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**On the Availability of  
 Counterclaims  
 in Investment Treaty  
 Arbitration**

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*Abstract | This article explores the obstacles that may exist for states to bring counterclaims before an investment treaty tribunal and analyses the reasoning of the tribunals that have refused to hear such counterclaims. In relation to the key question of jurisdiction, the ICSID Convention and the UNCITRAL Rules both provide in principle for counterclaims. The question thus often becomes one of consent and whether an investor-state dispute resolution provision in a BIT encompasses counterclaims – an issue that always requires careful consideration of the treaty language. The investor’s consent is also discussed as well as the law applicable to such counterclaims. In order for counterclaims to be admissible they must be connected to the primary claims, but the nature of such a connection is not self-evident. The article concludes that the test established in the May 2004 decision in *Saluka Investments BV v. Czech Republic* was too strict, and leads to it being near-impossible for states to succeed in having their counterclaims heard, which is regrettable.*

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- 7.01.** Investment treaty arbitration is often seen as a form of internationalised administrative law<sup>1</sup> whereby the respondent state is brought to task for treating a foreign investor in a manner that violates its treaty obligations. However, on closer look there is nothing that fundamentally prevents the mechanism from being used also to adjudicate the state's grievances against the investor. It is undoubtedly the case that
- ... the investor may at all times choose to consent to the admissibility of the host State's counterclaim; which it may be advised to do, considering the time and money that can be saved by consolidating the parties' claims in one set of proceedings*<sup>2</sup>.
- 7.02.** As laudable as such strive for efficiency is, it is unlikely to occur in practice. From the point of view of the investor there is nuisance value in forcing the state to initiate its claims before a separate forum<sup>3</sup> – a concern that often plays a role in arbitration and litigation strategy – with a potential deterrent effect that will lead to such claims never being heard. There is also the more “presentable” concern of turning the eye of the tribunal away from the state's actions and focusing more on the behaviour of the investor, with the risk of detrimental effect on the tribunal's perception of the main claims as well. For these and a multitude of other possible reasons, litigants have, as a practical matter, throughout time sought to challenge jurisdiction of an arbitral tribunal to hear the claims of their adversaries once a dispute has arisen. As a result, trying to get investors to agree to hear all disputes before the same tribunal for the sake of efficiency seems in most cases unrealistic<sup>4</sup>.
- 7.03.** This article will explore what are the obstacles that may exist for states to bring counterclaims before an investment treaty tribunal and whether tribunals when they have refused to hear such counterclaims have been correct to do so or not<sup>5</sup>.

<sup>1</sup> Gus van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 (1) EJIL 121 (2006); Rudolph Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 INTERNATIONAL LAW AND POLITICS 953, 970 (2005).

<sup>2</sup> Hege Elisabeth Veenstra-Kjos, *Counterclaims by Host States in Investment Treaty Arbitration*, 4 (4) TDM 1 (2007).

<sup>3</sup> Whether before domestic courts or a separate arbitral forum, depending on the nature of the counterclaims and other circumstances.

<sup>4</sup> Investors are much more willing to agree to consolidation and other efficiency devices when the question is one of hearing more of *their* claims, or claims of their fellow shareholders or other related parties, in a single set of proceedings: see, eg. the *Aguas and Vivendi v. Argentina* case, where the tribunal issued a single decision on jurisdiction, even though the proceedings brought by the three individual shareholders were not only brought under different BITs, but even governed by different arbitration rules: *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction of August 3, 2006, paras. 7 and 19.

<sup>5</sup> Only one publicly available investment treaty award considers counterclaims on their merits, but summarily dismisses them without any detailed (or useful) analysis: *Genin and others v. Estonia*, ICSID Case No. ARB/99/2, Award of June 25, 2001,

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- 7.04. We will consider first below the question of jurisdiction and conclude that both the ICSID Convention<sup>6</sup> and UNCITRAL Rules<sup>7</sup> in principle provide for counterclaims. We will next look at the parties' consent and what kind of language is necessary for an investor-state dispute resolution provision in a Bilateral Investment Treaty (BIT) to encompass counterclaims. We will also discuss the investor's consent and what must the law applicable to the dispute be for counterclaims to be possible. We will then turn to the connection that must exist between the main claims and counterclaims, focusing in particular on the May 2004 Decision on Jurisdiction over the Counterclaims in *Saluka Investments BV v. Czech Republic*<sup>8</sup>. In our view the test established in that case was probably too strict, and leads to it being near-impossible for states to succeed in having their counterclaims heard by investment treaty tribunals.

### I. Determining Jurisdiction under the ICSID Convention and UNCITRAL Rules

- 7.05. In order for counterclaims to be successful, the first step is naturally to ensure that the tribunal has jurisdiction to hear them. The ICSID Convention and the UNCITRAL Rules in principle provide for counterclaims, so the starting point should be to ascertain whether in the right factual circumstances a tribunal has jurisdiction to hear them.

