

Exposé

Dissertation Title: Host-State Counterclaims in Investment Arbitration

Doctoral Candidate: Stefan Dudas LL.M.
(Matrikelnummer: 1349873)

Supervisor: Univ. Prof. Dr. Ursula Kriebaum

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1. Overview of the Research Topic

This research project deals with the issue of counterclaims in investment treaty arbitration and specifically looks into the fact that 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 host-States in turn do not seem to enjoy this right to the same extent.

While arbitral tribunals have generally accepted jurisdiction over host-state counterclaims in contract-based arbitrations, the same is not applicable when the main claim seeks relief for a treaty breach. In a ground-breaking article¹, Jan Paulsson coined the frequently-quoted expression “*arbitration without privity*” to refer to arbitration

¹ J. Paulsson, *Arbitration without privity*, ICSID Rev. 10/1995, p. 232.

² T. Weilder and T. W. Walde, *Investment Arbitration under the Energy Charter Treaty in the light of new*

proceedings where the claimant and respondent do not have any direct contractual relationship, but reach consent to arbitrate. Such consent, however, originates from a unilateral offer to arbitrate made by the host-State by way of an investment treaty concluded not with the investor itself, but with the investor's home State.

In order for the host-State to be able to bring a counterclaim before a treaty tribunal such counterclaim must, first of all, fall within the scope of the parties' consent to arbitrate. In the context of treaty-based arbitration this raises very specific and interesting questions. This is due to the fact that the primary goal of all investment treaties is to encourage foreign investments and to protect foreign investors. Thus, such treaties mainly focus on the host-State's obligations towards the investor and not the other way around. This has been characterized by some authors as an asymmetry inherent to investment treaties that gives the investors a so-called right to "*international quasi-judicial review of national regulatory action*"² or a form of international administrative law³.

It is, however, debatable whether such asymmetry can serve as grounds for an absolute bar to host state counterclaims. Even though most investment treaties do not explicitly provide host-States with rights, this should not automatically lead to the conclusion that there is an asymmetry that may necessarily prevent host-States from asserting their own rights. This is due to the fact that the role of the investment treaties is not only to protect foreign investors, but also to "*to stimulate the flow of private capital into the economies of the contracting states*"⁴. Equally, it has been generally held in ICISD case-law⁵ that in order to benefit from the investment protections conferred by treaties, the investment will need to contribute, to some extent, to the host-State's economic development. Some authors have framed this as "*quid pro quo of investment treaty arbitration*"⁶ in the sense that host-States are generally entitled to expect some sort of growth or economic development in exchange for the substantive investment protections granted to foreign investors. It is however, uncertain under the current state of law if this is

² **T. Weilder and T. W. Walde**, *Investment Arbitration under the Energy Charter Treaty in the light of new NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation*, TDM 1/2004, p. 1.

³ **G. van Harten and M. Loughlin**, *Investment Treaty Arbitration as a Species of Global Administrative Law*, EJIL 1/2006, pp. 121-150; **R. Dolzer**, *The Impact of International Investment Treaties on Domestic Administrative Law*, N.Y.U. J. Int'l L. & Pol., Volume 37/2006, pp. 953-971.

⁴ **Z. Douglas**, *The International Law of Investment Claims*, Cambridge University Press 2009, p. 135.

⁵ See e.g., ICSID Case no. ARB/00/4, Decision on Jurisdiction, July 23, 2001 *Salini Costruttori SpA et Italstrade v. Royaume du Maroc*; ICSID Case No. ARB/03/11, Decision on Jurisdiction of 23 July 2001, *Joy Mining Machinery Limited v. Egypt*; ICSID Case No. ARB/04/13, Decision on Jurisdiction of 16 June 2006, *Jan de Nul N.V. v. Egypt*.

⁶ **Z. Douglas**, *The International Law of Investment Claims*, Cambridge University Press 2009, pp. 161-163.

sufficient to allow host States to bring their own claims before an investment tribunal and if so, under which specific circumstances could this be possible, if at all.

2. Purpose and structure of the research

The main task of this research 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 dissertation will be structured in four parts. Firstly, an introduction of the concept of counterclaims in international adjudication will be made. In this part, the legal provisions that regulate counterclaims in the most relevant legal texts to investment arbitration will be 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.

The second part will analyse the two fundamental conditions for the admissibility of counterclaims in investment treaty arbitration: the requirement of consent to counterclaims and the close-connection of the counterclaim with the main claim. The core of this part consists of the analysis of the major types of dispute settlement provisions in IIAs, investment laws and contracts, as well as the case law of investment tribunals and the relevant doctrine. For comparative purposes, treatment of counterclaims in other international *fora* is also examined, such as ICJ or Iran-US Claims Tribunal.

With regards to the requirement of consent, the focus of the analysis will be placed on the language of the host State's offer to arbitrate as this seems to be highly determinative for the scope of possible host State's counterclaims, but at the same time potential options for the limitation or extension of the scope of the consent, as expressed in the offer to arbitrate, by the investor are also examined. As far as the connection test is concerned, the research will focus on the way in which this test has been applied so far in investment arbitration, but will also draw a parallel with its application in other *fora* such as ICJ or Iran-US Claims Tribunal or commercial arbitration.

