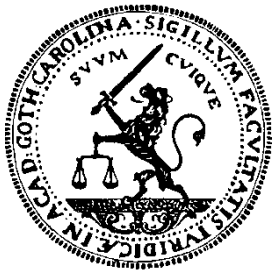

FACULTY OF LAW

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BITing Back

A Study of the Conditions for Respondent State Counterclaims in Investor-State Investment Arbitration under Bilateral Investment Treaties

JURM02 Graduate thesis

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Summary

In this thesis, I present a study of the conditions for a respondent state to introduce counterclaims in the same arbitration procedure as an investor's initial claim in a dispute arising from a Bilateral Investment Agreement (BIT). Investment disputes between foreign investors and host states are often referred to international investment arbitration to exclude the jurisdiction of the host states' national courts, with the aim to provide the investor with an effective remedy and neutral forum for dispute resolution. The arbitration is conducted in accordance with a choice of procedural framework that governs the process from the initiation of arbitration to the effect of the award. Although states regularly pursue counterclaims, successful ones are rare.

The purpose of the thesis is to clarify the legal provisions regulating if and under what conditions counterclaims can be raised by the respondent state, and if the phrasing of the arbitration clause of the BIT could have an impact on the possibilities for successful counterclaims. I proceed methodologically by first studying how arbitration clauses are typically phrased in BITs and how the most widely used procedural frameworks regulate counterclaims. Then, finally, I study how tribunals have addressed and ruled on counterclaims in individual cases in light of the relevant treaty's arbitration clause and the applicable procedural framework. My study exclusively focuses on investor-state arbitration based on BITs in accordance with the ICSID, UNCITRAL, ICC och SCC frameworks for arbitration and therefore does not address other types of investment treaties or procedural frameworks.

The result of my study shows that while all of the abovementioned frameworks explicitly allow for counterclaims, tribunals have adopted a restrictive approach, generally rejecting counterclaims, even when the arbitration clause in the relevant BIT has been drafted in a way that leaves open the possibility for the tribunal to rule on other disputes than solely the ones arising from an alleged breach of the host state's treaty obligations towards the foreign investor. In summary, I find that, in principle, it is possible to assess what may constitute more or less favourable conditions for respondent state counterclaims. For example, a 'wider', more inclusive phrasing of an arbitration clause is to prefer over a 'narrower' phrasing. However, it is important to emphasise that the conditions are examined by an independent tribunal in each specific case, which means that in practice, the outcome may be different than anticipated.

Finally, the question of whether an open approach to counterclaims is consistent with the purpose of investment arbitration is discussed. After considering the parties' interests of, for example, efficiency, procedural economy, and a neutral forum with their possibilities to influence the process as well as the principle of equality of the parties, I conclude that an open approach can indeed be considered in line with the objectives of investment arbitration.

Sammanfattning

I detta examensarbete presenterar jag en studie av de juridiska förutsättningarna för stater att väcka genkäromål inom ramen för ett skiljeförfarande angående en investerares krav gentemot staten med anledning av ett bilateralt investeringsskyddsavtal. Investeringstvister mellan utländska investerare och värdstater hänskjuts ofta till internationella skiljeförfaranden för att lyfta tvisten ut från värdstatens nationella rättssystem, i syfte att erbjuda investeraren ett effektivt rättsmedel såväl som ett neutralt forum för tvistlösning. Skiljeförfarandet styrs av ett valt processuellt ramverk som reglerar alla steg i processen, från inledandet av skiljeförfarandet till verkan av en utfärdad skiljedom. Även om stater regelbundet väcker genkäromål är det ovanligt med framgångsrika sådana.

Syftet med min studie är att klargöra de rättsliga bestämmelser som reglerar om och under vilka förutsättningar svarandestater kan väcka genkäromål. Vidare undersöker jag om formuleringen av skiljeklausulen i det bilaterala investeringsskyddsavtalet skulle kunna ha en inverkan på möjligheterna till framgångsrika genkäromål. Metodologiskt går jag tillväga på så sätt att jag först undersöker hur skiljeklausuler typiskt sett är formulerade i bilaterala investeringsskyddsavtal och hur de oftast använda processuella ramverken reglerar genkäromål. Avslutningsvis undersöker jag hur skiljetribunaler har adresserat och bedömt frågan om genkäromål i enskilda fall med beaktande av avtalets skiljeklausul samt det valda processuella ramverket. Min studie fokuserar uteslutande på investeringsskiljeförfaranden mellan utländska investerare och värdstater, baserade på bilaterala investeringsskyddsavtal i enlighet med de processuella regelverken under ICSID, UNCITRAL, ICC samt SCC. Jag behandlar därför inte andra typer av internationella investeringsskyddsavtal eller processuella ramverk närmare.

Resultatet av min undersökning visar att även om samtliga av de ovannämnda ramverken uttryckligen tillåter genkäromål, har skiljetribunaler antagit en restriktiv inställning till sådana. Skiljetribunaler har generellt sett avvisat genkäromål, även när skiljeklausulen i det relevanta bilaterala investeringsskyddsavtalet har utformats på ett sätt som lämnar det öppet för skiljetribunalen att pröva andra tvister än enbart sådana som härrör från en påstådd överträdelse av värdstatens traktatsenliga förpliktelser gentemot den utländska investeraren. Sammanfattningsvis finner jag att det rent principiellt är möjligt att bedöma vad som kan anses utgöra mer eller mindre gynnsamma förutsättningar för framgångsrika genkäromål. Till exempel är en bredare,

mer inkluderande formulering av en skiljeklausul gällande vad som kan prövas av tribunalen att föredra framför en snävare formulering. Det är dock viktigt att understryka att förutsättningarna för genkäromål prövas i varje enskilt fall av en självständig och oberoende skiljetribunal, vilket innebär att utfallet i praktiken kan bli ett annat än det förutspådda.

Slutligen diskuteras frågan om huruvida ett öppet och inkluderande förhållningssätt till genkäromål från svarandestater är förenligt med syftet med internationella investeringsskiljeförfaranden. Efter att ha beaktat parternas intresse av bland annat effektivitet, processekonomi och tillgången till ett neutralt forum, med deras möjligheter till inflytande över processen samt principen om parternas likställdhet, når jag fram till slutsatsen att ett sådant förhållningsätt får anses vara i linje med investeringsskiljeförfarandets syfte och ändamål.

Abbreviations

BIT	Bilateral Investment Treaty
ECT	The Energy Charter Treaty
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
IIA	International Investment Agreement
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IPB	Investicní a poštovní banka
MFN	Most Favoured Nation
NPF	Czech National Property Fund
SCC	Stockholm Chamber of Commerce
UNCITRAL	United Nations Commission on Trade Law
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

The purpose of international investment law is to balance the sovereign rights of the host state to govern its own economic affairs with the legitimate rights for foreign investors. For political and ideological reasons, this balancing act has been an issue of ongoing contention.[1]

In this thesis, I discuss international investment arbitration as a tool to resolve investor-state disputes arising from Bilateral Investment Treaties (BIT)-s. BITs play an important role in international investment law as an instrument for states to mutually both protect and encourage investments from nationals of one contracting state party (the investor) in the territory of the other contracting state party (the host state).[2] They are considered as the most important source of international investment law of today[3] and in the time of writing, there are close to 2 200 BITs in force worldwide.[4] Occasionally, investment disputes between investors and host states arise from the treaties. These disputes are usually referred to international arbitration as the selected mean for dispute resolution through the treaties' arbitration clauses, in the aim of providing a neutral forum separate from the domestic courts of the host state.[5]

The by far most common situation in investor-state arbitration is that the investor is acting as the claimant and the host state as the respondent.[6] A generally important element in dispute resolution is the respondent's possibility to invoke counterclaims towards the claimant in the context of the same proceeding. Some authors argue that admitting counterclaims to be heard in the same arbitration as the claimant's initial claim allows for both parties' claims to be assessed efficiently by the tribunal and avoids parallel or

[1] Henriksen, Anders, International law, Fourth edition., Oxford University Press, Oxford, 2023 p. 232.
[2] Dolzer, Rudolf, Kriebaum, Ursula & Schreuer, Christoph, *Principles of international investment law*, Third edition, Oxford University Press, Oxford, 2022 p. 58 f.
[3] Ibid. p. 16 f.
[4] UNCTAD Investment Policy Hub – International Investment Agreements Navigator. https://investmentpolicy.unctad.org/international-investment-agreements accessed 1 January 2024.
[5] Dolzer, Kriebaum & Schreuer p. 16 f.
[6] Ibid. p. 354.

subsequent proceedings regarding otherwise closely related issues.[7] While investors' claims relate to the host states' 'treaty obligations', i.e. an allegation that the respondent state has violated the rights that are granted the investor under a BIT, respondent states' counterclaims often concern allegations that the investor has breached the host state's domestic law and regulations or contractual obligations arising from an investment contract between the parties that regulates the specific investment.[8]

Most procedural frameworks governing international arbitration are 'party-neutral' and thus make no distinction in their provisions as to whether a state or an investor is the claimant or the respondent. An example of such a framework is the ICSID Convention, which is discussed in detail in section 3.3.2.[9] Although the most widely used frameworks of international investment arbitration, as described in section 3.3, generally do not contain provisions prohibiting state counterclaims in arbitration, several authors have emphasised the lack of successful counterclaims despite the relatively high number of awards addressing such claims.[10] Instead, the host state is usually referred to domestic courts to bring any claims towards a foreign investor. The investor, on the other hand, has the possibility to bring its claims against the host state through international arbitration under BITs. There are also situations where the proceedings in domestic courts regarding, for example, the host state's claims for damages, must be paused or temporarily suspended pending the award or decision from the arbitral tribunal regarding the investor's claim.[11] There is an ongoing debate between those who advocate that the possibilities for respondent state counterclaims should remain limited, while others argue that the possibilities should be extended. Furthermore, when reviewing awards addressing the issue of counterclaims in recent years, tribunals have generally taken a restrictive approach towards counterclaims and found it difficult to permit respondent state counterclaims in treaty arbitration.[12]

This discrepancy risks giving rise to parallel proceedings, where the dispute is reviewed and ruled in both international arbitration and national courts,

[7] Mees Brenninkmeijer, Fabien Gélinas, Counterclaims in Investment Arbitration: Towards an Integrated Approach, II. The current position, *ICSID Review - Foreign Investment Law Journal*, 2023.