#### I.1. ICSID Rules

- 7.06. Article 46 of the ICSID Convention provides as follows:  
*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.* (Emphasis added.)<sup>9</sup>
- 7.07. First it should be noted that the ICSID Convention thus specifically provides for counterclaims. This is of course standard in contractual disputes, of which ICSID hears some every year, but nothing in the text of Article 46 suggests that it is limited to contractual disputes and excludes investment treaty arbitrations.

paras. 376-8. The tribunal did not discuss its jurisdiction over the counterclaims, or whether they were admissible, presumably because the issue was not raised by the parties.

<sup>6</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (*ICSID Convention*).

<sup>7</sup> The Arbitration Rules of the United Nations Commission on International Trade Law, adopted on 28 April 1976, amended in June 2010 (*UNCITRAL Rules*).

<sup>8</sup> *Saluka Investments BV v. Czech Republic*, UNCITRAL arbitration, Decision on Jurisdiction over the Czech Republic's Counterclaim of 7 May 2004 (*Saluka v. Czech Republic*).

<sup>9</sup> See also Rule 40 (1) of the ICSID Rules of Procedure for Arbitration Proceedings (*ICSID Arbitration Rules*).

- 7.08. Secondly, the conditions for counterclaims being within the scope of the ICSID Convention are identity of subject-matter with the main dispute, parties' consent for the counterclaims to be arbitrated before ICSID and jurisdiction of an ICSID tribunal to hear them. There is nothing controversial about these conditions, and it is easy to see that states' counterclaims could fulfil them, as a matter of principle. The issue of jurisdiction is considered first below, before turning to "subject-matter". Consent will be discussed separately in section 2.
- 7.09. ICSID has *jurisdiction* over disputes that fall under Article 25 of the Convention, which provides in relevant part that it extends to "*any legal dispute arising directly out of an investment ...*". The intentional lack of definition<sup>10</sup> of the word "investment" has precipitated a wealth of case-law and commentary, but for present purposes it suffices to note that as long as the main claims arise out of an investment that passes the test in Article 25 (whatever that test may be), counterclaims that arise out of the same investment should come within ICSID jurisdiction<sup>11</sup>.
- 7.10. The requirement in Article 46 of the ICSID Convention that the counterclaims "*aris[e] directly out of the subject-matter of the dispute*" is *additional* to the jurisdictional requirements in Article 25 and thus pertains to the admissibility of such counterclaims<sup>12</sup>.
- 7.11. It is not immediately clear whether the "*subject-matter*" of the dispute in Article 46 is something different than the "*investment*" in Article 25. Moreover, is "subject-matter" a *legal* or *factual* concept?
- 7.12. The same subject-matter is probably something different – and *narrower* – than the same investment as that term is used in Article 25 of the ICSID Convention (a "dispute arising directly out of an investment"). If it were not, there would have been no reason to add the word "*subject-matter*" to Article 46, since the question of "*jurisdiction*" would in any event have covered the issue. But in the authors' opinion there is no reason to imply a requirement of a *legal* connection into the term "*subject-matter*". If this had been the intention, it could have been clearly stated, like it is in Article 25, which refers to a "*legal dispute*". It should be enough that the claims and counterclaims arise directly out of the same subject-matter as a matter of *fact*, as indicated in the official "Notes" that accompanied the first version of the ICSID Arbitration Rules:

*[T]o be admissible such claims must arise "directly" out of the "subject-matter of the dispute" (French version: "l'objet du différend": Spanish*

<sup>10</sup> 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, 18 March 1965, para. 27.

<sup>11</sup> Assuming that they fulfil the other jurisdictional requirements relating to nationality and timing.

<sup>12</sup> CHRISTOPH SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH & ANTHONY SINCLAIR, *THE ICSID CONVENTION: A COMMENTARY ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES*, Cambridge: Cambridge University Press 732-3, 751 (2<sup>nd</sup> ed. 2009).

version: “la diferencia”). *The test to satisfy this condition is whether the **factual** connection between the original and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute ....*<sup>13</sup>

- 7.13. Although it is not enough that the counterclaim relates to the same “investment” as the main claim, it should be enough that there is a factual nexus with the claims themselves – for example when the state’s actions of which the investor complains in the main claim were driven by the acts that constitute the heart of the counterclaim.

#### I.2. UNCITRAL Rules

- 7.14. The UNCITRAL Rules used to be ostensibly in a sense more problematic in this respect, as they limited counterclaims to those “*arising out of the same contract*” as the primary claim (former Article 19(3)). In another sense, the test in the UNCITRAL Rules is more straight-forward than the ICSID Convention, and thus *less* problematic. Be that as it may, the language in former Article 19(3) of the UNCITRAL Rules merely mirrors the language of former Article 1(1), referring to “*disputes in relation to [a] contract*”. If the language in Article 1(1) is broad enough to permit disputes under a BIT, presumably Article 19(3) permits counterclaims if the usual conditions (mainly jurisdiction and consent) are met. The only UNCITRAL BIT arbitration that considered counterclaims in detail (*Saluka v. Czech Republic*) appears to have believed this was the case, since Article 19(3) was not even discussed by the tribunal in any meaningful way.
- 7.15. If the concern was ever anything other than academic, it should no longer be so in the future. The revised version of the UNCITRAL Rules that applies to arbitrations brought under BITs concluded after 15 August 2010 removes the reference to “*the same contract*” and provides for counterclaims as long as the tribunal has jurisdiction to hear them (new Article 21(3)). This is not a coincidence. The report that was commissioned by UNCITRAL to kick off the revision process already noted that “[t]he limitation to contracts [in Article 19(3)] is simply inappropriate to arbitrations arising under international treaties”<sup>14</sup>.
- 7.16. However, since the new UNCITRAL Rules only apply to disputes under BITs that have been concluded *after* their entry into force in August 2010 (unless the BIT specifies that arbitrations are to be conducted under the

