basis for a host State's counterclaim.

ii. IIA procedural provisions as causes of action for counterclaims

Turning to the procedural provision of the treaty that is directed at investors – the State parties standing offer to arbitrate, the analysis leads to a significantly different solution. By accepting the offer to arbitrate the investor in effect concludes a contract with the State party to the dispute.¹⁵⁴ The arbitration agreement so derived from the IIA can impose obligations directly on the investor's side. And in effect, it so does, since entering into an arbitration agreement contains the inherent duty to perform the agreement in good faith¹⁵⁵ The view of admissibility of counterclaims based on the breach of an agreement to arbitrate was admitted in the contract based – *MINE v Guinea*,¹⁵⁶ referred to as possibly the only truly successful counterclaim in investment arbitration.¹⁵⁷ A similar approach was adopted in the *Reineccius & others v Bank for International Settlements* case, where the tribunal awarded costs to the Bank for the proceedings brought against it in front of the US courts by one of the claimants, in breach of the 1930 Convention regarding the Bank for International Settlements, establishing an exclusive dispute resolution mechanism.¹⁵⁸ It has on this basis been argued by scholars that the breach of the arbitration agreement itself – by pursuing an arbitration in a different forum from the one agreed upon, would constitute an admissible counterclaim on the part of States.¹⁵⁹ This is at the present state of law the only viable basis for a state's counterclaim arising out of the IIA itself.

The interest of such possible cause of action for a State's counterclaim within the structure of investment treaty arbitration, remains limited, as investors most often accept the State's offer to arbitrate only at the time of filing of their claim.¹⁶⁰ The breach of the arbitration agreement would seem useful, however, in some particular circumstances.

The context of denunciation of the ICSID Convention provides an interesting possible application of this cause of action. Of particular interest is the case of institution of proceedings in front of the Centre pursuant to an acceptance by the investor of the offer to arbitrate in an IIA after the receipt by the Centre of the notice of denunciation. At this point the investor does no longer have the right to institute such

¹⁵⁴ J Crawford, 'Treaty and Contract in Investment Arbitration' *The 22nd Freshfields Lecture on International Arbitration, London 29 November 2007* (Freshfield Bruckhaus Deringer 2007) 13.

¹⁵⁵ Lalive and Halonen (n 50) 149.

¹⁵⁶ *Maritime International Nominees Establishment (MINE) v Republic of Guinea*, ICSID Case No. ARB/84/4, Award, 6 January 1988.

¹⁵⁷ Vohryzek-Griest (n 134) 110.

¹⁵⁸ *Dr Horst Reineccius, First Eagle SoGeb Funds, Inc., Mr Pierre Mathieu and la Société de Concours Hippique de la Chatre v Bank of International Settlements*, Permanent Court of Arbitration, Partial Award of 8 January 2001, Final Award of 19 September 2003, cited by Crawford (n 156) 15.

¹⁵⁹ Crawford (n 156) 15; Lalive and Halonen (n 50) 149.

¹⁶⁰ See Crawford, (n 156) 15.

proceedings.¹⁶¹ Those were the facts of the *E.T.I. v. Bolivia*.¹⁶² Finally the dispute was discontinued before ICSID and pursued in *ad hoc* arbitration after two years of ‘protracted jurisdictional arguments’.¹⁶³ In a similar situation, in the second proceedings the host State could invoke the breach of the arbitration agreement, i.e. the reference to a forum that is not available to the investor, in order to claim its legal costs for the first proceedings.

A comparable cause of action for a counterclaim might be available for a host State in the case of an investor breaching the hierarchy of jurisdictions proposed to it in accordance with the offer in the IIA. An example of such IIA is the Canada – Venezuela BIT, 1982, according to which the proper forum to submit investor claims is ICSID and if only one of the contracting parties is party to the ICSID Convention – ICSID Additional Facility, finally only if both are ‘not available’ the case may be submitted to an *ad hoc* arbitration under the UNCITRAL Rules.¹⁶⁴ However, this basis for a counterclaim would only be available when legal costs have not been addressed in the course of the first proceedings.¹⁶⁵

2. Counterclaims based on international law, the utility of general principles of law

- A possible legal basis for a cause of action in international law for a State’s counterclaim outside of the IIA is provided by general principles of international law. These, however, can present difficulties regarding compensation, due to their general character.

Even though not considered by tribunals up to date, it is interesting to examine to what extent international law could serve as basis for counterclaims on the part of respondent States. This question brings up a more fundamental one regarding the possibility for a private person to bear international law obligations. Without discussing in detail this fundamental question, it will be stated here that in recent years both scholars¹⁶⁶ and case law¹⁶⁷ have recognised the fact that private persons

¹⁶¹ C Schreuer, ‘Denunciation of the ICSID Convention and Consent to Arbitration’, in M Waibel, A Kaushal et al (eds), *The Backlash against Investment Arbitration*, (Kluwer Law International 2010) 353, 364-366.

¹⁶² *E.T.I. Euro Telecom International N.V. v Plurinational State of Bolivia*, ICSID Case No. ARB/07/28.

¹⁶³ L E Peterson, ‘Venezuelan Exit from ICSID Raises Questions Both Legal and Financial’, IA Reporter, 31 January 2012, available at: <http://www.iareporter.com/articles/20120131_3>, accessed 12 March 2012.

¹⁶⁴ Canada-Venezuela BIT (1982), Article 12.

¹⁶⁵ See on a case where they were: L E Peterson, ‘Venezuela Prevails in Treaty-Based Arbitration, as Arbitrators Decline Jurisdiction over Investor Claim’, IA Reporter, 15 September 2010, available at: <http://www.iareporter.com/articles/20100916_12>, accessed 12 March 2012.

¹⁶⁶ See Kryvoi (n 18) 17-24; Toral and Schultz (n 150) 579-580; J Ruggie, ‘Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Delivered to the Human Rights Council’, U.N. Doc. A/HRC/4/35 (9 February 2007).

and investors, in particular, can be subject to a certain extent to obligations under international law and thus it should be examined as a possible source for counterclaims on the part of respondent States in investment treaty proceedings.

The relevant sources of international law would thus be examined in order to identify the possible grounds to be used as a counterclaim's basis. In this respect treaty law and customary international law, do not seem to be very helpful. Despite the growing idea that States are not the only debtors of international obligations regarding human rights or sustainable development, with the few exceptions mentioned in this part, there are hardly any IIAs which would impose such obligations on the part of investors. They leave, therefore, competent tribunals without any possibility to apply any obligations with regards to those fields of law to the investors.¹⁶⁸ The same conclusion has to be arrived at when examining customary international law, as well, as customary international law has developed as a result of States' interaction between them and is not even meant to create obligations for private parties.¹⁶⁹

It is only general principles of law that present a plausible basis for investors' obligations susceptible of giving rise to a counterclaim on the part of the State in the proceedings. It is in this context that tribunals found investors liable under international law. Both tribunals arriving at this conclusion considered the duty of 'good faith' imposed on the investors in accordance with international law, in the particular proceedings in order to reject its claims.¹⁷⁰ It seems that from there to take the leap to consider good faith as a possible legal basis for a counterclaim is not that big.

Moreover several other general principles have been applied frequently by investment treaty tribunals in their decisions, as well as by other international adjudication bodies as the Iran-U.S. Claims Tribunal.¹⁷¹ A very detailed list of principles used by investment tribunals is provided by Y. Kryvoi, who identified the use of the principles of good faith, *pacta sunt servanda*, obligation to mitigate damages, principle of *restitution in integrum*, *exception non adimpleti contractus*, unjust enrichment, estoppel and others.¹⁷²

There is, in the authors view, no reason for the application of those principles to remain only interpretative and not be used by respondent States as a possible legal basis for their counterclaims. The question that remains to be answered is to what extent the breach of such general principles would be willingly used by tribunals for

¹⁶⁷ *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009; *World Duty Free Company Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 6 October 2006.