[8] See further chapter 4 – Arbitral Awards.

[9] Dolzer, Kriebaum & Schreuer p. 354.

[10] See for example Vohryzek-Griest, Ana, State Counterclaims in Investor-State Disputes: A History of 30 Years of Failure, 15 *International Law, Revista Colombiana de Derecho Internacional*, 83-124, Bogotá, 2009; and Brenninkmeijer, Gélinas.

[11] Ibid. p. 113.

[12] Brenninkmeijer, Gélinas, I. Introduction.

leading to potentially lengthy and costly proceedings for both parties. In addition to the aspects mentioned, it can also be noted that an award rendered within a certain framework for arbitration is often significantly easier to enforce than a judgement from a national court, with reservation for jurisdictional variations.[13] Some authors point out that the possibility of hearing counterclaims in the same arbitration as the initial claim "serves the better administration of justice and, with a view to procedural economy, enables a tribunal to get a better overview of the parties' respective claims and to decide on them more consistently."[14] Other authors further argue that state counterclaims, where they are legitimate, can serve the purpose of deterring unfounded claims by the investors and increase efficiency by incentivising respondent states to shift focus from objections to the tribunal's jurisdiction to instead move directly to the merits of the dispute.[15]

At the same time, over the years there has also been awards rendered where tribunals have fully or partially allowed counterclaims from respondent states, as seen in chapter 4, and BITs that incorporate investor obligations in the treaty text have emerged, which I provide examples of in section 4.3.2.

With the above in mind, it is of interest to review and analyse the factors, such as relevant provisions in BITs and procedural frameworks, that make up the conditions under which respondent state counterclaims may be successfully invoked. The purpose of such a study is to bring further clarification of the issue in the context of investment arbitration. Although this thesis constitutes a limited contribution to the field of research, it may hopefully at least point to a certain direction for increased predictability in the arbitration procedures when the question of respondent state counterclaims arises.

1.2 Purpose and Research Questions

This is, first and foremost, an academic thesis. However, my ambition is that the thesis will also be of use to lawyers practising in the field of international investment law and arbitration when analysing the issue of respondent state counterclaims. Although I intend to focus on the conditions for *successful* respondent state counterclaims in my thesis, the study may be equally useful to draw conclusions about when there are *insufficient conditions* for such counterclaims. Hopefully, the observations and conclusions presented in this

[13] See more on the purpose of investment arbitration in section 3.1.1.
[14] Brenninkmeijer, Gélinas, II. The current position.
[15] Vohryzek-Griest p. 86 f.

thesis will therefore be of interest to both academic legal scholars as well as lawyers practising in the field of international investment law.

As previously indicated, the purpose of this thesis is to clarify the legal provisions regulating if and under what conditions counterclaims can be raised by the respondent state in investor-state arbitration based on a BIT, and the role the arbitration clause in the treaty plays. The reason why I choose to specifically focus on the arbitration clause is, as will be discussed in depth further below, because it is the foundation of the parties' agreement to arbitrate and affects what can be reviewed by the tribunal. I aim to ultimately provide the reader with a general indication of the characteristics of an arbitration clause providing increased possibilities for successful respondent state counterclaims in investment arbitration. In order to fulfil the purpose of the thesis, the following main research questions must be answered:

- Is it possible, based on consideration of different BITs, procedural frameworks for arbitration and previously issued awards, to assess how an arbitration clause could be phrased to increase possibilities of successful respondent state counterclaims in investment arbitration? And if that is the case, what are the characteristics of such a clause?

The answer to these questions is based on a study of BITs, procedural frameworks, jurisprudence as well as literature I present in my thesis by answering the following sub-questions:

- How are arbitration clauses typically phrased in BITs?
- How are state counterclaims regulated in international procedural frameworks for investment arbitration such as the ICSID, UNCITRAL, ICC, and SCC?
- How have international arbitral tribunals assessed the issue of counterclaims in light of the above-mentioned arbitration clauses and rules on arbitration?

In the following sections, I intend to explain how I will proceed methodologically to answer these research questions, what materials I will use for my study, and finally, to present the delimitations that provide the thesis with its frame.

1.3 Previous Findings

My thesis, like much other legal research, is based on and expands on previous submissions to the relevant research area. The law is not constant

but evolves over time, which is why observations, reasoning, and conclusions presented in previous studies can be re-examined and re-evaluated to continue the progress of research in the field. This thesis constitutes a link in what *Sandgren* describes as the chain of contributions that represent legal scholarship, and I – like many writers – also point to what could constitute a suitable continuation of this chain.[16] I will therefore present and consider the findings, views, and conclusions of several scholars on the issue where relevant to my presentation. In this section, however, I wish to address a specific publication to provide a background as well as a starting point for my study.

In 2009, a comprehensive article regarding respondent state counterclaims in disputes arising from investment agreements called 'State Counterclaims in Investor-State Disputes: A History of 30 Years of Failure' was published. In the article, which covers awards rendered by arbitral tribunals from the previous three decades up until 2009, *Vohryzek-Griest* describes why such claims have been unsuccessful when introduced in arbitration. The author primarily analyses arbitration under the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and argues that there is an imbalance between the rights of the parties in investor-state disputes, and that this practical reality deviates from the drafters' purpose of the Convention, namely, to balance the interests of both states and investors. The author points out that the ICSID Convention allows both investors and states to initiate proceedings and expressly provides for jurisdiction of counterclaims. Despite this, the number of successful respondent state counterclaims is low considering the time that the ICSID has been operating.[17] The basis of Vohryzek-Griest's explanation to the absence of successful respondent state counterclaims is the design of the rules on jurisdiction over counterclaims under the ICSID framework as well as the restrictive way in which tribunals have interpreted and applied them in disputes. The author further notes that the absence of host state's rights in international investment agreements such as BITs, comparable to the rights granted to investors under the same agreements, seems to further contribute to the lack of successful counterclaims.[18]

The abovementioned article remains both relevant and interesting for my research regarding the study of awards rendered under the ICSID framework

[16] Sandgren, Claes, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod, argumentation och språk*, Fifth edition, Norstedts Juridik, Stockholm, 2021. p. 72.
[17] Vohryzek-Griest p. 86.
[18] Vohryzek-Griest p. 84.

up until 2009, where Vohryzek-Griest's study ends, as well as the analysis of the treaties that the disputes arise from, and the jurisdictional requirements under the ICSID framework. However, since 2009, new awards and BITs have emerged that may affect how the issue should be understood and addressed today. The conclusions from the article may therefore be subject to reassessment and re-evaluation to examine if and how tribunals' approach to state counterclaims have evolved and changed since then.

Furthermore, the article is almost exclusively concentrated to arbitration under the ICSID framework. In my thesis, I will examine the conditions for state counterclaims in the context of arbitration under the UNCITRAL, ICC and SCC rules in addition to the ICSID framework. While Vohryzek-Griest's article focuses on why state counterclaims have failed, the purpose of my thesis is, in part, to examine when respondent state counterclaims may be successful by studying arbitration clauses in BITs, procedural frameworks for arbitration and previously issued awards where the issue of counterclaims has been addressed.

1.4 Methodology and Materials

Legal research requires a careful analysis of the relevant legal material before general conclusions can be drawn based on findings from the conducted analysis.[19] The choice of methodology to accomplish the purpose of my thesis and answer my research questions is closely linked to the material – i.e., the sources of law – I choose to utilise for my study.[20] The methodology establishes parameters on how to weigh different sources of law against each other, to provide a sound foundation for the conclusions derived from my study. Therefore, the questions that naturally follow are: what are these sources of law and what priority should one source have over the other in terms of their respective authority?[21]

In regard to the sources of international law, a distinction can be made between 'formal' and 'material' sources of law. A formal source of law can be understood as a source from which a legal norm derives or can be traced back to. A material source of law, on the other hand, can be understood as the material we may turn to in order to justify the conclusions we draw from the existence of the discovered legal norm.[22] In this case, the provisions on the

[19] Sandberg p. 45 f.

[20] Linderfalk, Ulf, *Om tolkningen av traktater*, Lunds univ. Juridiska fak., Diss. Lund: Univ., 2001, Lund, 2001 p. 18 f.