<sup>13</sup> Notes to the ICSID Arbitration Rules (1968), Note B (a) to Rule 40, reprinted in 1 ICSID REPORTS 63, 100 (emphasis added). As discussed below, the requirement of a legal connection imposed in the UNCITRAL arbitration of *Saluka v. Czech Republic* was in the authors’ opinion also misplaced.

<sup>14</sup> Jan Paulsson, Georgios Petrochilos, *Revision of the UNCITRAL Arbitration Rules*, para. 174 (2006). Available at: [http://www.uncitral.org/pdf/english/news/arbrules\\_report.pdf](http://www.uncitral.org/pdf/english/news/arbrules_report.pdf) (accessed on September 27, 2010).

UNCITRAL Rules “*as then in force*”<sup>15</sup>), the old UNCITRAL Rules will still govern investment disputes for years to come. But as seen above, this should not be a hindrance to a state introducing counterclaims in such proceedings: if investment claims arise out of a “*contract*”, counterclaims arise presumably out of “*the same contract*”<sup>16</sup>.

- 7.17. Accordingly both the ICSID Convention and the UNCITRAL Rules provide for the possibility of respondent state counterclaims, as long as the parties have consented to have them arbitrated.

## II. Consent

- 7.18. Consent being the cornerstone of arbitration, it is paramount that the parties have agreed to have the state’s counterclaims arbitrated. In a normal contractual relationship this is hardly problematic, with the arbitration agreement being intended to cover both parties’ grievances as a matter of course. In the case of investment treaty arbitration the terms of the consent given in the BIT must be carefully scrutinised to determine whether they are *intended* to cover counterclaims as well<sup>17</sup>. If this is the case, the investor’s consent must be interpreted to also extend to such counterclaims.
- 7.19. However, a further hurdle, also covered by the dispute resolution clause in the BIT, is the *law applicable to the dispute*. As the BIT itself imposes no obligations on investors in the vast majority of cases, the arbitration agreement should refer to disputes that can also be brought under domestic law for counterclaims to be within the tribunal’s jurisdiction.

### II.1. Dispute Resolution Clauses in BITs

- 7.20. The terms of dispute resolution clauses in BITs differ, and such differences should be given effect. This means that when the clause refers to claims “*arising from investments*”, and in particular when the clause appears to make it possible for the state to initiate the arbitration as well, a tribunal has no reason not to give effect to the text and purpose of such a clause and find that the state has consented to have such counterclaims arbitrated.

<sup>15</sup> E.g. Agreement between the Government of the Czech and Slovak Federal Republic and the Government of the Republic of Finland for the Promotion and Protection of Investments (adopted 6 November 1990, entered into force 23 October 1991), Art. 8(1) (b).

<sup>16</sup> Zachary Douglas has argued that the relevant consideration for the purpose of using the (old) UNCITRAL Rules to bring a claim and potentially a counterclaim under an investment treaty should not be the legal source but rather the *object of the primary claim*, namely the investment: ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS*, Cambridge: Cambridge University Press 257 (2009).

<sup>17</sup> A further pertinent issue in the context of counterclaims is the issue of *identity* of the parties to the dispute: Parties can only consent to adjudicate disputes to which they are *parties*, and the tribunal must thus evaluate carefully whether the counterclaim is based on an obligation owed by the *investor* to the *state*.

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7.21. Article 8 of the Czech Republic – Netherlands BIT<sup>18</sup> – which provided the jurisdictional basis for the *Saluka v. Czech Republic* case – is a good example of a dispute resolution clause that is broad enough to encompass counterclaims:

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.*

7.22. *Saluka v. Czech Republic* provides the most comprehensive treatment to date of jurisdiction over respondent state's counterclaims of publicly available investment treaty decisions. The case arose out of the forced administration of Investiční a poštovní banka a.s., a bank in which Saluka owned shares. During the arbitral proceedings, the Czech Republic raised several counterclaims alleging violations of Czech banking, competition and tax laws as well as the Share Purchase Agreement by which Saluka's parent (and predecessor-in-interest) Nomura Europe plc had obtained the shares that constituted the "investment". The tribunal issued a decision in May 2004 holding that it had no jurisdiction to hear the counterclaims.

7.23. However, on the issue of consent pursuant to Article 8 of the Czech Republic – Netherlands BIT, the *Saluka v. Czech Republic* tribunal stated that the language of the provision was:

*... wide enough to include disputes giving rise to counterclaims, so long, of course, as other relevant requirements are also met. [The wording of Article 8] carries with it no implication that Article 8 applies only to disputes in which it is an investor which initiates claims*<sup>19</sup>.