¹⁶⁸ Kryvoi (n 18) 19-21; Toral and Schultz, (n 150) 577-589.

¹⁶⁹ Kryvoi (n 18) 21-22.

¹⁷⁰ See (n 169).

¹⁷¹ G Hanessian, "General Principles of Law" in the Iran-U.S. Claims Tribunal' 27 *Columbia J. Transnat'l L* (1989) 309.

¹⁷² Kryvoi (n 18) 23.

the evaluation and granting of compensation.

An example, both of the use of a general principle and of the tribunal's reluctance to award compensation on their basis is provided by the Uzan family claims against Turkey. In this case an abuse of process was found, which is the prolongation of the good faith principle. The cases were based on the Energy Charter Treaty and the claimants ('companies owned and controlled by the Uzan family')¹⁷³ were not able to prove that they had in fact made the investments that they claimed being expropriated.¹⁷⁴ The respondent in two of the cases requested a formal declaration of the tribunals that Claimants' claims were 'manifestly ill-founded',¹⁷⁵ and one of the tribunals granted such a declaration,¹⁷⁶ while the other even though it did not, acknowledged that claimants conduct amounted to an abuse of process.¹⁷⁷

In both cases the respondent also sought monetary compensation for the moral damages of the committed abuse.¹⁷⁸ Even though it never presented its request in the terms of a counterclaim, the request has all the characteristics of one. Such compensation was not granted, as both tribunals found that the award of costs would be sufficient remedy for the reputational prejudice suffered by respondent, differentiating this case from other cases where moral damages were awarded.¹⁷⁹ A question remains, however, as to whether this result was not entailed by the actors' reluctance to assess the jurisdiction tribunals would have upon such counterclaim for damages (defined by the tribunal in the *Europe Cement v Turkey* case itself as coming 'close to an ancillary claim'), with regards to the narrow definition of arbitrable disputes under the Energy Charter Treaty. Within the framework of another IIA, the situation might have been different.

B. ADDITIONAL REQUIREMENTS FOR THE ASSERTION OF COUNTERCLAIMS ARISING OUT OF NATIONAL LAW SOURCES

1. The effect of the applicable law provisions in IIAs to the dispute for the assertion of counterclaims

- Applicable law clauses contained in IIAs are not relevant for the tribunal's jurisdiction, as they constitute a choice of law to be applied to the merits of the dispute;

¹⁷³ *Cementownia "Nowa Huta" SA v Turkey*, ICSID Case No ARB(AF)/06/2 Award 11 September 2009, para 162.

¹⁷⁴ *Cementownia v Turkey* (n 175) paras 160-171; *Europe Cement Investment and Trade SA v Republic of Turkey* (ICSID Case No. ARB(AF)/07/2) Award 13 August 2009, paras 146-181; *Libananco Holdings Co Limited v Republic of Turkey* (ICSID Case No. ARB/06/8) Award 2 September 2011, paras 127-538.

¹⁷⁵ *Cementownia v Turkey* (n 175) paras 160-171; *Europe Cement v Turkey* (n 176) paras 146-181.

¹⁷⁶ *Cementownia v Turkey* (n 175) paras 162-163.

¹⁷⁷ *Europe Cement v Turkey* (n 176) para 175.

¹⁷⁸ *Europe Cement v Turkey* (n 176) para 123; *Cementownia v Turkey* (n 175) paras 106.

¹⁷⁹ *Europe Cement v Turkey* (n 176) para 181; *Cementownia v Turkey* (n 175) paras 171.

- As tribunals have taken them into account, nevertheless, the influence of those clauses over the admission of counterclaims is studied in detail (see Table No 2).

Restrictive applicable law provisions in IIAs can limit the host State's chance to advance an admissible counterclaim. Two of the arbitral decisions on counterclaims, as well as scholars¹⁸⁰ seem to consider the applicable law provision contained in the IIA as relevant when assessing their jurisdiction on counterclaims brought by the respondent State. In *AMTO v Ukraine*, for instance the tribunal dismissed Ukraine's counterclaim, without discussing its jurisdiction separately, solely on the basis that:

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 for [its counterclaim].¹⁸¹

In *Roussalis v Romania*, the tribunal expressly referred to the applicable law provision, as much as to the definition of the possible subject matter of the dispute, when denying jurisdiction over Romania's counterclaims based on its domestic law. In this respect the tribunal stated that where the BIT does specify that the applicable law is the BIT itself, counterclaims fall outside the tribunal's jurisdiction. Indeed, in order to extend the competence of a tribunal to a State counterclaim, "*the arbitration agreement should refer to disputes that can also be brought under domestic law for counterclaims to be within the tribunal's jurisdiction*".¹⁸² The reference to the applicable law clause of the IIA is rather surprising when used in the context of jurisdiction, as an applicable law clause is not determinative for a decision on the tribunal jurisdiction to entertain a counterclaim. In international arbitration,¹⁸³ and in investment treaty arbitration in particular,¹⁸⁴ the applicable law is the one under which the merits of the dispute are evaluated. It is usually different from the law that governs the arbitration agreement, which, on its side, determines the scope of the consent of the parties.

This principle has been constantly respected by tribunals when assessing the existence of consent of the parties to submit their dispute to arbitration. In the context of treaty based investment arbitration, it was affirmed on numerous occasions, both in the context of the ICSID Convention¹⁸⁵ and outside of it,¹⁸⁶ that the existence of the

¹⁸⁰ Lalive and Halonen (n 50) 150-151.

¹⁸¹ *Limited Liability Company AMTO v Ukraine*, SCC Case No. 080/2005 (ECT), Final Award, 26 March 2008, para 118.

¹⁸² *Spyridon Roussalis v. Romania* (n 42) para 871.

¹⁸³ See G Born, *International Commercial Arbitration* (Kluwer Law International 2009) 411-421; Y Derains, 'Observations on Final Award in ICC Case No 4381', in S Jervain, Y Derains and J-J Alvarez (eds), *Collection of ICC Arbitral Awards 1986-1990* (ICC 1994).

¹⁸⁴ Schreuer, (n 35) 550-552,

¹⁸⁵ See *Siemens AG v Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004; *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003.

parties' consent is governed by the particular provision of the IIA which contains it, as well as the relevant procedural rules.

In addition, no analogical restriction of the tribunal's jurisdiction with regards to the applicable law clause in the IIA has been made in cases where investors have relied on bases for their claims, which are outside of the IIA, and in particular in cases regarding contract claims. Moreover, such importance attached to the applicable law clause in a particular IIA would not be in line with the fact that the practical importance of such clauses seems to be fading, as the nature of investment disputes is such that tribunals are necessarily brought to apply both domestic and international laws and those clauses are seen as a mere affirmation of the tribunal's right to consider a particular source of law.¹⁸⁷

It seems preferable to refer to the applicable law clause when considering the merits of the counterclaim, i.e. the existence of 'legal basis', referring back to the wording used in *AMTO v. Ukraine* of the counterclaim in the particular law chosen as applicable by the parties.

We will examine how the different types of applicable law clauses in IIAs can affect the possibility for a respondent State to assert counterclaims. It seems that tribunals would refuse to examine counterclaims based on the State's domestic law if the applicable law clause in the IIA refers only to international law.¹⁸⁸ A similar result could be expected regarding counterclaims based on a contract, as contracts are normally subject to a particular domestic law. This statement bears the exception of express references to contracts made in the applicable law provision, besides the application of international law, as is done for example in the France – Dominican Republic BIT.¹⁸⁹ Conversely, when a domestic law is included in the applicable law provision, it seems reasonable to admit that contractual counterclaims would be more easily admitted.