[21] Linderfalk (2001) p. 18 ff.

[22] Linderfalk (2001) p. 18 f.; Oppenheim, L, "Oppenheim's international law. Vol. 1, Peace" [Digital resource], 1996 p 23.

possibility for respondent states to introduce counterclaims in the context of investor-state arbitration originate from (among other factors) the wordings of certain provisions. These provisions consist of dispute settlement clauses in BITs as well as relevant procedural frameworks for arbitration. The agreements and frameworks thus form norms concerning what can be addressed in the context of investor-state investment arbitration, such as state counterclaims. These two different sets of legal provisions thus constitute formal sources of law in this context. In this section, I will therefore hereafter concentrate on an introduction to the different material sources of law I will use in my study.

Like mentioned, the question still remains as to which material sources of law should be consulted to clarify these norms deriving through treaties and frameworks through their application and interpretation.[23] Guidance can be sought in Article 38.1 in the Statue of the *International Court of Justice* (ICJ):

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
    a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
    b. international custom, as evidence of a general practice accepted as law;
    c. the general principles of law recognised by civilised nations;
    d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Although the Article provides the sources of law the Court applies when resolving a dispute, scholars argue that the Article constitutes a description of the sources of law that exist in international customary law and should therefore be generally used by all lawyers and scholars active in the field of international law.[24] Article 38 makes a distinction between primary (Art. 38.1a-c) and secondary (Art. 38.1d) sources of law. *Henriksen* describes this division as the first mentioned type of sources being "law *creating* because they create (new) rights and obligations" while the latter type of sources as "law *identifying* since they merely apply or clarify the content of existent

[23] Linderfalk (2001) p. 19 f.
[24] Linderfalk (2001) p. 20 f.

law".[25] Considering Henriksen's classification, we could categorise the former as formal sources of law, and the latter as material sources of law. Thus, jurisprudence and "the teachings of the most highly qualified publicists of the various nations" – namely the literature of international law – can be referred to as material sources of law.

There are some diverging views on the comparative authority of these two sources. Some scholars argue that case law is always more authoritative than the legal literature of international law, while others argue that we should instead consider the extent and coherence of said jurisprudence and literature.[26] Furthermore, some authors are considered more authoritative than others, just as some judges or courts from which the cases originate are considered more authoritative than others.[27] In the following sections, I will explain how I will use these sources in my thesis.

1.4.1 Arbitral Awards

Arbitral awards will be utilised to demonstrate how arbitral tribunals have assessed the issue of respondent state counterclaims in investor-state disputes arising from BITs. I have selected awards that set clear examples of how the tribunals have interpreted and applied provisions such as arbitration clauses in a variety of BITs in the light of relevant rules on arbitration when assessing counterclaims. Furthermore, only awards issued in English, which in turn relates to BITs whose official treaty language is English, will be used. The reasons for this are both to reflect my selection of BITs for the study, further discussed in section 1.5 below, as well as to avoid any language confusion. Regarding the age of the awards, a few decisions from the nearest years before 2009, with Vohryzek-Griest's article in mind, and a number of decisions from years afterwards until today have been selected. My aim with the selection is to make the presentation as concentrated and concise as possible given the timeframe and delimitations of the thesis. The selection may additionally may also make it possible to assess whether there is any difference in how the tribunals' address state counterclaims prior to and after 2009.

There is no system of binding precedents in international investment law. An award is only binding on the parties in the specific case and has no future precedential effect between the same. However, arbitral tribunals, like other judicial bodies, often consider rulings from other tribunals when assessing disputes as arbitral awards, like other material sources of law, are means for

[25] Henriksen p. 22.
[26] Linderfalk (2001) p. 25.
[27] Ibid.

determining the law.[28] Consideration of the reasoning, interpretations and decisions of other tribunals is a common feature of arbitral awards and could ultimately also contribute to greater consistency and stability in the law, as well as increased predictability in case law.[29]

It is, however, necessary to bear in mind that the considerations of previous awards are not based on a hierarchy of courts as in national jurisdictions, where decisions of a higher court are regarded as binding on lower courts, but rather on the persuasive force of a particular award. This means that although arbitration tribunals are independent in their decision-making and rulings according to the relevant applicable law, compelling previous awards may be adhered to when the tribunals are facing a similar dispute[30] and, as previously mentioned, used as a mean for determining the law.

Furthermore, through their rulings, arbitral tribunals can play a role in developing the law. Scholars point to the tribunal's responsibility, to provide the parties with the best award possible, to seek out and apply the relevant legal principles of international law when resolving disputes, and thereby developing said principles. It is regarded as positive that tribunals, through their work and rendering of awards, therefore contribute to the development of legal scholarship and even a decreased pace of fragmentation in the field of international law.[31]

In light of the above discussion regarding a *de facto* existence of – and place for – precedents in international investment law, a case law analysis may not only demonstrate how an arbitration clause has been interpreted and applied in a particular award, but also the likely interpretation and application of the same or similarly phrased clauses by future tribunals. A review of awards thus offers perspectives on both past and future rulings. Such a study is particularly useful in answering my research questions by illustrating how tribunals have assessed the issue of respondent state counterclaims in the light of arbitration clauses and procedural frameworks for arbitration.

1.4.2 The Literature of International Law

There is plenty of literature covering the general topic of international investment law and international investment arbitration. However, I have

[28] McLachlan, Campbell, Shore, Laurence & Weiniger, Matthew, *International investment arbitration: substantive principles* / Campbell McLachan, Laurence Shore, Matthew Weiniger, 2 ed., Oxford University Press, Oxford, 2017 p. 87 ff.
[29] Dolzer, Kriebaum & Schreuer p. 46.
[30] McLachlan, Shore & Weiniger p. 90 ff.
[31] Ibid. p. 89.

selected two specific works in the field to support the writing of the more descriptive elements of the thesis based on the authors positions and recognised expertise on the topic, namely *Principles of International Investment Law* and *International Investment Law: Substantive Principles.*

On the narrower issue of respondent state counterclaims, the literature is more limited. The selected literature is used to further nuance and complement the process of clarifying the rules on counterclaims – for example by contributing with further analysis and discussion of relevant awards and the effects the mentioned rules have. When selecting the literature, I have considered the author's expertise in the relevant field of law and the extent to which the authors are cited in other works. I have sought to align my choice of literature with what is stated in Article 38.1 d) of the IJC's statute regarding "[...] the teachings of the most highly qualified publicists of the various nations."

Legal literature is a description of the law and its effects. Each author brings his or her own perspectives and, to some extent, has their own agenda when presenting their reasoning and conclusions. It is not certain that the opinions and positions expressed by the author in a particular work can be equated with the current consensus on the issue. Statements should therefore be addressed and anchored in treaty text and in VCLT on matters of interpretation.

Some authors argue that while parties still refer to literature to support their arguments in disputes before international courts and tribunals, the literature is losing its role as evidence of international law as practice of states is becoming increasingly more accessible through records and reports.[32] There are simply other sources that provide better evidence of international law. However, authors also point out that literature not only influences tribunals but also has an important role in its independence and critical review of state practise.[33] The literature of international law can thus have an impact on practitioners as well as those who are active in the development and progression of international law.[34] In my thesis, the literature will therefore be used both for fact finding, to complement my argumentation and to offer further insights and analysis.

1.4.3 Out with the old, in with the new?

Since the law is not a constant but evolves over time, it is desirable to look to the most recent material sources to understand the content and impact of the

[32] Oppenheim p. 42 f.
[33] Ibid. p. 43 f.
[34] Henriksen p. 32.

relevant legal rule; more recent awards and literature may therefore be preferred to older.[35] However, in order to recognise the current state of research as a starting point for my study, earlier publications than the most recent ones must be taken into account. Although Vohryzek-Griest's findings from 2009 as described above in section 1.3 are important for the understanding of how tribunals have assessed the issue of respondent state counterclaims up until that year, almost fifteen years have passed since then. During these fifteen years, both new BITs as well as awards concerning counterclaims have emerged. The conclusions in Vohryzek-Griest's article may therefore be subject of review, evaluation, and criticism.

In regard to other literature used for my study, it can be said that in order to fully provide a background of the issue, the progress in the field and the impact of specific rulings over time, it may be relevant to consider both the most recent and relatively older literature to form the overall picture. Therefore, even though I will consult recent arbitral awards and literature as starting point, it is necessary to consider relevant relatively older material to successfully answer my research questions.

1.4.4 Short Notes on Interpretation

In the course of my work, it may be necessary to consult rules for the interpretation and application of BITs and procedural frameworks for arbitration. Treaties, such as BITs, shall be interpreted in accordance with the rules on interpretation in international law. For this purpose, I will rely on the *Vienna Convention on the Law of Treaties* (VCLT).[36] The general rule for interpretation provided in the VCLT Article 31(1) is that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." This rule for interpretation is therefore the starting point when I study the text of treaties in my thesis.