This is a correct reading of the dispute resolution provision the tribunal was interpreting, as it refers to "[a]ll disputes ... concerning an investment". By contrast, a clause that limits jurisdiction to claims brought under the BIT itself would in all likelihood not suffice for counterclaims to be introduced, as BITs generally impose no obligations on investors, only on states<sup>20</sup>.

<sup>18</sup> Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (adopted 29 April 1991, entered into force 1 October 1992).

<sup>19</sup> *Saluka v. Czech Republic*, para. 39.

<sup>20</sup> The tribunal in *Sempra v. Argentina* commented on Argentina's complaints about the investor's alleged lack of diligence and good faith, excessive earnings, failure to resort to local courts or to respect contractual commitments and the regulatory framework as follows:

*The Tribunal notes that to the extent that any such issues would be within the Tribunal's jurisdiction to decide, and could have resulted in breaches of the Treaty, the Respondent would be entitled to raise counterclaims.*

*Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award of September 18, 2007, para. 289. It is unclear, however, what provisions in the United States – Argentina BIT (1994) could have provided the foundation for such counterclaims.

Examples of more restrictive consent provisions that will make jurisdiction over counterclaims doubtful, or only available in limited specific circumstances, can be found in the Czech Republic – United Kingdom BIT<sup>21</sup>, and the Czech Republic – Canada BIT<sup>22</sup>. Article 8(1) of the former states:

*Disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2(3), 4, 5 and 6 of this Agreement in relation to an investment of the former which have not been amicably settled ...* (Emphasis added.)

The latter (Czech Republic – Canada BIT) provides in Article X.1:

*Any dispute between one Contracting Party and an investor of the other Contracting Party relating to the effects of a measure or series of measures taken by the former Contracting Party on the management, use, enjoyment or disposal of an investment made by the investor, and in particular, but not exclusively, relating to expropriation referred to in Article VI (Expropriation) of this Agreement or to the transfer of funds referred to in Article VII (Transfer of Funds) of this Agreement, shall, to the extent possible, be settled amicably between them.* (Emphasis added.)

- 7.24. The recently released award in *Hamester v. Ghana* discussed briefly the respondent state's counterclaims, although those had not been developed beyond a request for relief in the Counter-Memorial<sup>23</sup>. The tribunal noted the test under ICSID Convention Article 46 and mentioned the relevant passages in the applicable BIT, but concluded simply that:

*...in the absence of any submissions on the nature of the Respondent's counterclaim under the BIT, the Tribunal is unable to analyse whether it [i.e. the counterclaim] is capable, in accordance with Article 46 of the Convention, of falling within the parties' scope of consent<sup>24</sup>.*

- 7.25. The language in the applicable BIT gave the Contracting Parties' consent to disputes "*concerning an obligation of [one Contracting Party] under this Treaty in relation to an investment of [a national or company of the other Contracting Party]*"<sup>25</sup>, but the tribunal noted that under the BIT a state could also be an aggrieved party, and refer a dispute to arbitration<sup>26</sup>.

<sup>21</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Republic for the Promotion and Protection of Investments with Protocol (adopted 10 July 1990, entered into force 26 October 1992).

<sup>22</sup> Agreement between Canada and the Czech Republic for the Promotion and Protection of Investments (adopted 6 May 2009, not yet in force).

<sup>23</sup> *Gustav F. W. Hamester GmbH & Co KG v. Ghana*, ICSID Case No. ARB/07/24, Award of June 18, 2010, paras. 351-2 (*Hamester v. Ghana*).

<sup>24</sup> *Ibid.*, para. 355.

<sup>25</sup> Treaty between the Federal Republic of Germany and the Republic of Ghana for the encouragement and reciprocal protection of investments (adopted 24 February 1995, entered into force 23 November 1998), Art. 12 (1) (emphasis added). Translation from *Hamester v. Ghana*, para. 353.

<sup>26</sup> *Hamester v. Ghana*, para. 354.

Faced with such ambiguous treaty text, it is understandable that the tribunal decided that it was not going to interpret it in the absence of any substantive pleading from the parties. Had the respondent been serious about its counterclaim, it would undoubtedly have argued in detail (a) why the tribunal had jurisdiction to hear the counterclaim; (b) why the counterclaim was admissible; (c) what the legal norm that the claimant had allegedly violated was; and (d) what acts constituted such a violation. Throwing in such “off the cuff” allegations without seriously developing them unnecessarily undermines counterclaims as a genuine and legitimate tool in investment treaty arbitration.

- 7.26. Nevertheless, the award demonstrates that the host state’s consent depends on the text of the applicable investment treaty, which should be carefully interpreted. There is no room for general sweeping statements about whether counterclaims are within the consent to arbitrate investor claims.
- 7.27. Even when faced with a restrictive clause, the state could possibly bring a counterclaim for abuse of process, which arises directly from the investor’s act of commencing arbitration. This could be a viable option when the investment arbitration is brought, for example, with the aim of interfering in domestic criminal or other court proceedings, leading to delay, nuisance and monetary losses to the respondent state. Although BITs do not in principle create obligations on investors as such, invoking the arbitration clause arguably binds the investor to act in good faith, an obligation which would be breached by an abuse of process.