To illustrate the questions raised above in simpler terms, a chart is presented showing the counterclaims that would be capable of being lodged, as having a legal basis in the applicable law, with regards to different applicable law clauses in IIAs.

¹⁸⁶ See *Saluka v Czech Republic* (n 41); *Sergei Paushok v Mongolia* (n 41).

¹⁸⁷ Y Banifatemi, 'The Law Applicable in Investment Treaty Arbitration' in K Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 191, 209-210; Z Douglas (n 136) 42-43.

¹⁸⁸ *AMTO v Ukraine* (n 183) para 118; *Spyridon Roussalis v Romania* (n 42) para 869.

¹⁸⁹ Accord entre le Gouvernement de la République Française et le Gouvernement de la République Dominicaine sur l'Encouragement et la Protection Réciproque des Investissements, Article 7, see Table No 2, *infra*.

Table No. 2
Applicable Law Provisions in IIAs

No	IIA	Text of the applicable law provision (Relevant parts)	Types of counterclaims capable of being lodged
1.	Energy Charter Treaty, 1994, Article 26	(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.	Counterclaims arising out of international law only.
2.	France – Dominican Republic BIT, 1999, Article 7	2. [...] 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. ¹⁹⁰	Counterclaims arising out of: 1. international law; and 2. contracts regarding the particular investment
3.	United States Uruguay BIT, 2005, Article 24	1. Subject to paragraph 3, when a claim is submitted [regarding a breach of an obligation of the substantive provisions of the BIT], the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law. 2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted [regarding an investment authorization or an investment agreement], the tribunal shall apply: (a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or (b) if the rules of law have not been specified or otherwise agreed: (i) the law of the respondent, including its rules on the conflict of laws; and (ii) such rules of international law as may be applicable.	Counterclaims arising out of: 1. international law; 2. an investment contract 3. an investment authorization 4. the host State's domestic laws (or another domestic law as may be applicable by choice of the parties to the agreement/ authorization or according to conflict of law rules.
4.	Bulgaria – Thailand BIT, 2003, Article 9	3. 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.	Counterclaims arising out of: 1. international law; 2. an investment contract; 3. the host State's domestic laws.
5.	China - Cote d'Ivoire	4. [...] The tribunal [...] shall adjudicate in accordance with the law of the Contracting	Counterclaims arising out of: 1. international law;

¹⁹⁰ Unofficial translation.

No	IIA	Text of the applicable law provision (Relevant parts)	Types of counterclaims capable of being lodged
	BIT, 2002, Article 9	Party to the dispute accepting the investment including its rules on the conflict of laws, the provisions of this Agreement as well as the applicable principles of international law.	2. an investment contract; 3. the host State's domestic laws (or another domestic law, as designated by the applicable rules of conflict of laws).
6.	Netherlands-Slovakia BIT, 1991, Article 8	6) The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: <ul style="list-style-type: none"> • the law in force of the Contracting Party concerned; • the provisions of this Agreement, and other relevant Agreements between the Contracting Parties; • the provisions of special agreements relating to the investment; • the general principles of international law. 	Counterclaims arising out of: <ol style="list-style-type: none"> 1. international law; 2. possibly other 'relevant' treaties between the parties to the BIT; 3. an investment contract; 4. the host State's domestic laws.

In the absence of an express provision on applicable law in the IIA, it is the relevant arbitration rules that determine the law applicable to the merits of the dispute, thus those provisions need to be examined as well. In the case of investment treaty arbitration the most relevant instruments are of course the ICSID Convention, as well as the UNCITRAL Arbitration Rules. Even though the provisions on applicable law in the two sets of rules are drafted in a very different manner the outcome when facing an investment treaty arbitration would be virtually the same, i.e. allowing the arbitral tribunal to refer to both domestic and international law.¹⁹¹ Therefore, whether the proceedings are conducted under the one set or the other would not have a particular effect on the assertion of counterclaims.

2. The 'party identity' requirement in investment arbitration context

- For the successful assertion of counterclaims, there is a need of identity between the parties to the proceedings and the respective parties to the substantive obligations arising out of the instrument invoked by the respondent as basis for its counterclaim.
- Regarding contract-based counterclaims by the host State, their admission is subject to the condition that the invoked contract was concluded by the investor itself (to the exclusion of later transferees of rights or subsidiaries), as well as by the State itself (to the exclusion of legally incorporated State entities or third parties);

¹⁹¹ Banifatemi (n 189) 205.

- Regarding host State's domestic law based counterclaims, their admission is subject to the participation in the proceedings of an investor operating/incorporated on the territory of the host State, i.e. subject to its legislative jurisdiction, to the exclusion of a foreign parent company.

The nature of counterclaims, require them to be advanced between the same parties as the ones to the original claim.¹⁹² This requirement means that a respondent in the proceedings would need to have an actionable substantive right against the claimant only, to the exclusion of third parties.

In the context of investment treaty arbitration this requirement poses some specific problems, as the claimant in the dispute is not always the party debtor of obligations to the host State,. The host State itself, especially in a contractual context, is often not the creditor of the investor's obligations. The parties to the dispute may well be not the proper parties to the counterclaim.

In State procedural laws, this type of problems is remedied by the assertion of a possibility to present a claim also against a third party in the original proceedings, as for example a cross-claim. This possibility's interest is limited in the context of arbitration and investment treaty arbitration in particular. Due to the consensual nature of arbitration such claims against a third party to the original dispute will often fall outside of the jurisdiction of the tribunal, as the third party would not have necessarily agreed to arbitration.

i. Proper parties to the contract forming the legal basis for the counterclaim

The invocation of a contract as basis for a State's counterclaim would be possible only if the parties to the dispute in which the counterclaim is invoked coincide with the ones bound by the contract itself, both on the State and the investor's side. In this respect two criteria can be inferred from relevant case law – one regarding the State party to the dispute and another with respect to the investor.

On the State's side, the tribunals have been reluctant to admit counterclaims on the basis of a contract that is not concluded with the State itself or with an organ of the latter.¹⁹³ In this respect it seems logical to apply to counterclaims the same requirements as the ones for the invocation by the investor of a contractual breach on the part of the host State in an IIA based arbitration, namely that the contract is not to be concluded with a State entity having its own legal personality, neither *a fortiori* with a third party.¹⁹⁴

On the investor's side, there is a similar obligation for the State to bring a counterclaim only against the investor protected under the relevant IIA and party to the proceedings, This particular requirement was found not to be met in *Paushok v Mongolia*, and was addressed as an obstacle to the assumption of jurisdiction in

¹⁹² See *Saluka v Czech Republic* (n 41) para 49.

¹⁹³ *Saluka v Czech Republic*, (n 41) para 51 *Hamester v Ghana*, (n 42) para 356.

¹⁹⁴ Crawford (n 156) 13; Kryvoi (n 18) 13-50.

Saluka v Czech Republic. In both cases the parties to the contract invoked as a basis for the State's counterclaim were not the same as the claimant in the particular dispute and were not bound by the agreement in another manner.¹⁹⁵ In view of this requirement of identity of the parties, doctrines such as *alter ego* or piercing the corporate veil might be a source of inspiration for States bringing a counterclaim based on a contract not originally signed by the investor party to the dispute, depending on the applicable law to the question of attribution of the conduct to the parent company.

ii. The party subject to the domestic law obligation forming the legal basis for the counterclaim

In a similar manner that with regards to contractual counterclaims, there is an additional hurdle to the assertion of domestic law counterclaims by the host State in investment treaty arbitration. In the domestic law breach context, the creditor of the relevant obligation is necessarily the host State. On the investor's side it is not usually the claimant to the particular proceedings who is its debtor. It is a local subsidiary that is subject to the relevant domestic law obligations. These local subsidiaries of the investor are rarely parties to the investment dispute. The party to the dispute is usually only the foreign owner of the subsidiary in question, not subject to the domestic laws of the respondent State.