As described in section 4.1.4, the VCLT is also consulted by tribunals when interpreting BITs in the context of arbitration. The VCLT is either applicable because the state parties are both bound by the Convention, or if this is not the case, because the provisions on interpretation in the Convention constitutes a reflection of customary international law[37], which has been recognised by the ICJ in numerous judicial cases.[38] In addition to Article

[35] Linderfalk (2001) p. 24.
[36] McLachlan, Shore & Weiniger p. 79 f.
[37] Ibid. p. 79 f.
[38] See for example *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* [1991] ICJ Judgement https://www.icj-cij.org/sites/default/files/case-related/82/082-19911112-

31(1), tribunals turn to other rules for interpretation in the VCLT. Mention could be made of interpreting the treaty in the context of relating agreements between the parties in connection with the treaty, relating instruments, subsequent agreements on the interpretation or application of the treaty and relevant rules of international law applicable between the parties, as specified in Article 31(2–4). Article 32 of the VCLT provides supplementary means for interpretation when clarity cannot be ascertained using the general rule for interpretation in Article 31, such as preparatory work of the treaty and the circumstances at the conclusion of the treaty. How tribunals have interpreted the meaning of specific BITs will be discussed in further detail in chapter 4 where a study of awards is presented.

1.5 Delimitations

International investment law and international investment arbitration are broad and extensive areas of international law. However, within the scope of this thesis, only BITs and procedural frameworks for arbitration aimed at resolving disputes arising from these treaties will be addressed and analysed. The readers who are familiar with the sector-specific multilateral Energy Charter Treaty (the ECT) may notice several similarities between the ECT and the BITs discussed in this thesis, both in terms of structure, substantive provisions as well as its references to procedural rules for dispute resolution.[39] Although I have chosen to not address the ECT in my thesis any further, the reader may be able to draw certain parallels between my findings regarding the discussed BITs and what could apply to the ECT.

At the time of writing, there are approximately 2220 BITs in force globally.[40] Given the limited scope and timeframe of this thesis, it is obviously not feasible to undertake the task of reviewing them all. Therefore, it has been necessary to limit the investigation to a smaller selection of BITs. The selection has been narrowed down to treaties whose official treaty language is English. This limitation aims to avoid possible discrepancies and confusion in translations from one language to another, as the text of the treaty is of utmost importance for interpretation and application of the treaty. Since my study builds on the findings of, among other, Vohryzek-Griest's publication

JUD-01-00-EN.pdf (accessed January 1 2024) para. 48; and more recently *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* [2008] ICJ Judgement https://www.icj-cij.org/sites/default/files/case-related/136/136-20080604-JUD-01-00-EN.pdf (accessed January 1 2024) para. 112.

[39] Dolzer, Kriebaum & Schreuer p. 18 f.

[40] UNCTAD Investment Policy Hub – International Investment Agreements Navigator. https://investmentpolicy.unctad.org/international-investment-agreements accessed 1 January 2024.

from 2009, which reviews awards rendered up to the same year, this has an impact on which BITs and related awards should be analysed in my thesis.

When considering the age of BITs to examine, there are several parameters I must consider, as the review of the treaties is closely linked to the related awards available. The issue of state counterclaims in disputes arising from BITs concluded before 2009 may have been assessed by tribunals both before and after that year. Counterclaims may also have been reviewed in subsequent awards based on BITs concluded after 2009. However, this raises the problem that the possibilities for state counterclaims under more recently concluded treaties are yet to be assessed and tested in the context of arbitration. The awards examined in my study concern disputes where none are based on BITs concluded later than 1998. It appears to be expected and understandable that it may take time for disputes based on activities and investments protected by a treaty to arise after its conclusion. Therefore, previous awards – and thus older BITs – are still relevant for my study to reflect on potential future development in the field.

When describing relevant provisions of BITs such as arbitration clauses, I will refer to the most recently concluded BITs in force, and then gradually move backwards in time. It should be noted, however, that I strive for a diversity of state parties to BITs for greater representation. Thus, as it is common for a state to conclude a number of BITs with different state parties around the same year, I have occasionally omitted a certain year in the chronological order.

The type of dispute resolution that will be investigated and discussed in this thesis is specifically investor-state arbitration resolving disputes arising from BITs. Thus, disputes between the state parties will not be addressed. Neither will arbitration arising directly from investor-state investment contracts and not BITs, since different conditions may apply as to what claims may be considered in disputes related to investment contracts.[41] However, awards where tribunals address claims arising from investment contracts are still relevant to understand tribunals' assessment of respondent state counterclaims in investment disputes arising from BITs, as seen in chapter 4 below. Investment contracts will therefore be addressed when relevant throughout the study. When it comes to the regulatory frameworks for resolving the above-mentioned kind of disputes, I have chosen to limit the investigation to arbitration under the ICSID Convention, the UNCITRAL Arbitration Rules, the ICC as well as the SCC Arbitration Rules. The reason

[41] See for example Vohryzek-Griest p. 92 ff.

why these specific sets of rules are discussed is that they are generally frequently and widely used rules for international investment arbitration[42] and referred to in the treaties and literature selected for my study.

1.6 Outline

My study begins in chapter 2 with an overview of fundamental aspects of BITs. This is followed by a description of dispute settlement under BITs, including examples of arbitration clauses and a description of the most widely used procedural frameworks in chapter 3. Subsequently, in chapter 4 I provide examples of awards where the tribunals have addressed the issue of respondent state counterclaims. In the same chapter, I describe various authors' suggestions regarding aspects that could potentially increase possibilities of successful counterclaims. Finally, I present my findings and answer my research questions in chapter 5 before further providing concluding reflections and remarks in chapter 6.

[42] Dolzer, Kriebaum & Schreuer p. 342 ff.; McLachlan, Shore & Weiniger. p. 58.

2 Bilateral Investment Treaties

2.1 Introduction

Investment disputes may arise from a variety of state-state international investment agreements (IIAs) such as bilateral investment treaties (BITs), multilateral investment treaties, free trade agreements with investment provisions, and international investment agreements focused on a specific sector or economic activity, for instance the ECT.[43] In the following, only BITs will be discussed.

In this section, I will first briefly outline the purpose and structure of these treaties. The treaties vary in terms of their scope, level of detail, and the nature of the host state's treaty obligations towards the investor. Therefore, my general description of their content does not constitute an exhaustive presentation but is limited to aspects relevant to answer my research questions.

In addition to the substantive rights described in section 2.2 below, the BITs contain dispute settlement clauses which regulate how disputes arising from the treaties are resolved between investors and host states. Most BITs offer arbitration as a mean or investor-state dispute settlement, either as sole option or as an optional alternative to proceedings before national courts.[44] In section 3.1–3.2 I will thoroughly explain and discuss the purpose, function, construction, and effect of investor-state dispute settlement clauses in BITs.

2.2 Core Elements in Bilateral Investment Treaties

BITs are concluded between states to – through international law – provide foreign investors with investment protection in the territory of the host state in addition to what is provided by the host state's national law. In this way, the state parties to the treaties aim to promote and encourage investments from nationals of one state to the territory of the other through reciprocal commitments.[45]

Although the specific content differs from treaty to treaty, they generally follow the same structure. The purpose of the BITs can be found in their preamble, where the state parties often express a desire for the treaty to strengthen the parties' economic relations by protecting and encouraging

[43] McLachlan, Shore & Weiniger p. 26.
[44] Dolzer, Kriebaum & Schreuer p. 125 f.
[45] Henriksen p. 234.

investments.[46] As an example of this, the preamble of the Bahrain – Japan 2022 BIT states that the parties:

> Desiring to further promote investment in order to strengthen the economic relationship between Japan and the Kingdom of Bahrain […] Intending to further create stable, equitable, favourable and transparent conditions for greater investment by investors of a Contracting Party in the Area of the other Contracting Party […] Convinced that this Agreement will contribute to the further development of the overall relationship between the Contracting Parties;

The preamble is followed by a list of definitions. Two particularly important elements of the definition's section in the context of this thesis are (1) who is considered to be a 'national' and (2) what constitutes an 'investment' under the treaty. The definition of 'national', which concerns the investor, limits who possesses rights under the treaty and thus can invoke the tribunals' jurisdiction as a claimant in the event of an investment dispute – the *ratione personae*.[47] As an example, the Hungary – Oman 2022 BIT states, in Article 1(2):

> The term "Investor" shall mean any Natural Person or Legal Person of one Contracting Party that has made an Investment in the Territory of the other Contracting Party;

Since the state parties to the treaty generally aim to increase the flow of investments between them, the term 'investment' is usually defined broadly to cover many different types and forms of investments and investment activities.[48] An example of a wide definition of an 'investment' covered by a BIT is the following wording of the Israel – United Arab Emirates 2020 BIT:

> **covered investment** means, with respect to a Party, an investment:
> (a) in its territory;
> (b) directly or indirectly owned or controlled by an investor of the other Party; and
> (c) existing on the date of entry into force of this Agreement, or made or acquired thereafter;

Subsequently, the investor's substantive rights protected by the BIT, which also constitute the host state's treaty obligations, follow.[49] The substantive

[46] McLachlan, Shore & Weiniger pp. 27 – 29.
[47] Ibid. p. 29 f.
[48] Henriksen p. 234 f.
[49] McLachlan, Shore & Weiniger p. 31.

rights covered by the BITs generally include *fair and equitable treatment*, *full protection and security*, *protection from expropriation*, *national treatment*, *most-favoured-nation treatment* as well as certain provisions referred to as *umbrella-clauses*.[50] Furthermore, most BITs offer guarantees for *free transfers of payments/funds* linked to the investment.[51]

As the reader will notice throughout the thesis, the provisions in the BITs are usually centred around investment protection for the investor. Few BITs provide for any investor obligations towards the host states. Some authors argue that this constitutes an asymmetry in the reciprocity that otherwise exists in agreements. *Dolzer*, *Kriebaum*, and *Schreuer* however offer a different perspective, suggesting that the nature of foreign investment law does not entail the traditional element of reciprocity but instead focus on unilateral obligations of the host state towards the investor, with the aim of attracting foreign investments that would not be materialised in absence of the BIT. According to the mentioned authors, the starting point of the investment treaty is not that the host state and the investor have opposing interests, but that their interests should be understood "as complementary, held together by the joint purpose of implementing investments consistent with the business plan of the investor and the legal order of the host State."[52] Yet, as seen in section 4.3.2 Vohryzek-Griest suggests that implementing substantive provisions regarding the investor's obligations towards the host state could facilitate increased possibilities for successful state counterclaims. Such arguments will be discussed more in detail further ahead in the thesis.