## II.2. Investor’s Consent

- 7.28. The terms of the BIT are of course only half of the issue when considering consent. An investor most commonly provides *its* consent to arbitrate by initiating the proceedings. In such circumstances, the request for arbitration rarely expressly states that the investor consents to the state’s counterclaims to be arbitrated. More commonly the language will either:
- (a) “*invoke*” the arbitration clause in the BIT;<sup>27</sup>
  - (b) “*consent to arbitration in accordance with*” the applicable treaty;<sup>28</sup>
- or
- (c) “*accept the Respondent’s offer to arbitrate and consent to the jurisdiction ... over [the investor’s] claims*”<sup>29</sup>.

<sup>27</sup> For example, the Notice of Arbitration dated 25 March 1999 in *Pope & Talbot, Inc. v. Canada 1*, available at:

<http://www.naftaclaims.com/Disputes/Canada/Pope/PopeNoticeOfArbitration.pdf> (accessed on September 27, 2010).

<sup>28</sup> For example, the Request for Institution of Arbitration Proceedings dated 21 October 2003 in *Corn Products International, Inc v. Mexico*, para. 17, available at:

<http://naftaclaims.com/Disputes/Mexico/CPI/CPI%20-%20Claim.pdf> (accessed on September 27, 2010).

<sup>29</sup> For example, the Request for Arbitration dated 19 February 2010 in *FTR Holding and others v. Uruguay*, para. 56, available at:

- 7.29. The first two of the above examples arguably simply mirror the consent in the BIT's arbitration clause, and can thus be said to amount to consent in relation to counterclaims, as long as such counterclaims come within the consent of the host state as expressed in the BIT.
- 7.30. But how about the third example? On the face of it, it would appear to only give the investor's consent to have its own claims heard, rather than those of the host state. In our opinion this is an overly narrow reading of such language. The investor cannot pick and choose from the dispute resolution provision of a BIT, just like it cannot pick and choose from other provisions of the investment agreement. A BIT is not an *à la carte* selection of provisions among which the investor can choose – deciding, for example, to arbitrate its own expropriation claim but not the state's "essential security interests" defence. The offer to arbitrate in a BIT's dispute resolution provision can only be accepted according to its own terms. If those terms provide an opportunity for the state to introduce counterclaims, then an investor cannot exclude this possibility by wording its acceptance of the offer narrowly<sup>30</sup>.

### II.3. Applicable Law

- 7.31. In general BITs do not provide for obligations on investors, only on the contracting states. This does not mean that an arbitration initiated under a BIT could not espouse counterclaims that are governed by a national law, most often the law of the host state. The offers to arbitrate contained in BITs' dispute resolution provisions are not by necessity limited to claims that arise under the BIT in question, although such claims form the vast majority of cases initiated under them. Where the BIT does not specify any applicable law, the default rule is that the *lex specialis* is the BIT itself<sup>31</sup>, and counterclaims are likely to fall outside a tribunal's jurisdiction<sup>32</sup>.
- 7.32. By contrast, where the BIT specifies applicable law to include domestic

<http://www.arbitration.fr/resources/ICSID-ARB-10-7-Notice-of-arbitration.pdf> (accessed on September 27, 2010).

<sup>30</sup> Cf. Hege Elisabeth Veenstra-Kjos, *Counterclaims by Host States in Investment Treaty Arbitration*, 4 (4) TDM 17-8 (2007). Professor Schreuer's Commentary on the ICSID Convention provides slightly confusingly in this regard that

*[i]f the investor accepts the offer [to arbitrate contained in a BIT] 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.*

CHRISTOPH SCHREUER ET AL., *supra* note 12, at 756.

<sup>31</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 31. The ICSID Convention (Article 42) provides that the applicable law is the one agreed by the parties. In the absence of such agreement, the laws of the host state together with applicable rules of international law would govern, but in the case of BIT arbitration, the BIT constitutes the agreement on applicable law.

<sup>32</sup> Except for claims for abuse of process, discussed above.

law, there should be no problem for states to bring counterclaims *which have their basis in that law*, but which arise out of the same “investment” or “subject-matter”. An example of such a clause can be found also in the Czech Republic – Netherlands BIT, Article 8(6) of which provides as follows:<sup>33</sup>

*The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:*

- *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.*

- 7.33. The respondent state should face fewer problems bringing counterclaims that arise out of breaches of domestic law when the BIT includes such a broad applicable law clause, but the situation in relation to contract breaches is more problematic. The *ad hoc* annulment committee in *Vivendi v. Argentina* famously ruled that contract claims are separate from treaty claims<sup>34</sup>. The same act (by the state) could constitute a violation of *both* a contract and a BIT, but only the latter may be brought before the BIT tribunal, whereas the former must usually be litigated in accordance with the dispute resolution mechanism provided in the contract. The committee made this finding despite the fact that the applicable law clause in the BIT was broad and specifically included host state law<sup>35</sup>. The committee did not appear to consider the question of applicable law under Article 8(4) of the BIT, but simply assumed that it was international law<sup>36</sup>.
- 7.34. A lot has been said about the *Vivendi* decision<sup>37</sup>, and not much need be added here. In the context of counterclaims by the respondent state, the

<sup>33</sup> The *Saluka v. Czech Republic* tribunal did not discuss the law applicable to the counterclaims, as it held that it had no jurisdiction on other grounds, as discussed below.