The tribunal in *Saluka v Czech Republic* acknowledged this issue.¹⁹⁶ It was discussed more in detail by the Tribunal in *Paushok v. Mongolia*. The tribunal stated that even though the local subsidiary involved in the dispute was 'omnipresent', it remained not a party to the same dispute,¹⁹⁷ thus the assertion of counterclaims regarding the foreign investor parties to the dispute, would be equivalent to:

[E]xtend the extraterritorial application and enforcement of [the host State's] public laws, and in particular its tax laws, to individuals or entities not subject to and not having accepted to submit to Mongolian public law or its courts.¹⁹⁸

The tribunal dismissed this possibility, as it rightly qualified the admission of such counterclaim to be tantamount to an 'extension of Mongolia's legislative jurisdiction, without any legal basis under international law'.¹⁹⁹

In view of the stated above, unless where the local subsidiary of the investor party to the dispute is also a party to the same proceedings, the only manner of asserting a counterclaim based on the respondent State's domestic laws would be if the breaches

¹⁹⁵ *Saluka v Czech Republic* (n 41) para 50; *Paushok v Mongolia* (n 41) para 696.

¹⁹⁶ *Ibid* paras 40-44.

¹⁹⁷ *Paushok v. Mongolia* (n 41) para. 686.

¹⁹⁸ *Ibid* para. 695.

¹⁹⁹ *Ibid*.

committed by such local subsidiary are found to be attributable to the foreign investor itself. An important question in this respect would be the determination of the law that should be applied to such attribution, however this questions lies beyond the scope of the present report.

3. Contract-based counterclaims in the perspective of conflicting *fora*

- For a successful contract-based counterclaim on the part of the State to be asserted, at the present state of the law, such a contract should not contain its own exclusive dispute resolution clause (independently of whether the investor's claim is based on an umbrella clause or a different standard of protection under the IIA).

The fact that a contract contains its own exclusive dispute resolution clause has been interpreted by tribunals, particularly in *Vivendi v Argentina*, to create an obstacle for the assertion of contractual based claims in investment arbitration in general. Tribunals formulate this obstacle as lack of jurisdiction regarding/inadmissibility of the claim in question, due to the need to uphold the respect of contractual obligations between the parties to the contract, i.e. the use of the principle *pacta sunt servanda*.²⁰⁰

The *Vivendi* reasoning was expressly adopted by the tribunal in the *Saluka v Czech Republic* case with regards to counterclaims based on a contract which did contain its own dispute resolution mechanism, when dismissing the counterclaims advances by the Czech Republic.²⁰¹ The 'fairness' of such symmetrical respect of contractually agreed upon dispute resolution mechanisms, i.e. prohibiting States from bringing contractual counterclaims in front of investment treaty tribunals, in the same manner as investors are prohibited to do so, was noted by scholars.²⁰²

This affirmation would seem also true when faced with an umbrella clause based dispute, which provides for an even more undesirable scenario. The claim invoked by the investor in this case remains a substantive treaty claim²⁰³ – the particular umbrella clause invoked, while the one advanced by the State is one that finds its legal basis only in the contract that it invokes. Thus, the *Vivendi v Argentina* position, relying on the respect of the contractually agreed forum by both parties, would prevent the State from asserting its contract-based counterclaim, in the same manner as when another substantive treaty protection is the basis of the investor's claim.

However, it has been suggested²⁰⁴ that, both for reasons of fairness and for reasons of procedural efficiency the outcome should be different in the case of a dispute based in an umbrella clause. As it was stated in *SGS v Pakistan* 'it would be inequitable if, by

²⁰⁰ *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; *Vivendi Universal S.A. and Compañía de Aguas de Aconquija v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para 98, 41 International Legal Materials (2002), 1135.

²⁰¹ *Saluka v Czech Republic* (n 41) paras. 54-58.

²⁰² Lalive and Halonen (n 50) 152.

²⁰³ Crawford, (n 156) 18-22.

²⁰⁴ Lalive and Halonen (n 50) 152.

reason of the invocation of ICSID jurisdiction, the Claimant could on the one hand elevate its side of the dispute to international adjudication, and on the other preclude the Respondent from pursuing its own claim for damages...'. More than inequitable such a solution would be contrary to the rationale of procedural efficiency and finality of decisions, as two claims based - on the merits – on the same legal instrument would be considered in two different *fora*, thus increasing both the costs of the proceedings and the risk of conflicting decisions.

One solution is for tribunals abstain to exercise jurisdiction when the contract the breach of which is invoked by the investor pursuant to an umbrella clause, contains an exclusive dispute resolution mechanism of its own. This is the position adopted by the tribunal in *SGS v Philippines*.²⁰⁵ However it is not followed by all tribunals, as was illustrated by the *SGS v Paraguay* recent award.²⁰⁶ Therefore the existing standards for interpretation of the tribunal's jurisdiction in view of an umbrella clause might need to be accommodated in order to promote both equity of parties and procedural efficiency.

There is still no unanimity on the effect of such contractual dispute resolution clauses on the tribunal's jurisdiction neither in case law nor doctrine.²⁰⁷ It is preferable for the successful assertion of a contract-based counterclaim, that the contract the State is relying upon does not contain an exclusive jurisdictional provision.

IV. LIMITS OF THE CURRENT SYSTEM AND SUGGESTIONS TO AMELIORATE THE CHANCES OF ASSERTING COUNTERCLAIMS

Before pointing out the particular limits of the current system and offering particular tools for ameliorating the availability of counterclaims, it is important to recapitulate the advantages and disadvantages which their increased availability might bring.

The reasons for not setting the threshold for admitting counterclaims too low can be e.g. the fear of opening for the host States a possibility of adjudicating purely domestic disputes arising from the general municipal law and allowing for an extra-territorial enforcement of these. A pragmatic concern is also the question of an international arbitral tribunal's capability to deal with highly technical and complex aspects of the national laws, e.g. in the field of tax law. Furthermore, if international investment law is viewed as a species of international judicial review of the acts of the sovereign directed towards individuals, that is to say a sort of international

²⁰⁵ *SGS v Philippines* (n 202) 155.

²⁰⁶ *Société Générale de Surveillance S.A. v Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012, paras 175-185

²⁰⁷ See for the opposite opinion: *SGS v Paraguay*, (n 208) paras 175-185; *Aguas 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.

administrative law, the availability of counterclaims to the host State is at odds with this conception of international investment law. As the counterclaims have been historically admitted in investment arbitration and were also enshrined in the applicable arbitration rules, it is submitted that such view of international investment arbitration is unduly reductive, however.

Thus turning to the advantages of increased availability of counterclaims, it is argued that policy reasons weighing in favour of this availability are overwhelming. First, it is the reason of efficiency and economy of the settlement of investment disputes which calls for all aspects of the dispute to be heard and decided in one *forum*. Neither party is forced to pursue the remedy of other party's alleged wrongdoings in a different *forum*, which saves resources spent in the proceedings and prevents conflicting decisions. Second, the enforcement of international awards against the investor is also increased in comparison with the judgments of domestic judiciary and goes in line with the original intention of the drafters of the ICSID Convention. Furthermore, the States have on many occasions interest in having different types of their claims heard in a neutral *forum*, as this can improve their credibility and avoid them being accused of bias of their domestic courts. Finally, having counterclaims as a general possibility can work as prevention against abusive and frivolous investors' claims.