2.2.1 The Right to Fair and Equitable Treatment, and Full Protection and Security

The standard of *fair and equitable treatment* (FET) of foreign investments is frequently invoked in investment disputes. The standard is an expression of the rule of law and has been applied by tribunals to a wide range of circumstances. Tribunals have occasionally emphasised that the standard appears vague, but have through their judgements given it a more detailed meaning, such as "[t]he FET standard does not depend on how a host State treats its own nationals or the nationals of a third State. It is an absolute standard that has its reference point in international law. FET is also an absolute standard in the sense that it does not depend on domestic law."[53] Concrete examples from BITs of what has been covered by the standard

[50] McLachlan, Shore & Weiniger p. 31.
[51] Ibid. p. 33.
[52] Dolzer, Kriebaum & Schreuer p. 26 f.
[53] Ibid. p. 186 f.

include the host states' obligation not to deny the investor access to legal remedies as well as protection against discrimination.[54] *Fair and equitable treatment* is not to be confused with the notion of *full protection and security* (FPS). The latter standard has been described by a tribunal as it "[…] obliges the host state to provide a legal framework that grants security and protects the investment against adverse action by private persons as well as state organs […]" while the former "[…] consists mainly of an obligation on the host state's part to desist from behaviour that is unfair and inequitable."[55]

2.2.2 Protection from Expropriation of Investments

Another central right of the investor under BITs is *protection from expropriation*. The host state's right to expropriate alien property in accordance with the principle of territorial sovereignty in international law contrasts with the fact that the same right poses a concern for foreign investors' activities in the territory.[56] Expropriation always involves an action by the state, usually through regulatory or administrative measures. The object of the treaty protection against expropriation is the investment itself and may therefore include both tangible as well as intangible property such as contracts and loans.[57] The term of 'expropriation' is not only limited to situations where an investment is made unusable or restricted due to, for example, amended legislation and regulations, but also refers to direct taking of ownership and thus depriving investors of their property.[58] Investors' rights to protection against undue expropriation in BITs reflects rules of international law such as Article 1 in the Protocol to the European Convention of Human Rights, governing the right to property for natural and legal persons.

In modern BITs, the issue of expropriation is often managed by the state parties restricting the host state's right to expropriate by limiting lawful expropriation to certain conditions.[59] In general, an expropriation by the host state must fulfil three cumulative criteria to be considered permissible under BITs. These criteria are usually specified in writing in most BITs but are also considered as customary international law. To be considered permissible under the treaties, the expropriation must serve *public purpose,* be *non-discriminatory,* follow principles of *due process* and that the investor receives

[54] Dolzer, Kriebaum & Schreuer p. 190 f.
[55] Ibid. p. 231 f.
[56] Ibid p.146 f.
[57] Ibid p. 151.
[58] Ibid p. 147 ff.
[59] Ibid p. 146 f.

adequate and effective *compensation* within a duly timeframe of the expropriation.[60]

2.2.3 National Treatment and Most-Favoured-Nation Treatment

The standard of *national treatment* obliges the host state to not discriminate in their treatment of foreign investors compared to the treatment of the state's own nationals. Usually, the obligation enters into effect after the investor's establishment in the host state's territory. The purpose of the obligation is to prevent distorted competition between foreign investors and nationals[61], which is in line with the general overall purpose of the treaties; to protect and encourage foreign investment between the state parties. Similar to the standard of *national treatment*, the aim of the *most-favoured-nation treatment* (MFN) provision is to combat potential host state discrimination of foreign investors compared to nationals. However, according to the MFN standard, foreign investors also benefit from any more favourable protection and treatment offered to nationals of a third state with which the host state has concluded a BIT.[62] The MFN standard thus ensure that the host state does not treat foreign investors unequally due to differences in the level of investment protection from treaty to treaty. The BIT – to which the host state is a party – that provides the most favourable treatment of foreign investors thus sets the bar for the treatment of *all* foreign investors covered by BITs, creating a level playing field for foreign investments.[63]

2.2.4 Umbrella Clauses

The so-called umbrella clause in the BIT guarantees that the host state will honour its obligations towards the investor. The reason why they are called umbrella clauses is because they include host state obligations other than strictly those already provided for in the treaty – thus 'shielding' the obligations under the umbrella of the treaty. Dolzer, Kriebaum, and Schreuer describe that an often disputed issue is whether or not umbrella clauses 'import' the state's contractual obligations towards the investor into the treaty. There are, however, cases where contractual obligations have been considered to be covered by the treaty and therefore subject to review by international tribunals. Dolzer, Kriebaum, and Schreuer further point out that since a breach of contract does not always constitute a breach of a specific treaty standard, umbrella clauses play an important role as the host state's

[60] Dolzer, Kriebaum & Schreuer p. 182 f.
[61] Ibid p. 253 f.
[62] Ibid p. 264 f.
[63] Ibid.

breach of the contract may be considered as a treaty violation due to the umbrella clause, and thus gives the investor access to an effective remedy – international arbitration – through the treaty's arbitration clause.[64] Umbrella clauses do not only extend to the state's contractual obligations, but also to unilateral acts such as legislation, where obligations towards the investors arising from domestic law and regulations may also be brought under the treaty.[65] In chapter 4, there are examples of investors using contracts as a basis for their claim in investment arbitration.

2.2.5 Free Transfers of Payments

Since the ability to transfer funds both into and out of the host state at the time of the establishment of the investment and during its lifetime is of great importance to the investors, most BITs contain provisions regarding free transfers of payments or free transfers of funds. However, the investors right to transfers of funds must be balanced with the host state's interest in managing its currency and foreign reserves. As national monetary and financial policies on cross-border transfers may differ, the wording of the provisions regarding transfers of funds often varies from treaty to treaty. Sometimes, only certain kinds of transfers are covered by the treaty provisions. The right to transfer may either be general as in transfers of payments related to an investment, or specified as transfers of, for example, profits, interest, or funds necessary to finance an investment. While it is very rare for an investor to be guaranteed an absolute right to free transfers of payments under a treaty, some restrictions may be regarded as more limiting. An example of such a restriction is that the investor only has the right to transfer funds in line with the host states laws and regulations, as these laws may of course change after the establishment and over the course of the investment.[66]

2.3 Short Notes on Investment Contracts

In the sections above, I have described the protection and rights granted the foreign investor in relation to their investment in the territory of the host state because of a BIT concluded by the host state and the home state of the investor. However, in addition to the BIT, it is common to regulate large-scale investments directly through an investment agreement/ -contract between the host state and the investor. These agreements can be both extensive and complex in scope. In this section, however, commonly used key elements of

[64] Dolzer, Kriebaum & Schreuer p. 272 f.
[65] Ibid. p. 285 f.
[66] Ibid. p. 290 ff.

the agreements that are relevant for the understanding of my study are described.[67]

The content of investment agreements usually consists of, among other provisions, the allocation of rights and obligations between the parties, applicable law to the contract and choice of forum for settlement and resolution of any disputes between the parties arising from the agreement. In addition to the agreement being concluded directly between the investor and the host state, there are other party constellations, such as state entities – investor, state-local subsidiary, or state entities-local subsidiaries.[68]

As regards the applicable law, it is common that the parties agree that a combination of domestic law as well as rules of international law shall be applicable to the substance of the agreement.[69] Similar to the provisions for dispute resolution under BITs, it is common that the parties to have agreed that dispute resolution should take place through international arbitration to exclude the jurisdiction of domestic courts, either through ad hoc arbitration or through institutional international arbitration such as the framework of ICSID.[70] However, there are investor-state investment agreements which refer the disputes arising from the specific agreement to the host state's domestic courts, while a BIT – providing 'parallel' protection to the investment at treaty level – concluded between the state party and the investor's home state instead refer to international investment arbitration, which has given rise to complicated disputes regarding the courts' and the tribunals' jurisdiction.[71] Authors such as McLachan, Shore and Weiniger emphasise the importance of distinguishing disputes attributable to the investment contract between the parties and the BIT respectively, if both the contract and the treaty contain dispute resolution provisions such as arbitration clauses.[72] As seen below in section 4.1.1, the case of Saluka Investments B.V. v. The Czech Republic address the question of jurisdiction where both an investment contract as well as the BIT contain provisions on arbitration.

