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Counterclaims by States in Investment Arbitration

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Why Not More Counterclaims by States?

- Quite common for States to assert defenses criticizing investor conduct: illegality, breach of contract, violation of regulation, etc.
- Yet these defenses are rarely framed as counterclaims seeking affirmative relief.
- The answer may lie in instinctive preferences to pursue claims in local courts – but may also be rooted in perceived limits to arbitral jurisdiction.
- The perceived lack of counterclaim jurisdiction reinforces State concerns about balance in the broader system.
- Two recent cases revisit the issue, reaching diametrically different results: *Roussalis v. Romania* and *Goetz v. Burundi*.

Background: The Earlier Cases

- Counterclaim jurisdiction founded on contract rather than treaty
  - E.g., *MINE v. Guinea* and *Atlantic Triton v. Guinea*

- Tribunals not required to address jurisdiction head on:
  - E.g., *Genin v. Estonia* and *Hamester v. Ghana*

- *Saluka v. Czech* Republic examined the issue in the context of UNCITRAL, but its ruling on arbitral authority was largely swamped by two caveats that limited applicability of the principle.

Two New Decisions Reach Opposite Results

- *Roussalis v. Romania* (majority):
  - No jurisdiction over counterclaims
    - ICSID Case No. ARB/06/2 (7 Dec. 2011)
- *Goetz v. Burundi*:
  - Jurisdiction over counterclaims
    - ICSID Case No. ARB/01/2 (21 June 2012)

The Policy Debate Underlying the Doctrinal Debate

- The reasons to allow counterclaims:
  - Efficiency, centralization of inquiry, avoiding duplication
  - Avoiding inconsistent results
  - Avoiding impasses from attempted injunctions against parallel proceedings
  - Avoiding irony of forcing State back to local courts when investor selected arbitration to begin with
- The reasons to restrict counterclaims:
  - Possible end-run around contractual dispute resolution clauses
  - Embroils tribunal in disputes governed by local law
  - Possible chill to investor invocation of arbitration

The Doctrinal Debate: Sources of Consent
A. ICSID Convention and Rules

- "Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."
  - ICSID Convention Art. 46; see also Arbitration Rule 40(1)

The Doctrinal Debate: Sources of Consent
A. ICSID Convention and Rules

- Unpacking the dense text:
  - mandatory (“shall”), but only after numerous prerequisites:
    - (1) “except as the parties otherwise agree”
    - (2) “arising directly out of the subject matter of the dispute”
    - (3) “provided that they are within the scope of the consent of the parties”
    - (4) “and are otherwise within the jurisdiction of the Centre”
- Recent decisions were not troubled by (2) or (4), and did were not forced to confront (1) – but differed on (3)
- *Roussalis* dissent and *Goetz*: Investor’s consent to ICSID is sufficient to consent to counterclaims; no need to examine treaty
- *Roussalis* majority: Mere filing at ICSID is not sufficient – must have an external source of consent

The Doctrinal Debate: Sources of Consent
B. Specific Treaty Language

- Greece-Romania BIT in *Roussalis*:
  - Covered "disputes between an investor … and [a State] concerning an *obligation of the latter under this Agreement*, in relation to an *investment of the former*"; "the investor concerned may submit the dispute…."

- Belgium-Burundi BIT in *Goetz:*
  - Covered disputes concerning interpretation or application of investment authorizations granted by host State authorities; applicable law included national law as well as international law

The Doctrinal Debate: Sources of Consent
C. Contractual Dispute Resolution Clauses

- An interpretative approach to BIT text may not be enough to answer all questions in future; contracts may become equally relevant:
  - As potential source of consent notwithstanding a narrow BIT clause (such as the one at issue in *Roussalis*)
  - As a potential "agreement otherwise" notwithstanding a broad BIT clause (such as the one at issue in *Goetz)*

The Possible Future

- States may provide more explicit statements regarding their intent regarding counterclaim jurisdiction (either through interpretative notes or in new treaty text)
- We are already seeing stirrings from some countries in this direction (as well as advice to this effect more generally from NGOs)

Possible Treaty Approaches to the Issue

- Express reference to State counterclaims (*n.b*. leaves open the question of what types of claims could be brought)
- Alternatively, express reference to either party being able to initiate arbitration (*n.b.* leaves open same question)
- Some newer model treaties impose substantive obligations on the investor, or a BIT could authorize the State to present local law or contract-based claims
- Examples: (1) Commonwealth Guide to International Investment Agreements; (2) draft REIO model investment chapter for external trade agreements

- Any Questions?