Several obstacles which the States encounter when asserting counterclaims can be inferred from the above analysis and need to be remedied in order to enhance the easier assertion of counterclaims. These obstacles are posed either by the treaty language employed in IIAs and the applicable rules or by the tribunals' restrictive reading of the applicable rules:

- **Narrowly worded jurisdictional offer in the IIA** which excludes the possibility of States to assert counterclaims and limit the material scope of jurisdiction of the tribunal only to the host State's obligations under the IIA;
- **Lack of identity between the parties** to the dispute and the proper parties to the instrument invoked as legal basis for the host State's counterclaim;
- **Treaty provisions limiting the applicable law to the merits** seen by tribunals as a hurdle. Although this type of provisions is not conceptually relevant to the jurisdiction of the tribunal, they must be considered as the reference to them forms part of the current arbitration tribunals' practice;
- **Lack of investors' obligations** in the IIAs and under international law in general;
- **Tribunals' restrictive approach to the connectedness requirement** limits artificially the scope of types of obligations that can be invoked as bases for counterclaims (mainly regarding host State's general domestic law obligations).

The obstacles existing under the current state of law can be remedied either through new approaches of investment tribunals to the interpretation of certain requirements, particularly to the criterion of the connectedness. The rest of the hurdles are best addressed through treaty amendments. These amendments would make clear that counterclaims can be presented and what are the conditions for their admissibility. These treaty amendment proposals are presented in the following part of this section.

Such proposals can be made both with regards to procedural provisions of the IIAs and the substantive standards therein.

A. JURISDICTION— INCLUDING COUNTERCLAIMS IN THE JURISDICTION OF THE TRIBUNAL

From the analysis above two different patterns can be discerned for the inclusion of counterclaims in the scope of jurisdiction of tribunals reviewing investment treaty based disputes, which can be used in conjunction or separately.

On the one hand, it seems that tribunals see the inclusion in an IIA of a broad dispute settlement provision as including counterclaims – based on sources both in the IIA and outside of it – in their jurisdiction. Such a provision needs both to give a broad definition of the disputes which can be subject to the tribunal’s jurisdiction (‘all/any disputes’ or ‘all/ any disputes concerning investments’), as well as to provide the State with *locus standi* as possible claimant in the dispute also (the dispute shall be submitted ‘by either party’ or ‘by request of one or the other of the parties’ to arbitration).

1. First option: Broad definition of dispute and ample *locus standi*

Broad definition of disputes in the jurisdiction of the tribunal and giving to both parties to the dispute *locus standi* as claimant (good example is the France-Dominican Republic BIT:

Any dispute concerning investments between one of the contracting parties and a national or company of the other contracting party is settled amicably between the two parties concerned. If such a dispute was not settled within a delay of six months starting from the moment when it was brought by one or the other party to the dispute, it is submitted by request of one or the other of the parties, [to arbitration].²⁰⁸

Such a provision might, however, have the adverse effect of bringing an equally broad scope of claims on the side of investors against the State in the tribunal’s jurisdiction.

²⁰⁸ Emphasis added.

Thus, another option for the provision jurisdiction of tribunals over counterclaims asserted by the State, even in the case of a narrow dispute settlement provision in the IIA, is the express inclusion of counterclaims in the scope of jurisdiction of the tribunal.

In any case, it seems also useful to provide for an indication as to which connecting factor should be applied by the tribunal for counterclaims to be admitted. It is argued throughout this paper that the particular investment which is in the dispute is a proper connecting factor, as it would be easier to enhance.

2. Second option: Express inclusion of counterclaims

Express inclusion of counterclaims in the dispute settlement offer (this option is of assistance regarding the interpretation of the connectedness requirement too):

The Respondent shall have the right to assert any and all counterclaims which arise out of the investment that constitutes the subject matter of the primary claim.

It can be argued that this provision does in effect extend the jurisdiction of the tribunal. The effect of the provision depends on its intersection with other treaty clauses, particularly with the arbitration offer. If we consider the use of this provision in the context of a narrow jurisdictional offer limited only to the host State's treaty obligations, this provision would effectively put respondent in a position of being able to counterclaim on a larger scope of causes of action than the investor bringing the original claim. This would switch the perceived imbalance between the possibility of claiming under IIAs caused by the narrow offer to arbitrate to the other side of the scale, i.e. favouring the host State. Therefore, this provision should be rather considered in conjunction with a broad offer to arbitrate.

In the case of a broad jurisdictional provision described above, this provision would merely expressly confirmed the availability of counterclaims and would further specify what sort of counterclaims can be brought against the investor, i.e. only those meeting the connecting factor of "investment that constitutes the subject matter of the primary."

Lastly, when the jurisdictional offer of the tribunal is worded in similar terms as the most of the U.S. BITs [see above U.S.-Uruguay BIT]²⁰⁹ the provision can be formulated as follows in order to limit the effect of extending the tribunal's jurisdiction:

'The Respondent shall have the right to assert any and all counterclaims which arise

²⁰⁹ Jurisdiction of the tribunal extends to disputes concerning (A) an obligation of the host state under Articles 3 through 10, (B) an investment authorization, or (C) an investment agreement.

out of the investment that constitutes the subject matter of the primary claim and are within the jurisdiction of the tribunal.’

B. JURISDICTION– ATTRIBUTION OF OBLIGATIONS TO THE INVESTOR PARTY TO THE DISPUTE

In case of espousal of claims of the locally incorporated company which is usually the party to contracts concluded with the host State and is subject to the host State’s local laws, this provision, included in the dispute settlement provision in the IIA might offer the possibility to assert counterclaims directly against the foreign investor.

When an investor submits a claim on behalf of an enterprise of the respondent State that is a juridical person that the investor owns or controls directly or indirectly, any and all breaches of the enterprise’s legal obligations consistent with the present treaty towards the Respondent State shall be deemed attributable to the investor.

This provision attempts to address the problem of locally incorporated companies being treated as an investment and, thus, not being a party to the arbitration proceedings. The clause touches upon a delicate question of piercing of the corporate veil and separate personality of corporations. In this respect, however, the foreign investor would agree to assume potential responsibility voluntarily, because the possibility of such attribution is available only when the foreign investor decides to bring a claim where the locally incorporated corporation is considered as its investment. The tribunal would decide the existence of any breach of the local subsidiary as an incidental question. A potential attribution of the subsidiary’s responsibility can be viewed as a trade off for the access to the Investor-State dispute settlement mechanism. It is assumed that under normal circumstances, this clause should not be considered problematic. The clause operates with the logical reservation that only the legal obligations that are not in violation of the IIA can be attributed.

C. SUBSTANTIVE OBLIGATIONS OF INVESTORS/INVESTMENTS IN IIAS

1. Compliance with host State local laws

Investors and investments of one Contracting Party in the territory of the other Contracting Party shall comply with all laws and regulations in force in that Party, which are consistent with its obligations in the present Treaty.

This provision makes the compliance with local legislation a treaty obligation on the part of investor. This would allow the tribunal to hear the host State counterclaims even when the State’s offer to arbitrate is worded in a narrow terms, limited to international obligations under the treaty. The requirements on the requisite

connectedness must, nevertheless, apply to any counterclaim based on this treaty provision.

2. Respect of contract obligations (to be included when an umbrella clause is present in the relevant IIA)

i. First option: A mirror/reverse umbrella clause

Similarly as the previous provision, the reverse umbrella clause makes contractual commitments with the State treaty obligations under which the State will be able to counterclaim:

Investors and investments of each Contracting Party shall observe any obligation it has entered into with the other Contracting Party.

ii. Second option: Limited to counterclaims

In the case of assertion of a claim on the basis of Article X [umbrella clause] of this Treaty the Respondent shall have the right to assert any and all counterclaims arising out of the instrument incorporating the obligations assumed towards the investor.

This option works on the presumption that State would want to keep a narrow jurisdictional offer in the treaty, which would be limited only to its obligations under the treaty. On the other hand, the reason for having such a narrow offer in the treaty on the part of State is because the State wants to limit the ambit of claims investors will be able to bring. It may be asked how does an offer limited to treaty obligations including an umbrella clause really limit the ambit of possible claims to be brought by investor. For the investor will be in fact able to bring the whole variety of State conducts formulated as a treaty claim and such purportedly narrow jurisdictional offer in the vast majority of cases will not have the intended effect.