[67] Dolzer, Kriebaum & Schreuer p.122 f.
[68] Ibid. p.123 f.
[69] Ibid. p.125 f.
[70] Ibid.
[71] Ibid.
[72] McLachlan, Shore & Weiniger p. 106.

3 Dispute settlement under BITs

3.1 Investor – State Dispute Settlement

Arbitration between a foreign investor and a host state can take many different forms. There are several different international institutions providing standardised frameworks for rules on arbitration the parties can refer to in the arbitration clause of their agreement, which will be described more closely in section 3.3. In older BITs, the state parties often refer to so-called *ad hoc* arbitration in the dispute settlement clauses, while most relatively newer BITs refer to arbitration within a certain institutional framework of choice.[73] In the first scenario, where the parties have not agreed that the arbitration should be conducted within a specific institutional framework, an ad hoc arbitration can be invoked. Ad hoc arbitration requires the parties to agree on many issues, ranging from the appointment of arbitrators to a number of concrete procedural aspects of how the proceedings shall be conducted.[74] It can therefore be assumed that the parties consider it most beneficial to include provisions in the investment treaty stating that arbitration shall be conducted according to certain institutional framework(s) and rules on arbitration, which, as mentioned, is reflected in more recent treaties. In my thesis, I will discuss the rules of arbitration of the United Nations Commission on International Trade Law (UNCITRAL), the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), and the Stockholm Chamber of Commerce (SCC).

3.1.1 Why Investment Arbitration?

International arbitration offers benefits to the investor, the host state as well as for the investor's home state.[75] There are several reasons, illustrated by the different purposes of investment arbitration, as to why this is the preferred way of dispute resolution in investment disputes.

First, the purpose of depoliticising can be mentioned. By providing the parties to an investor-state dispute arising from a BIT the option of arbitration as method of dispute resolution, the jurisdiction of domestic courts is excluded.[76] As for the investor, litigation in the host state's courts could pose a risk for partiality and irregularities, given the potential bias of the court to the host state. A fair and objective legal process is not a matter of fact in all states,

[73] Dolzer, Kriebaum & Schreuer p. 125 f.
[74] Ibid. p. 342.
[75] Ibid. p. 340 f.
[76] Ibid. p. 125 f.

which may be particularly significant and visible when the investor raises large monetary claims against the host state.[77] Furthermore, when states can leave the issue of, for example, investors' claims for compensation and the defending of their rights and interests against another state up to an international tribunal, the pressure on the investors' home state to pursue its national's interest may be reduced and the state may gain more flexibility in terms of foreign policies.[78]

Arbitration provides an effective tool for obtaining justice and compensation, as arbitration is often more efficient than litigation in the host state's domestic courts and thus additionally favourable from a perspective of judicial economy.[79] Additionally, as the parties themselves usually decide on the composition of the tribunal, they have the opportunity to select arbitrators with expertise in the field and whom they have confidence in, which can benefit both sides in the process both in terms of the assessment of substantive issues as well as efficiency.[80] Resolving disputes through arbitration also benefits the parties after the award has been rendered. Enforcing a foreign award is significantly easier than enforcing foreign judgements from domestic courts, which is often exceedingly difficult if not impossible.[81] For example, an award rendered within the framework of the ICSID Convention is binding on the parties and enforceable in all the state parties to the Convention, according to Article 54 of the same. Another example of efficient enforcement of awards is Article 46 in the 2023 SCC Arbitration Rules, stating that by agreeing to arbitration under the rules, the parties also undertake to carry out the subsequent award without delay.

Although it can be argued that the host state also benefits from speedy, efficient processes, authors point out that another incentive to offer this type of dispute resolution is to favour the investment climate for foreign investors.[82] Dolzer, Kriebaum, and Schreuer suggest that the mere existence of arbitration as a mean for settling investment disputes between an investor and a host state may have a positive influence on the parties to the investment's behaviour, even if it is not used. The author suggests that access to effective remedy in case of a dispute can serve as a tool for the parties to strive to avoid arbitral proceedings they risk to losing and thus have a mitigating effect. This could also, according to Dolzer, Kriebaum, and

[77] Dolzer, Kriebaum & Schreuer p. 339.
[78] Dolzer, Kriebaum & Schreuer p. 340 f.
[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Ibid.

Schreuer, lead the parties to making greater efforts to settle any disputes in good faith to avoid arbitration.[83] According to my understanding, this may have a beneficial effect on the parties' relationship with regard to the investment and promote further cooperation, which may ultimately contribute to a favourable investment climate.

Another important element of investment arbitration – and a fair system of judgement in general – is the principle of equality of the parties stemming from the requirements of good administration of justice. *McLachlan* describes that states have strived for greater equality by introducing international arbitration as a mean for dispute resolution under BITs. A tribunal in an international arbitration shall treat the parties – an investor and a state – equally, although they may otherwise not be balanced. The principle of equality of the parties was considered in the drafting of the ICSID Convention (discussed in detail in section 3.3.2) but is also explicitly reflected in other frameworks. McLachlan points out that there is an ongoing debate on both procedural and constitutional level regarding the application of the principle in investment arbitration and if whether this method of dispute resolution is the most suitable one. There have been several initiatives to review various forms and forums for dispute resolution, one of which should be particularly mentioned in this context is the UNCITRAL Working Group III. In its overview of a potential reform of investor state dispute settlement, the Working Group reviews the question of how counterclaims could be addressed in the context of dispute settlement.[84]

The Working Group has developed draft provisions to reform procedural aspects related to investor-state dispute settlement, which could be incorporated into future international investment agreements, including provisions relating specifically to counterclaims.[85] In documents from the Working Group's sessions, it can be read that provisions in international investment agreements allowing for respondent state counterclaims "could reduce uncertainty, promote fairness and ultimately ensure a balance between the disputing parties in ISDS." (Investor-state dispute settlement, my remark). And that "[a]llowing counterclaims to be heard together with the original claim enhances procedural efficiency and could avoid multiple proceedings

[83] Dolzer, Kriebaum & Schreuer p. 341.

[84] McLachlan, Campbell, Introduction. In *The Institute of International Law's Resolution on the Equality of Parties Before International Investment Tribunals*: *Introduction, Text and Commentaries* (pp. 1-12), Cambridge University Press, Cambridge, 2021.

[85] UNCITRAL Working Group III *Possible reform of investor-State dispute settlement (ISDS) Draft provisions on procedural and cross-cutting issues – Note by the Secretariat Forty-sixth Session (2023) A/CN.9/WG.III/WP.231 p. 6.*

in different forums involving the same disputing parties."[86] While there are several suggestions and initiatives to reform investment arbitration, McLachlan also emphasises that other scholars argue that investment arbitration as a form of dispute resolution fulfil the demands of a fair system and can successfully maintain the balance between the interests of the respective parties to the dispute.[87] The mentioned balancing act is further discussed in chapter 6.

Ultimately, a few words could be said about confidentiality, which is a common feature in commercial arbitration. Limited insight in and confidentiality of the process may be particularly desirable in disputes concerning vast amounts or sensitive business sectors.[88] It should be noted, however, that special provisions on transparency with reference to public interest and accountability may arise in the context of treaty arbitration, where states and state entities are present in the dispute.[89] One example of such provisions are discussed further in section 3.3.3.

3.2 Investor-State Arbitration Clauses

3.2.1 Prerequisites for Arbitration

First, it should be noted that arbitration clauses in BITs provide that the initiation of arbitration must be preceded by a time period during which the parties must have attempted to settle the dispute by other means, for example by consultation and negotiation. In some BITs, it is explicitly stated that the parties must have made attempts to settle the dispute amicably or, similarly, in good faith. This time period is sometimes referred to as a 'cooling off' period.[90]

An example of an arbitration clause providing for a 'cooling off' period before arbitral proceedings can be initiated can be found in the Myanmar – Singapore 2019 BIT:

> ARTICLE 12
> INSTITUTION OF ARBITRAL PROCEEDINGS
> 1. The disputing parties shall initially seek to resolve the dispute by consultations and negotiations.

[86] UNCITRAL Working Group III *Annotations to the draft provisions on procedural and cross-cutting issues – Note by the Secretariat Forty-sixth Session* (2023) A/CN.9/WG.III/WP.232, para 27.
[87] McLachlan pp 1–12.
[88] Dolzer, Kriebaum & Schreuer p. 340.
[89] McLachlan, Shore & Weiniger p. 66.
[90] Ibid. p. 52 f.

2. Where the dispute cannot be resolved as provided for under paragraph 1 within 6 months from the date of a written request for consultations and negotiations, then, unless the disputing parties agree otherwise, the disputing investor may submit the dispute to arbitration: […]

Furthermore, an example of an arbitration clause expressly providing for attempts to settle the dispute amicably or in good faith before initiating arbitration can be found in the Hungary – Belarus 2019 BIT and the Turkey – Zambia 2018 BIT respectively.

> Article 9
> Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party
> 1. Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party shall, if possible, be settled amicably and be subject to negotiations between the parties in dispute.
> 2. […]
>
> ARTICLE 11
> Settlement of Disputes between One Contracting Party and Investors of the Other Contracting Party
> 1. […] As far as possible, the investor and the concerned Contracting Party shall endeavour to settle these disputes by consultations and negotiations in good faith.