<sup>34</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Decision on Annulment of July 3, 2002, para. 98.

<sup>35</sup> Agreement between the Government of the French Republic and the Government of the Argentine Republic on the Encouragement and Reciprocal Protection of Investments (adopted 3 July 1991, entered into force 3 March 1993), Art. 8(4): “*L'organe d'arbitrage statuera, sur la base des dispositions du présent Accord, du droit de la Partie contractante partie au différend – y compris les règles relatives aux conflits de lois –, des termes des accords particuliers éventuels qui auraient été conclus au sujet de l'investissement ainsi que des principes de droit international en la matière.*” (Emphasis added.).

<sup>36</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Decision on Annulment of July 3, 2002, para. 102: “*the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law.*”

<sup>37</sup> See, e.g. Bernardo M. Cremades, *Litigating Annulment Proceedings The Vivendi Matter: Contract and Treaty Claims*, in ANNULMENT OF ICSID AWARDS 87 (E. Gaillard & Y. Banifatemi eds., 2004); Christoph Schreuer, *Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA,

*Saluka v. Czech Republic* tribunal agreed expressly with the reasoning of the *Vivendi* committee in rejecting jurisdiction to hear the counterclaims arising from the Share Purchase Agreement – in particular because there was a mandatory dispute resolution clause in that agreement<sup>38</sup>. However, again the tribunal did not consider the question from the viewpoint of applicable law, which it arguably should have done.

- 7.35. Nevertheless, to the extent that investors are prohibited from bringing contractual claims before an investment treaty tribunal, it appears fair that the state should also litigate such claims before the contractual forum. A more difficult situation arises when such claims are brought not directly as contractual claims but under an “umbrella clause” found in the applicable BIT. In such circumstances fairness would tend to dictate that contractual counterclaims are heard by the same forum, but if *Vivendi* is followed to the letter, this will not be possible: the counterclaims remain contractual claims, whereas the investor’s claims are international law claims brought for violation of the “umbrella clause” itself. This would tend to suggest that the “*Vivendi* doctrine” might deserve to be refined to achieve fairness and efficiency.

### III. The Required Connection between the Main Claims and the Counterclaims

- 7.36. The tribunal in *Saluka v. Czech Republic* decided that in addition to fulfilling the jurisdictional requirements set out in the applicable instruments, a counterclaim must have a “*connexion*” with the main claim that is closer than that required by Article 46 of the ICSID Convention, or what is found in the UNCITRAL Rules. It is unclear why this should be the case. The rules are presumably sufficiently set out in the ICSID Convention (or UNCITRAL Rules) and the applicable BIT.

#### III.1. *Saluka v. Czech Republic*

- 7.37. The tribunal in *Saluka v. Czech Republic* began its analysis of its jurisdiction over the domestic law counterclaims by stating that “*a legitimate counterclaim must have a close connexion with the primary claim to which it is a response*”<sup>39</sup>, and then went on to note that “[*t*he nature and extent of the necessary close connexion may be variously expressed”<sup>40</sup>.
- 7.38. It had been considered in the early ICSID case of *Klöckner v. Cameroon* that the tribunal had jurisdiction to hear the respondent’s counterclaims because, although not based on the same contract, they were “indivisible”

BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 281 (T. Weiler ed., 2005).

<sup>38</sup> *Saluka v. Czech Republic*, paras. 55-7. The tribunal also noted problems with identity of parties, which probably would have been sufficient to defeat its jurisdiction to hear the contractual claims: *Ibid.*, paras. 49-51.

<sup>39</sup> *Ibid.*, para. 61.

<sup>40</sup> *Ibid.*, para. 63.

and “interdependent” with the primary claim<sup>41</sup>. This reasoning was quoted with approval in *Saluka v. Czech Republic*. The *Saluka* tribunal stated that the counterclaims:

... cannot be regarded as constituting “an indivisible whole” with the primary claim ... or as invoking obligations which share with the primary claim “a common origin, identical sources, and an operational unity” or which were assumed for “the accomplishment of a single goal, [so as to be] interdependent.” The legal basis on which the Respondent has itself relied ... is to be found in the application of Czech law, and involves rights and obligations which are applicable, as a matter of the general law of the Czech Republic, to persons subject to the Czech Republic’s jurisdiction<sup>42</sup>.

This was the main basis on which the *Saluka* tribunal refused to hear the respondent’s counterclaims arising under Czech domestic law.