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, will be considered. In particular the focus will be placed on finding out whether host States are, or should be, allowed to assert counterclaims which rely on the IIA, general international law or the general principles of law such as good faith, as well as on the procedural provisions of IIAs, as a cause of action. Also, this section will focus on contract-based counterclaims that are subject to the additional challenge of conflicting *fora*, when the contract invoked contains its own exclusive dispute resolution mechanism.

The fourth and final part of the research project will present 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 will also address the issues of party identity and umbrella clauses.

To date, there is no other complex study or research focusing exclusively on host-state counterclaims in investor-state arbitration and the so-called asymmetry of investment treaties. The contribution this research will bring to the current system of international law of foreign investment and the existing literature is to provide answers to all of the questions surrounding the circumstances under which host-state should, if at all, be allowed to submit counterclaims in investor-state arbitration.

3. Research Methodology

The study will make use of a combined research method, that is, both quantitative and qualitative methods will be used in order to first gather all relevant case-law and then to analyse it and provide an answer to the research question.

More specifically, the first part of the research will entail a time period of 8-10 months of gathering all relevant investor-state arbitration awards where the tribunal was asked to rule on host-state counterclaims. This will entail studying the archives of various arbitration institutions that are most active in investor-state arbitration, such as ICSID, ICC, SCC or UNCITRAL. Potential research visits at the UNCITRAL, SCC and the ECT Secretariat will be conducted in this time frame in order to overcome potential difficulties in getting access to awards rendered under the administration of these institutions.

The second and final part of the research (12-18 months) will entail a two-pronged analysis of the information gathered:

- (i) In-depth analysis of the awards gathered in order to determine a pattern for the use of counterclaims by host states and the way in which such counterclaims have been dealt with by arbitral tribunals.
- (ii) Analysis of the identified patterns with the aim of presenting a comparative view of the arbitral tribunals' approach regarding host-state counterclaims. For example, two recent cases dealing with host-state counterclaims resulted in contradictory awards. In *Roussalis v. Romania*⁷ the ICSID tribunal held that it did not have jurisdiction over the host-State's counterclaim on grounds that the parties' consent to arbitrate did not encompass counterclaims. The majority of the tribunal based its decision mainly on the interpretation of the wording of the dispute resolution clause in the Romania-Greece BIT and rejected the dissent made by Professor Reisman whereby article 46 of the ICSID Convention was sufficient basis for the host-state's counterclaims. On the other hand, the tribunal in *Goetz and others v. Republic of Burundi*⁸ followed Professor Reisman's dissent and opined that article 46 of the ICSID Convention is sufficient to create jurisdiction over host-state counterclaims.

The estimated time for completion of the research is approx. 2, 5 years.

⁷ ICSID Case no. ARB/06/1 Award, December 7, 2011 *Spyridon Roussalis v. Romania* (Roussalis v. Romania).

⁸ ICSID Case No. ARB/01/2 Award 21 June 2012, *Antoine Goetz and others v. Republic of Burundi*.

4. Draft Outline

I. INTRODUCTION

- A. General Introduction to Counterclaims in International Law
- B. General Introduction to Counterclaims in Investment Treaty Arbitration
- C. Legal Basis for Counterclaims
 - 1. International Court of Justice
 - 2. Iran – United States Claims Tribunal
 - 3. ICSID and ICSID Additional Facility Rules
 - 4. UNCITRAL Arbitration Rules

II. PROCEDURAL ISSUES REGARDING THE ADMISSION OF COUNTERCLAIMS IN TREATY-BASED ARBITRATION

A. The Requirement of Consent to Counterclaims

- 1. The necessity of consent to counterclaims
- 2. The offer to arbitrate in IIAs
- 3. The investor's acceptance and potential amendment or limitation of the offer to arbitrate

B. The Connection test between the Main Claim and the Counterclaim

- 1. The connection test as applied in other international forums (e.g. ICJ, Iran-US Claims Tribunal, Commercial Arbitration)
- 2. The connection test in investment arbitration
- 3. Conclusion

III. CAUSE OF ACTION FOR HOST STATE COUNTERCLAIMS

A. Cause of Action under International Law Sources

- 1. Investment treaty
- 2. Customary international law
- 3. Counterclaims based on the domestic law of the host-State

B. Cause of action under the domestic law of the host-state

IV. *De lege ferenda* suggestions to balance the investor-state dispute resolution mechanism by improving the host state's chances of bringing counterclaims

- A. Including broad definitions of the dispute and ample *locus standi* provision in the investment treaties;
- B. Including explicit substantive obligations for investors in investment treaties;
- C. The investor's contractual obligations to be imported in investment treaty arbitration under umbrella clauses;
- D. Compliance with host State local laws.

V. Conclusion

5. Bibliography

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