There may also be provisions in the dispute resolution clauses in BITs that stipulate that the dispute must first be referred to local courts for a certain time period before international arbitration can be initiated.[91] These are unusual requirements in more recent BITs, but can be illustrated by an extract from the older Argentina – United Kingdom 1990 BIT, which provides that:

> Article 8
> Settlement of Disputes Between an Investor and the Host State
> 1. Disputes with regard to an investment […] which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

[91] McLachlan, Shore & Weiniger p. 52 f.

2. The aforementioned disputes shall be submitted to international arbitration in the following cases:
    a. if one of the Parties so requests, in any of the following circumstances:
        i. where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;
        ii. where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

To continue my study, I will proceed from the scenario that these prerequisites for arbitration are met. The remainder of this chapter will therefore exclusively concentrate on issues related specifically to arbitration, such as the parties' choice of framework for arbitration and what kind of dispute the tribunal is authorised to review in the context of arbitration.

3.2.2 Choice of Procedural Framework and Rules of Arbitration

Most BITs do not state that one framework for dispute resolution shall have priority over another. Instead, the party who initiate the proceedings – almost exclusively the investor – may choose freely between different options provided.[92] An example of this can be found in the dispute settlement clause of the Denmark – North Macedonia 2015 BIT:

ARTICLE 9
Disputes between a Contracting Party and an Investor

1. Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party shall, as far as possible, be settled amicably.
2. If such a dispute between an investor of one Contracting Party and the other Contracting Party continues to exist after a period of six months, investor shall be entitled to submit the case either to:
    a. international arbitration of the International Center for Settlement of Investment Disputes established

[92] McLachlan, Shore & Weiniger p. 48 f.

pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C on 18 March 1965 (ICSID Convention), or

b. an arbitrator or international ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law, or

c. by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce (ICC).

[…]

This type of arbitration clause, where the investor – who usually is the claimant – is offered several options of frameworks for dispute resolution in no particular order of priority, is referred to by some authors as a 'cafeteria style approach'.[93] Other BITs, such as the Hong Kong, China SAR – Mexico 2020 BIT specifically identify a certain framework, but the parties are free to agree on other alternatives:

> ARTICLE 16
> Submission of a claim
> 1. An investor of a Contracting Party may submit to arbitration a claim that the other Contracting Party has breached an obligation under Chapter II, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.
> 2. An investor of a Contracting Party, […] may submit to arbitration a claim that the other Contracting Party has breached an obligation under Chapter II, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.
> 3. A disputing investor may submit the claim to arbitration under:
>   a. the UNCITRAL Arbitration Rules; or
>   b. any other arbitration rules, if the disputing parties so agree.
>
> […]

This wording of the arbitration clause allows the investor to choose another framework for arbitration than the first mentioned one, on the condition that this can be agreed by the other party.

3.2.3 The Nature of the Dispute to be Ruled by the Tribunal

[93] McLachlan, Shore & Weiniger p. 48 f.

In addition to specifying the options available to the parties in terms of procedural frameworks and rules for arbitration, the arbitration clause often specify the nature of the dispute that can be referred to arbitration, although the definitions vary in granularity.[94] Below are several examples of how this is expressed in the arbitration clauses of various BITs.

3.2.3.1 "Disputes" and "any disputes"

Often, the arbitration clauses in BITs simply states that disputes between the parties regarding an investment shall be submitted to international arbitration. See, for example, the Gambia – Turkey 2013 BIT:

> ARTICLE 8
> SETTLEMENT OF DISPUTES BETWEEN A CONTRACTING PARTY AND AN INVESTOR
>
> 1. Disputes arising between a Contracting Party and an investor from the other Contracting Party in respect of an investment of the latter in the territory of the former shall, as far as possible, be settled amicably.
> 2. If such disputes cannot be settled within a period of three months from the date on which either party to the dispute requested for amicable settlement by the delivery of a notice, in writing, to the other party, the dispute shall be submitted for resolution […]

Another example of an arbitration clause with a similar wording can be found in the Kuwait – Kenya 2013 BIT:

> ARTICLE 8
> SETTLEMENT OF DISPUTES BETWEEN A CONTRACTING PARTY AND AN INVESTOR
>
> 1. Disputes arising between a Contracting Party and an investor from the other Contracting Party in respect of an investment of the latter in the territory of the former shall, as far as possible, be settled amicably.
> 2. If such disputes cannot be settled within a period of three months […] the dispute shall be submitted for resolution, at the election of the investor party to the dispute, through one of the following means: […]

[94] McLachlan, Shore & Weiniger p. 48 f.

Sometimes, the phrasing is extended to "any dispute". An example of an arbitration clause providing that "any dispute" may be submitted to arbitration is the arbitration clause in the Paraguay – Qatar 2018 BIT:

> ARTICLE 8
> Settlement of Disputes between a Contracting Party and an Investor of the Other Contracting Party
> 1. Any dispute under the provisions of this Agreement, arising directly from an investment between one Contracting Party and an investor of the other Contracting Party shall be settled amicable among themselves.
> 2. If such disputes cannot be settled according to the provisions of paragraph (1) of this Article within (3) three months from the date of request in writing for settlement, the investor concerned may submit at his preference the dispute settlement to: […]

A similar wording can be found in the Bahrain – Pakistan 2014 BIT:

> Article 9
> Settlement of investment dispute
> 1. Each Contracting State consent to submit any disputes that may arise out of or in relation to any investment or associated activities made in its territory by an investor of the other Contracting State for settlement in accordance with the provisions of this Article.
> 2. […]

As can be seen from the extracts above, the clauses do generally not define what is specifically included in the terms "dispute" or "any dispute", whether, for example, they exclusively refer to breaches of substantive provisions of the treaty such as the rights of the investor, or whether they also include other matters regarding the investment and thus have the characters of general dispute settlement clauses.[95] Instead, for guidance, we may look to how tribunals have interpreted and provided meaning to this type of wording in chapter 4.

3.2.3.2 Disputes regarding breaches of the host state's obligations

However, in contrast to what was illustrated above, there are many examples where the arbitration clauses expressly state that only disputes arising from

[95] McLachlan, Shore & Weiniger p. 48 f.

breaches by the host state of its treaty obligations towards the investor can be considered by an arbitral tribunal.

The Armenia – Korea 2018 BIT sets out a clear example of an arbitration clause providing that disputes concerning breaches of the host state's obligations towards the investor can be referred to arbitration:

> Article 11
> Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party
>
> 1. This Article 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 Contracting Party under this Agreement which causes loss or damage to the investor or its investment.

A similar wording can be found in the arbitration clause of the Canada – Moldova 2018 BIT, stating that:

> ARTICLE 20
> Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise
>
> 1. An investor of a Party may submit to arbitration under this Section a claim that:
>   a. the respondent Party has breached an obligation under Section B (Substantive Obligations), other than an obligation under Article 8(3) (Senior Management, Boards of Directors and Entry of Personnel), 12 (Transparency) or 15 (Health, Safety and Environmental Measures); and
>   b. the investor has incurred loss or damage by reason of, or arising out of, that breach.
>
> […]

Similarly, the first article of the chapter in the Austria – Kyrgyzstan 2016 BIT governing settlement of disputes between investors and the host state states that:

> ARTICLE 13
> Scope and Standing
> This Part 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 his investment.

After studying how the parties can regulate under which framework for arbitration a dispute can be resolved and if there are any limitations as to what type of dispute can be resolved through arbitration, it remains to study the relevant provisions regulating counterclaims in the procedural frameworks available to the parties.

3.3 Procedural Frameworks

3.3.1 Introduction

In the following section, I will describe the relevant provisions regarding counterclaims under frequently applied frameworks for investor-state investment arbitration. Arbitration as a mean for dispute resolution has primarily been used to resolve commercial disputes between private parties, which is why many elements in investment arbitration can be recognised from commercial arbitration. Some frameworks primarily governing commercial arbitration are also applicable to investment arbitration, while other frameworks, such as the ICSID has been developed specifically for investment arbitration.[96]

The mentioned frameworks govern matters such as the tribunal's jurisdiction and what claims may be raised by the parties in the context of the disputes. It should be noted that when I identify and draw conclusions regarding the conditions for successful counterclaims under the procedural rules, I do so with reservation that the outcome may be different when a tribunal examines the circumstances of the individual case in the light of the relevant framework, which is also reflected in chapter 4. Today, the ICSID is often the most preferred forum for investor-state arbitration. However, as seen in section 3.2.2 it is common that the dispute settlement clauses in BITs often provide different forum options and rules for arbitration, by some called the "cafeteria style approach".[97] In this section, I will describe and discuss arbitration under the ICSID, then the UNCITRAL Rules, ICC and then finally SCC.