### III.2. Why such a Strict Test?

- 7.39. In the authors’ opinion *Saluka*’s reliance on *Klöckner* was incorrect, as the latter was a contractual arbitration, and different considerations thus applied. The language in the *Klöckner* decision referring to claims and counterclaims that are aimed at the “*accomplishment of a single goal*” is simply misplaced and inappropriate in an investment treaty context where the parties to the arbitration have rarely been engaged in a joint enterprise in the way that contractual parties often have. In an UNCITRAL arbitration the text of the earlier version of the Rules (referring to the “*same contract*”) is in general unhelpful when the primary claims do not arise out of a contract. Thus the tribunal should instead have focused on the terms of the BIT, which refer to claims “*concerning an investment*”<sup>43</sup>. Nothing suggests that a stricter test of “*interdependence*” with the primary claims is required. The *Saluka v. Czech Republic* tribunal’s contention that there are various ways of expressing the required connection might be true as a matter of principle, but it should have had no place in the tribunal’s analysis. The tribunal was not called upon to rule on the question of jurisdiction over (or admissibility of) counterclaims as a matter of general principles of law, but under a very specific instrument, the Czech Republic – Netherlands BIT. The way of expressing the required connection in that instrument was the only one with which tribunal needed to concern itself: the fact that the counterclaims arose out of the same investment should have been sufficient.

<sup>41</sup> *Klöckner Industrie-Anlagen GmbH et al v. Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment of May 3, 1985, paras. 17 and 65.

<sup>42</sup> *Saluka v. Czech Republic*, para. 79. The tribunal also analysed the connection that had been required by the Iran-United States Claims Tribunal and in *Amco v Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction in the Resubmitted case of May 10, 1998: *Saluka v. Czech Republic*, paras. 68-75.

<sup>43</sup> The term “contract” in the old UNCITRAL Rules could also be read to refer to the object of the claim, i.e. the investment: see *supra* note 16.

- 7.40. Similarly, the *Saluka* tribunal appeared to suggest that the required connection had to be *legal* when it made particular reference to the “*legal basis*” of the counterclaims as being “*found in the application of Czech law*”<sup>44</sup>, whereas the primary claims arose under the BIT. From a practical viewpoint this is again rather unhelpful, and makes the apparent availability of counterclaims a mirage. Whereas the investor might well have committed unlawful acts that are closely connected to the measures taken by the state that allegedly violate the BIT, it is hard to see a scenario where they may arise under the same legal order, namely international law. As an investor cannot in general violate a BIT, the complaints of the state are going to arise from (alleged) violations of its own laws (such as environmental or banking regulation) or a contract between the investor and the state.
- 7.41. Other commentators have also criticised the connection required in *Klöckner* and *Saluka* as being too demanding<sup>45</sup>, suggesting that a close factual nexus should be enough or that the fact that the counterclaim arises from the same “investment” as the claim suffices. We join in these criticisms. The “connection” that is required should be deducted from the ICSID Convention/UNCITRAL Rules and the applicable BIT (such as “subject-matter” or “investment”), nothing suggests that a stricter test than that for jurisdiction or admissibility should be devised (like the *Saluka* tribunal did). This might be the direction in which investment tribunals are going: the recent *Hamester* tribunal did not require overcoming such an additional hurdle of “connection”, but restricted itself to considering whether the counterclaim came within Article 46 of the ICSID Convention and the parties’ consent<sup>46</sup>.

#### IV. Conclusion

- 7.42. The introduction of counterclaims into investment arbitration requires careful study of the applicable instruments, in order to establish that such counterclaims are within the tribunal’s (and institution’s) jurisdiction. However, such analysis is the bread and butter of investment arbitration lawyers. The fact that states have so rarely brought counterclaims into investment treaty proceedings may be the result of their counsels’ failure to advise them on the matter. Good counsel should see if there is something in the investor’s behaviour that is more than just a defence to the claim, but can in fact form the basis of a counterclaim (such as breaches of local environmental regulatory norms or abuse of process), and consider whether efficiency or a tactical advantage could be gained by introducing those counterclaims into the same proceedings. States would probably have more faith in the process of investment treaty arbitration

<sup>44</sup> *Ibid.*, para. 79, quoted above.

<sup>45</sup> ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS*, Cambridge: Cambridge University Press 260-3 (2009); Hege Elisabeth Veenstra-Kjos, *Counterclaims by Host States in Investment Treaty Arbitration*, 4 (4) TDM 43-6 (2007).

<sup>46</sup> *Hamester v. Ghana*, paras. 351-6.

if they saw that it could also provide quality adjudication of their own grievances in appropriate circumstances.