Nonetheless, this provision may be viewed as a possible tool available for the treaty negotiation, especially between two States having unequal bargaining power. It can be in the interest of one of the States (the one who is expected to be more often a home State of investors) not to allow host State's counterclaims. The other State, thus, might be able to have at least the contractual counterclaims heard.

D. APPLICABLE LAW PROVISIONS IN THE IIA

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.

For the easier assertion of counterclaims, in view of arbitral tribunals practice to

consider applicable law clauses as relevant for the scope of their jurisdiction, the applicable law clause in the IIA, if at all present, should contain a reference to the domestic law of the host State, in order to include in the permissible causes of action for potential counterclaims both contracts and investor's obligations under the host State's domestic law.

BIBLIOGRAPHY

MONOGRAPHS:

- Cappelletti, M (ed)** *International Encyclopedia of Comparative Law*, Vol. XVI, Civil Procedure (Brill Nijhoff)
- Aldrich, G H** *The Jurisprudence of the Iran-United States Claims Tribunal* (Clarendon Press 1996)
- Caron, D, Caplan, L, Pellonpää, M** *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press 2006)
- Douglas, Z** *The International Law of Investment Claims* (Cambridge University Press 2009)
- ICSID** *History of the ICSID Convention*, Vol. 2 (ICSID 1970)
- Pauwelyn, J** *Conflict of Norms in Public International Law: How the WTO Relates to Other Rules of International Law* (Cambridge 2003)
- PCIJ** *The Permanent Court of International Justice: Statutes and Rules* (A. W. Sitjhoff's Uitgeversmaatschappij 1922)
- Salacuse, J** *The Law of Investment Treaties* (Oxford University Press 2010)
- Schreuer, C** *The ICSID Convention: A Commentary* (2nd ed Cambridge University Press 2009)
- Simpson, J L, Fox, H** *International Arbitration: Law and Practice* (Stevens and Sons Limited 1959)

BOOK CONTRIBUTIONS:

- Banifatemi, Y** 'The Law Applicable in Investment Treaty Arbitration' in K Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 191
- Paulsson, J** 'Jurisdiction and admissibility', in G Aksen, K-H Böckstiegel et al (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner* (ICC Publishing 2005) 601
- Schreuer, C** 'Denunciation of the ICSID Convention and Consent to Arbitration', in M Waibel, A Kaushal, et al (eds), *The Backlash against Investment Arbitration*, (Kluwer Law International 2010) 353
- Toral, M,** 'The State as a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations' in M. Waibel, A. Kaushal, et al. (eds),

Schultz, T *The Backlash Against Investment Arbitration* (Kluwer Law International 2010) 585

ARTICLES:

Asgarkhani, A 'Compromise and Cooperation at the Iran-United States Claims Tribunal', 19(2) *Arb. Int'l* (2003) 149

Ben Hamida, W 'L'arbitrage Etat-investisseur cherche son équilibre perdu : Dans quelle mesure l'Etat peut introduire des demandes reconventionnelles contre l'investisseur privé ?' in *International Law FORUM du droit international* 7 (2005) 261

Crawford, J 'Treaty and Contract in Investment Arbitration' *The 22nd Freshfields Lecture on International Arbitration, London 29 November 2007* (Freshfield Bruckhaus Deringer 2007)

Hanessian, G 'General Principles of Law' in the Iran-U.S. Claims Tribunal' 27 *Columbia J. Transnat'l L* (1989) 309

ICSID 'Rules of Procedure for Arbitration Proceedings (Arbitration Rules), 1968', 1 *ICSID Reports* (1993) 63

Kryvoi, Y 'Counterclaims in Investor-State Arbitration', *LSE Law, Society and Economy Working Papers* 8 (2011), 3

Lalive, P,
Halonen, L 'On the Availability of Counterclaims in Investment Treaty Arbitration', *Czech Yearbook of Int'l L* Vol. II (2011) 141

Larschan, B
Mirfendereski,
G 'The Status of Counterclaims in International Law, with Particular Reference to International Arbitration Involving a Private Party and a Foreign State' 15 *Den. J. Int'l L. & Pol'y* (1986-1987) 11

Marossi, A 'Iran-United States Claims Tribunal, Claims, Counterclaims, Dual Nationality and Enforcement' in 23(6) *J. of Int. Arb* (2006) 493

Paulsson, J 'Arbitration Without Privity', 10 *Foreign Inv't L J*, No. 2 (1995) 232

Pauwelyn, J,
Salles, L E 'Forum Shopping Before International Courts: (Real) Concerns, (Im)Possible Solutions, 42 *Cornell Int'l L J* (2009) 77

Shihata, F I,
Parra, A 'The Experience of the International Centre for Settlement of Investment Disputes' 14 *ICSID Review – FILJ* (1999)

Van Harten, G
Loughin, M 'Investment Treaty Arbitration as a Species of Global Administrative Law' 17 *EJIL* (2006) 121

Veenstra-Kjos,
H 'Counterclaims by Host States in Investment Treaty Arbitration' 4 (4) *TDM* 1 (2007) 12.

Vohryzek-Griest, A 'State Counterclaims in Investor-State Disputes: a History of 30 Years of Failure', 15 *International Law, Revista Colombiana de Derecho Int'l* (2009) 85

OTHERS:

J Paulsson and G Petrochilos, *Revision of the UNCITRAL Arbitration Rules: A Report* (2006), <http://www.uncitral.org/pdf/english/news/arbrules_report.pdf> accessed 8 April 2012.

J. Ruggie, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Delivered to the Human Rights Council', U.N. Doc. A/HRC/4/35 (9 February 2007)

Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf> accessed 19 April 2012

United Nations Commission on International Trade Law, *Report of the Working Group on Arbitration and Conciliation on the work of its forty-sixth session (New York, 5-9 February 2007)* A/CN.9/619, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V07/818/18/PDF/V0781818.pdf?OpenElement>> accessed 8 April 2012.

United Nations Commission on International Trade Law, *Report of the Working Group on Arbitration and Conciliation on the work of its fiftieth session (New York, 9-13 February 2009)* A/CN.9/669, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V09/813/43/PDF/V0981343.pdf?OpenElement>> accessed 8 April 2012

INVESTMENT ARBITRATION DECISIONS ON COUNTERCLAIMS :

ICSID: *S.A.R.L. Benevenuti & Bonfant v. Congo*, ICSID Case No. ARB/77/2, Award 8 August 1980 1 ICSID Reports (1993) 362

Klöckner Industrie-Anlagen GmbH and others v Republic of Cameroon and Société Camerounaise des Engrais SA, ICSID Case No. ARB/81/2, Award 21 October 1983, 2 ICSID Reports (1994) 9

Amco Asia Corporation, Pan American Development Limited, PT Amco Indonesia v Republic of Indonesia, Award 20 November 1984, 1 ICSID Reports (1993) 413

Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea, ICSID Case No. ARB/84/1, Award 21 April 1986, English

translation of French original 3 ICSID Reports (1995) 13

Maritime International Nominees Establishment (MINE) v Republic of Guinea, ICSID Case No. ARB/84/4, Award 6 January 1988, 4 ICSID Reports (1997) 61

Amco Asia Corporation and others v The Republic of Indonesia, Resubmitted Case, ICSID Case No. ARB/81/1, Decision on Jurisdiction 10 May 1988, 1 ICSID Reports (1993) 543

Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award 20 May 1992, 3 ICSID Reports (1995) 189

Alex Genin and others v. Estonia, ICSID Case No. ARB/99/2, Award 25 June 2001

Desert Line Projects LLC v. Yemen, ICSID Case No. ARB/05/17, Award 6 February 2008

Gustav W. F. Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award 18 June 2010

RSM Production Corporation and others v. Grenada, ICSID Case No. ARB/10/6, Award 10 December 2010

Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award 7 December 2011

Ad hoc tribunals *Saluka Investments B.V. v Czech Republic*, UNCITRAL, Decision on Jurisdiction Over the Czech Republic's Counterclaim 7 May 2004

under UNCITRAL Rules: *Sergei Paushok et al v, The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability 28 April 2011

SCC: *Limited Liability Company AMTO v Ukraine*, SCC Case No. 080/2005 (ECT), Final Award 26 March 2008

OTHER DECISIONS:

PCIJ: *Case concerning the Factory at Chorzow (Germany v. Poland)*, Claim for Indemnity, Merits, Judgment of 13 September 1928, PCIJ Series A, No. 17 (1928) 38

ICJ: *Asylum case (Colombia v. Peru)*, Judgment of 20 November 1950, ICJ Reports 1950, 265

Rights of Nationals of the United States of America in Morocco (France v. U.S.), Judgment of 27 August 1952, ICJ Reports 1952, 176

Application of the Convention on the Prevention and Punishment of the

Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Order of 17 December, ICJ Reports 1997, 243

Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Order of 10 March 1998, ICJ Reports 1998, para 37

Jurisdictional Immunities of the State (Germany v. Italy), Order of 6 July 2010, General List, No. 143

PCA: *Dr Horst Reineccius, First Eagle SoGeb Funds, Inc., Mr Pierre Mathieu and la Société de Concours Hippique de la Chatre v Bank of International Settlements*, Permanent Court of Arbitration, Partial Award of 8 January 2001, Final Award of 19 September 2003

ICS Inspection and Control Services Limited (United Kingdom) v Republic of Argentina, PCA Case No. 2010-9 (Award on Jurisdiction) (10 February 2012)

<http://italaw.com/documents/ICS_v_Argentina_AwardJurisdiction_10Feb2012_En.pdf> accessed 11 April 2012.

Iran-United States Claims Tribunal: Case No.A/2 Decision of 13 January 1982

Gould Marketing, Inc. v. Ministry of National Defense, Case 49, Award ITL 24-49-2, 27 July 1983, reprinted in Iran-United States Claims Tribunal Reports, vol. 3, 151–152

Westinghouse Electric Corp. v Islamic Republic of Iran, Case No. 389, 12 February 1987, Award 6 Iran-US CTR II (1984)

American Bell International Inc. v. Islamic Republic of Iran, Case No. 48, Award, 31 May 1984, 6 Iran-US CTR II (1984) 83

Harris International Telecommunications, Inc. v. Iran, Partial Award of 2 November 1987; 17 Iran-US CTR 3

Case No. B1, Interlocutory Award, 9 September 2004

ICSID: *Vivendi Universal S.A. and Compañía de Aguas de Aconquija v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment 3 July 2002, 41 International Legal Materials (2002), 1135

CMS Gas Transmission Co. v. the Argentine Republic (ICSID Case No. ARB/01/8), Decision on Objections to Jurisdiction 17 July 2003

SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction 6 August 2003, 18 ICSID Review – FILJ (2003)

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

LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. the Argentine Republic, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction 30 April 2004

Enron Corporation and Ponderosa Assets L.P. v. the Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), 2 August 2004

World Duty Free Company Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award 6 October 2006

Agua del Tunari v Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction 21 October 2005

Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009

Europe Cement Investment and Trade SA v Republic of Turkey, ICSID Case No. ARB(AF)/07/2, Award 13 August 2009

Cementownia "Nowa Huta" SA v Turkey, ICSID Case No ARB(AF)/06/2, Award 11 September 2009

Itera International Energy LLC and Itera Group NV v. Georgia, ICSID Case No. ARB/08/7, Decision on Admissibility of Ancillary Claims 4 December 2009

Libananco Holdings Co Limited v Republic of Turkey, ICSID Case No. ARB/06/8, Award 2 September 2011

Société Générale de Surveillance S.A. v Republic of Paraguay, ICSID Case No. ARB/07/29, Award, 10 February 2012

ANNEXES

Table No. 3
Contract-based Counterclaims

Case	Title of Jurisdiction	Forum	Claim	Counterclaim	Outcome
<i>S.A.R.L. Benvenuti & Bonfant</i> v <i>People's Republic of the Congo</i>	Article 12 of the Agreement between Claimant and Respondent	ICSID Case No. ARB/77/2	1. Compensation for non-payment of the capital stock; 2. Non fulfilment of contractual obligations by the Respondent; 3. Seizure of the company by the Respondent.	1. Damages for non-payment of duties and taxes on imported goods; 2. Damages for alleged overpricing of raw materials; 3. Damages for alleged defects on the construction of the plant; 4. Damages for intangible losses, among others.	Tribunal found jurisdiction to entertain Respondent's counterclaim. It dismiss them due to insufficient evidence in their support.
<i>Klöckner Industrie-Anlagen</i> v <i>United Republic of Cameroon and Société Camerounaise des Engrais</i>	Invoked by Claimant: Article 18 of Supply Contract for Fertilizer	ICSID Case No. ARB/81/2	Compensation for outstanding balance of the price for supplying the factory.	Misrepresentation by Claimant of its management capabilities	Tribunal assumed jurisdiction over the counterclaim as it was 'an indivisible whole' with the main claim and shared 'a common origin, identical sources and an operational unity' with it. Counterclaim was rejected as Respondent acted with full understanding of its actions, and could no have been

Factory

Case	Title of Jurisdiction	Forum	Claim	Counterclaim	Outcome
	Invoked by Respondent: Article 22 of Protocol of Agreement and Article 21 of Establishment Agreement				mislead by claimant. Annulment Committee reaffirmed original tribunal's reasoning.
<i>Amco Asia Corporation and others</i> v <i>Republic of</i>	Article IX of P.T. Amco Indonesia's application (local subsidiary)	ICSID Case No. ARB/81/1	Compensation for Jakarta's Court order to rescind the Lease and Management Contract and cancellation of P.T. Amco's license by Respondent	<u>Before the first tribunal:</u> Payment of all taxes and import duties, except for the 'tax holiday' granted by the license.	The first tribunal rejected the counterclaim as they found P.T. Amco's license revocation to be illegal. The annulment committee reversed this finding.

Counterclaims in Investor-State Dispute Settlement (ISDS) under International Investment Agreements (IIAs)

Case	Title of Jurisdiction	Forum	Claim	Counterclaim	Outcome
<i>Indonesia</i>				<u>Before the resubmission tribunal:</u> ‘Systemic course of tax evasion’ by Claimant.	The resubmission tribunal found the tax evasion was outside of the jurisdiction of the Centre, as the obligation no to engage in tax fraud is a general obligation of law (not especially contracted for) and does not arise directly out of the investment (Art. 25 ICSID).
<i>Atlantic Triton Company Limited</i> v <i>People’s Revolutionary Republic of Guinea</i>	Joint Venture Contract between Claimant and Respondent.	ICSID Case No. ARB/84/1	Payment of sums due, management costs and damages for prejudice suffered.	Damages and interest for breach of Claimant’s contractual obligations under the Joint Venture.	Tribunal assumed jurisdiction over the counterclaim. The breach was not attributable to the Claimant. Counterclaim was taken into considerations when awarding damages.
<i>Southern Pacific Properties (Middle East) Limited</i> v <i>Arabic Republic</i>	Article 8 of Law No. 43 of 1974 (investment protection law).	ICSID Case No. ARB/84/3	Compensation for investment made pursuant to a cancelled joint venture agreement with the Government to develop a tourist complex at the Pyramids Oasis.	1. Non-compliance with joint venture agreement, i.e. transforming the project into a residential complex; 2. Absence of touristic elements in the project’s design;	None of the alleged breaches were committed by the Claimant; Egypt did not raise the issues before cancelling the project.