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### Summaries

**DEU** [*Über die Möglichkeit von Gegenklagen in Schiedsverfahren für Investitionsabkommen*]

*Dieser Beitrag untersucht die Hindernisse, denen Staaten begegnen können, wenn sie ihre Gegenansprüche vor einem Schiedstribunal für die Schlichtung von Streitigkeiten aus Investitionsabkommen vorbringen und analysiert die Argumente von Schiedstribunalen bei der Weigerung, solche Gegenansprüche zu verhandeln. Was die Schlüsselfrage der Gerichtsbarkeit anbelangt, so sehen sowohl das ICSID-Abkommen als auch die UNCITRAL-Regeln prinzipiell die Möglichkeit von Gegenklagen vor. Damit stellt sich die Frage oft erneut als eine Frage nach der Einwilligung in die Schiedsgerichtsbarkeit und, ob die fragliche Schlichtungsbestimmung in einem BIT, die Beilegung von Streitigkeiten zwischen Investor und Staat auch Gegenansprüche einbezieht – ein Thema, welches stets eine gründliche Betrachtung des Wortlauts des Abkommens notwendig macht. Außerdem wird auch die Einwilligung des Investors diskutiert sowie das auf besagte Gegenklagen anzuwendende Recht. Gegenklagen müssen mit der Hauptforderung in Verbindung stehen, um zulässig zu sein, aber die Art solcher Verbindung ist allerdings nicht offensichtlich. Der Beitrag kommt zu dem Schluss, dass der mit der Entscheidung in Sachen Saluka Investments BV vs. Tschechische Republik im Mai 2004 geschaffene Test zu streng war, und dazu führt, dass es für Staaten fast unmöglich ist, Gehör für ihre Gegenklagen zu erlangen, was zu bedauern ist.*

**CZE** [*O přípustnosti protinároků v investičním rozhodčím řízení*]

*Tento článek analyzuje překážky, které se mohou objevovat při vznášení protinároků hostitelských států před tribunály rozhodujícími spory z investic, a zkoumá argumentaci těch tribunálů, které tyto protinároky odmítly projednat. S ohledem na klíčovou otázku soudní pravomoci poskytují v zásadě prostor pro protinároky hostitelských států v investičním rozhodčím řízení jak Washingtonská úmluva (Úmluva o řešení sporů z investic mezi státy a občany druhých států), tak Rozhodčí pravidla UNCITRAL. Tato otázka se tak často stává otázkou souhlasu podrobit se investičnímu rozhodčímu řízení a toho, zda ustanovení o řešení sporů mezi investorem a státem v dvoustranných dohodách o podpoře a ochraně investic zahrnují taktéž protinároky – otázkou, kterou je vždy třeba pečlivě posuzovat s ohledem na textaci příslušné dohody. Článek se dále zabývá otázkou souhlasu investora, jakož i práva použitelného pro vznášené protinároky. Aby mohl být protinárok hostitelského státu vůči investorovi přípustný, musí souviset s původním nárokem investora, ovšem povaha této souvislosti není samozřejmá. Autoři uzavírají svůj příspěvek konstatováním, že test, který aplikoval rozhodčí tribunál v květnu 2004 v případě Saluka Investments BV v. Česká republika byl příliš přísný, a vede ke stavu, kdy je pro státy prakticky nemožné uspět při vznášení svých protinároků vůči investorům, což je nežádoucí.*

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- POL** [*Dostępność roszczeń wzajemnych w arbitrażu w oparciu o umowy inwestycyjne*]  
*Niniejszy artykuł omawia dostępność roszczeń wzajemnych w postępowaniu arbitrażowym inwestor-państwo. Jest to zasadniczo kwestia właściwości sądu w rozumieniu stosownych instrumentów. Kluczowy problem stanowi zgoda, która wymaga dokładnej analizy warunków stosownej umowy inwestycyjnej. Dopuszczalność roszczeń wzajemnych uzależniona jest również od związku z roszczeniem pierwotnym, choć jest to wymóg, którego wykładnia nie powinna być nazbyt surowa.*
- FRA** [*Sur la disponibilité des demandes reconventionnelles dans les arbitrages relatifs aux traités d'investissement*]  
*Cet article explore la possibilité d'utiliser les demandes reconventionnelles dans les arbitrages investisseurs-État. Il s'agit en premier lieu d'une question de compétence, qui dépend des outils applicables. La question de l'aval, qui exige une analyse prudente des dispositions du traité d'investissement en vigueur, constitue un aspect essentiel de cette problématique. La recevabilité des demandes reconventionnelles dépend également du rapport entre les requêtes fondamentales, soit une exigence qu'il convient de ne pas interpréter de façon trop stricte.*
- RUS** [*О наличии встречных исков в арбитраже с рассмотрением инвестиционных соглашений*]  
*В настоящей статье изучается явление встречных исков в арбитраже между государством и инвестором. Вопрос прежде всего состоит в юрисдикции согласно соответствующему инструментарию. Ключевым моментом, требующим тщательного анализа условий применимого инвестиционного соглашения, является согласие. Допустимость встречных исков также зависит от связи с первичными претензиями, и такое требование не должно интерпретироваться очень строго.*
- ES** [*Sobre la disponibilidad de las contrademandas en el Arbitraje de tratados de inversión*]  
*Este artículo examina la disponibilidad de las contrademandas en el arbitraje inversor-estado. Una de las preguntas principales es la de la jurisdicción de los instrumentos relevantes. Un elemento clave es el consentimiento, que requiere un análisis cuidadoso de los términos del tratado de inversión aplicable. La admisibilidad de las contrademandas también depende de la conexión con las demandas principales, un requisito que no debería interpretarse demasiado estrictamente.*

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Rights of the Host States within the System  
of International Investment Protection

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