Case	Title of Jurisdiction	Forum	Claim	Counterclaim	Outcome
<i>of Egypt</i>				3. Refusal to cooperate in the relocation of the project.	
<i>Maritime International Nominees Establishment (MINE) v Republic of Guinea</i>	Article XVIII of Agreement between Claimant and Respondent	ICSID Case No. ARB/84/4	Breach of provisions of the Agreement to mine bauxite in conformity with a joint venture agreement.	1. Reimbursement of legal fees incurred by Respondent to reverse outcomes of Claimant's actions in breach of the arbitration agreement (AAA arbitration and US Courts); 2. Reimbursement of legal expenses incurred by Respondent to release attachments made pursuant to the aforementioned legal actions.	1. Reimbursement of legal fees was rejected as Respondent failed to raise the objection on time before the AAA tribunal. 2. Payment of legal expenses to release attachments was admitted and granted. (USD210,000.00, 33% less than original request).
<i>RSM Production Corporation v Grenada</i>	Article 26 of the Agreement between Claimant and Respondent for the exploration	ICSID Case No. ARB/05/14	Denial of exploration license by Respondent in breach of the Agreement.	1. Claimant fraudulently induced Respondent to conclude the agreement through misrepresentation; 2. Claimant failed to take all reasonable measures to remove causes of <i>force majeure</i> ; 3. Claimant damaged local	Tribunal denied all counterclaims: 1. Claimant misrepresentation was made in good faith, so it was not fraudulent; 2. Lack of causation in the <i>force majeure</i> counterclaim;

Counterclaims in Investor-State Dispute Settlement (ISDS) under International Investment Agreements (IIAs)

Case	Title of Jurisdiction	Forum	Claim	Counterclaim	Outcome
	and extraction of offshore oil and gas.			fishermen through unauthorized research.	3. Damages to fishermen did not arise out of the investment (applying <i>Klöckner</i> criteria).

Table No. 4
Treaty-based Counterclaims

Case	Title of Jurisdiction	Forum	Claim	Counterclaim	Outcome
<i>Alex Genin, Eastern Credit Limited, Inc. & A.S. Baltoil v Republic of Estonia</i>	Article VI of US – Estonia BIT.	ICSID Case No. ARB/99/2	Revocation of banking license of an Estonian bank controlled by Claimant.	Some commercial transactions of Claimant where made with speculative purposes up to USD3,400,000.00.	Tribunal assumed jurisdiction over counterclaim, but rejected it on the merits because of the inconsistency of its presentation before the tribunal.
<i>Spyridon Roussalis v Romania</i>	Article 9 of the Greece – Romania BIT	ICSID Case No. ARB/06/1	Malicious and unjustifiable acts by the Romanian government against the Claimant’s investment which constitutes a breach of FET standard and indirect expropriation.	Enforcement of contractual pledge made by Claimant’s local subsidiary; Request to Tribunal to issue a declaration of the illegality of another Claimant’s subsidiary’s resolution for the increase of share capital.	The Tribunal declined jurisdiction over Respondent’s counterclaims due to the its limited jurisdiction as expressed in the offer to arbitration in the IIA (only claims by investor regarding obligations of the host State) Arbitrator W. Michael Reisman submitted a separate declaration. He considers that when parties consent to ICSID arbitration, the consent to counterclaims is ‘ <i>ipso facto</i> imported’. He advanced policy

Counterclaims in Investor-State Dispute Settlement (ISDS) under International Investment Agreements (IIAs)

Case	Title of Jurisdiction	Forum	Claim	Counterclaim	Outcome
					reason to support his contention, i.e. efficiency, resolution of all investment disputes in a single neutral forum.
<i>Saluka Investments BV v Czech Republic</i>	Article 8 of the Netherlands – Czech and Slovak Republics BIT	<i>Ad hoc</i> (UNCITRAL Arbitration Rules).	Discriminatory, unfair and expropriatory forced administrative actions and sale by Respondent of assets in one partially State owned commercial bank in which Claimant held shares.	<ol style="list-style-type: none"> 1. Non-observance by Claimant of the Share Purchase Agreements (of the same commercial bank). 2. Violations of domestic commercial legislation. 	<ol style="list-style-type: none"> 1. Tribunal had no jurisdiction over the first counterclaim because an exclusive dispute resolution provision contained in the same agreement; 2. Tribunal had no jurisdiction over the second type of counterclaims, as general domestic law obligations are not connected with the main claim (<i>Klöckner</i> criteria).
<i>Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia</i>	Article 6 of the Russia – Mongolia BIT	<i>Ad hoc</i> (UNCITRAL Arbitration Rules)	Legal measures (tax impositions) taken by Respondent affected Claimant’s mineral extraction activity negatively.	<ol style="list-style-type: none"> 1. Violations by Claimants of its obligation under the license agreement to extract gold; 2. Non-payment of fees related to foreign workers permits; 3. Tax evasion; 4. Non-compliance with environmental obligations towards Mongolia 	<p>Tribunal declared it had no jurisdiction over counterclaims as:</p> <ol style="list-style-type: none"> 1. They arose of Mongolian domestic law; 2. There were not connected to the main claim; 3. Claimants were not the proper debtor of the obligations.

Case	Title of Jurisdiction	Forum	Claim	Counterclaim	Outcome
<p><i>Gustav F. W. Hamester GmbH & Co KG</i> v <i>Ghana</i></p>	<p>Article 12 of the Germany – Ghana BIT</p>	<p>ICSID Case No. ARB/07/24</p>	<p>Breaches by a Respondent of a Joint Venture contract with Claimant for the establishment and operation of cocoa production plant</p> <p>Violations of the BIT regarding Full Protection and Security, FET and expropriation.</p>	<p>Damages for losses the Respondent has suffered as a result of Claimant’s conduct.</p>	<p>Counterclaim was dismissed because tribunal had no jurisdiction over it based on the language of the BIT.</p>

Counterclaims in Investor-State Dispute Settlement (ISDS) under International Investment Agreements (IIAs)

Case	Title of Jurisdiction	Forum	Claim	Counterclaim	Outcome
<p><i>Desert Line Projects LLC</i></p> <p>v</p> <p><i>The Republic of Yement</i></p>	<p>Article 11 of the Yemen – Oman BIT</p>	<p>ICSID Case No. ARB/05/17</p>	<p>Breaches by Respondent of contractual obligations a Road Construction Contract.</p> <p>Breaches were previously dealt with in a Settlement Agreement (which Respondent imposed on Claimant) and later in domestic arbitration</p>	<p>1. Damages for Claimant’s breaches of obligations under the Settlement Agreement;</p> <p>2. Damages for unfulfilled obligations under the domestic arbitral award.</p>	<p>The tribunal made no considerations on jurisdiction.</p> <p>Counterclaims were rejected on the merits in accordance with the principle of estoppel (reliance on the nullity of a document Respondent itself imposed).</p> <p>Counterclaim was considered in the calculation of damages.</p>
<p><i>Limited Liability Company AMTO</i></p> <p>v</p> <p><i>Ukraine</i></p>	<p>Article 26 of the Energy Charter Treaty</p>	<p>SCC Case No. 080/2005</p>	<p>Various violations of ECT (fair and equitable treatment, non-discrimination, umbrella clause, effective means obligation etc.) by measures in relation to the Claimant's participation in EYUM-10 company.</p>	<p>Reimbursement of arbitral costs and expanses, and for non-material injury to the host State's reputation.</p>	<p>Tribunal found that the host State has not presented any basis in the applicable law provision (limited to the rules of international law) for a claim of nonmaterial injury to reputation and dismissed the counterclaim.</p>