3.3.2 The ICSID Convention

3.3.2.1 Introduction

The International Centre for Settlement of Investment Disputes (ICSID) was established in 1966 under the World Bank in Washington through the

[96] Dolzer, Kriebaum & Schreuer p. 342.
[97] Ibid. p. 345.

development of the multilateral treaty *Convention on the Settlement of Investment Disputes between States and Nationals of Other States.* The Convention is often referred to, including here, as 'the ICSID Convention'.[98] At the time of finalising this thesis, 158 states have ratified the Convention.[99]

ICSID is an independent, depoliticised institution that offers dispute resolution between investors and host states, including arbitration.[100] In addition to providing standardised dispute resolution clauses for parties to incorporate in their contracts, the Centre also has detailed procedural rules for arbitration, and offers institutional support throughout the arbitral proceedings.[101] Additionally, Article 44 in the Convention stipulates that the proceedings shall be conducted in accordance with the ICSID Arbitration Rules in effect at date of the parties' consent to arbitration, unless the parties agree otherwise. In this section, I will refer to the 2022 version. The awards rendered under the ICSID Convention are binding and in principle not subject to review, except under very specific circumstances further specified in the Convention. The awards are recognised by all state parties to the Convention and any monetary obligations related to the awards are enforceable similarly to final judgements rendered by national courts, which is specified in Article 54.[102]

The preamble of the Convention emphasises the importance of "international cooperation for economic development, and the role of private international investment therein" and the necessity of "availability of facilities for international conciliation or arbitration to which the Contracting States and nationals of other Contracting States may submit such disputes if they so desire". Article 36(1) in the Convention reflects that the state may bring counterclaims towards the investors initial claim, stating that both contracting states and nationals of contracting states may initiate arbitral proceedings. Vohryzek-Griest points out that the purpose of the ICSID Convention was to balance the interest of both the investors and the host states, that both states and investors would be able to initiate proceedings under the Convention, and that the provisions of the Convention should not be applied differently to states and investors. Although the ICSID Convention explicitly provides for

[98] Dolzer, Kriebaum & Schreuer p. 342.
[99] ICSID – List of Contracting States and Other Signatories of the ICSID Convention as of 25 October 2022 https://icsid.worldbank.org/sites/default/files/ICSID%203/ICSID-3--ENG.pdf accessed 12 November 2023.
[100] ICSID – 'About ICSID' https://icsid.worldbank.org/About/ICSID accessed 18 December 2023.
[101] Dolzer, Kriebaum & Schreuer p. 343.
[102] Ibid. p. 344.

equality between the parties, Vohryzek-Griest argues that in practice, arbitration within the ICSID framework and submission of counterclaims under the same are limited in comparison to the possibilities of investors, which may be due to the way the issue of jurisdiction has been interpreted over time.[103]

3.3.2.2 Jurisdiction and counterclaims under ICSID

According to Article 41 in the Convention, the tribunal is the judge of its competence. In establishing competence, the tribunal applies Article 25(1) of the Convention, which governs the ICSID's jurisdiction. The Article provides that the Centre has jurisdiction over *any legal dispute* arising directly out of an investment between a contracting state and a national of another contracting state. Furthermore, Article 42 states that the tribunal shall decide the dispute in accordance with the rules of law agreed by the parties to the dispute, and in the absence of such agreement the tribunal shall apply the law of the state party to the dispute as well as such rules of international law as may be applicable. The Convention explicitly allows for counterclaims in Article 46, provided that such claims are covered by the Centre's jurisdiction. According to Article 25 of the Convention, the parties to the dispute must provide the Centre with their written consent for the tribunal to conduct the arbitration in its entirety, including hearing counterclaims. Once the parties to the dispute have given their written consent, a party cannot withdraw their consent unilaterally.

There are several ways for the parties to provide their consent. However, a common way for states providing consent to arbitration is through specific clauses in BITs where the host state offers arbitration as dispute resolution to investors who are nationals of the other state party. Furthermore, the offer of – and thus consent to – arbitration must be combined with an acceptance to arbitration by the investor for the Centre's jurisdiction to be established.[104] Vohryzek-Griest points out that as investors are not parties to investment treaties such as BITs, investor consent may be more complicated to determine.[105] Dolzer, Kriebaum, and Schreuer, on the other hand, note that a common way for the investor to give their consent to arbitration is by 'responding' to the host state's offer of arbitration provided in the BIT by

[103] Vohryzek-Griest p. 86 f.; 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 (as amended April 10th, 2006).
[104] Dolzer, Kriebaum & Schreuer p. 360.
[105] Vohryzek-Griest p. 90.

initiating proceedings.[106] It is not only the initiation of arbitration within the ICSID framework that requires the consent of the parties, but according to Article 46 of the Convention, the tribunal also needs the consent of the parties to address counterclaims. However, Article 46 does not suggest that consent is required beyond what is already stated in Article 25(1).[107] To summarise, the Centre's jurisdiction over a dispute cannot be established merely through a reference in the dispute resolution clause in an investment treaty but must be completed by the investor's consent to arbitration.

It should be noted that the provisions on the Centre's jurisdiction under Article 25(1) of the Convention require that both the host state and the investor's home state are contracting states to the Convention. In the event that any of these states are not parties to the Convention, the investor-state dispute may be submitted to the Additional Facility, offering dispute resolution administered by ICSID to non-contracting states.[108] Moreover, the Additional facility applies the Additional Facility Rules – the procedure is not governed by the provisions in the Convention.[109] However, this form of dispute resolution will not be dealt with in detail in the scope of this thesis.

Apart from both parties' consent to arbitration – which covers both the dispute as a whole and counterclaims specifically – Article 46 requires that the counterclaim in question arise directly out of the subject-matter of the dispute, and Article 25(1) that the claim arises directly out of an investment.[110] Similar requirements can be found in Article 40 of the 2022 Arbitration Rules, concerning ancillary claims, stating that unless the parties otherwise agree, a party may present an counterclaims arising directly out of the subject-matter of the dispute, provided that such an ancillary claim is within the scope of the parties' consent and within the Centre's jurisdiction.

Vohryzek-Griest describes that tribunals have sometimes had difficulties in specifying the substance of these requirements. Questions has arisen as to whether 'the subject-matter of the dispute' is to be interpreted narrowly as in 'indivisible from the original investment' or broadly as in 'the investment at issue and anything connected to it', giving more room for state counterclaims? The same kind of question has arisen in regard to the requirement that the claim shall arise directly from an investment.[111] How

[106] Dolzer, Kriebaum & Schreuer p. 366 f.
[107] Vohryzek-Griest p. 90.
[108] Dolzer, Kriebaum & Schreuer p. 359 f.
[109] Ibid. p. 345.
[110] Vohryzek-Griest p. 91.
[111] Ibid.

tribunals have assessed and interpreted these requirements in context of investment arbitration is discussed, as previously mentioned, in detail in chapter 4.

3.3.3 The UNCITRAL Arbitration Rules

3.3.3.1 Introduction

The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly through resolution 2205(XXI) of 17 December 1966. UNCITRAL develops the legal framework for facilitation of international trade and investments through, for example the making of legislative and non-legislative instruments in different areas of commercial law, one of them being dispute resolution.[112] In 1976, the UNCITRAL Arbitration Rules (henceforth the UNCITRAL Rules) were first adopted. They were originally developed for commercial arbitration[113] but have since then been applied in a wide range of dispute resolution settings, both for commercial arbitration as well as for state-state and investor state disputes.[114]

The framework was later revised in 2010 to modernise and make the procedure governed by the rules more efficient. In 2013, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration were adopted, and the 2010 rules were updated to incorporate the mentioned rules. The incorporation resulted in the introduction of a new wording in Article 1(4), stating that when the Rules on Transparency calls for the tribunal to exercise its discretion, the tribunal should consider both the public interest in transparency in treaty-based investor-state arbitration as well as the parties' interest in fair and efficient resolution of their dispute. The rules on transparency are only applicable in arbitration pursuant to an investment treaty concluded on or after 1 April 2014.[115] Furthermore, in 2021 the UNCITRAL Expedited Arbitration Rules were adopted and incorporated in the 2021 revised UNCITRAL Rules. If the parties prefer that the arbitration is to be conducted in accordance with the Expedited Rules, the parties must

[112] UNCITRAL – 'A Guide to UNCITRAL – Basic facts about the United Nations Commission on International Trade Law' https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf accessed 29 December 2023.

[113] Brenninkmeijer, Gélinas, II. Current Position.

[114] UNCITRAL – Information on the UNCITRAL Arbitration Rules https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration accessed 2 January 2024.

[115] Ibid.

express their specific consent. Despite these incorporations of additional sets of rules, the 2010 revised rules remain largely the same.[116]

The UNCITRAL Rules, specifically only provide rules for arbitration and thus does not in itself offer any institutional or administrative support to the parties to the dispute, they are therefore free to establish ad hoc tribunals wherever they prefer in the world. There are, however, instances where existing institutions apply the UNCITRAL Rules at the request of the parties[117], which will not be discussed further here. Although it is left to the parties to arrange for the administration of the procedure, the UNCITRAL Rules are intended to provide a comprehensive regulation of all aspects of the arbitration process, from the initiation of the process to the effects of the final award.[118]

Since the UNCITRAL Rules from 1976 underwent extensive revision prior to the new rules being adopted in 2010, the issue of counterclaims in the arbitral awards discussed in my thesis may have been governed by different provisions depending on which set of rules have been applied by the tribunal to the dispute. Therefore, I will first describe the conditions for counterclaims under the UNCITRAL Rules first prior to and then after 2010.

3.3.3.2 Jurisdiction and counterclaims under the UNCITRAL Rules

According to Article 21 of the UNCITRAL Rules from 1976, the tribunal has the power to rule on any objections to its jurisdiction, which suggests that the tribunal has the power to determine its jurisdiction as well. Article 1 states that the parties' dispute is to be settled according to the rules where the parties have agreed in writing that disputes related to their contract shall be referred to arbitration under the UNCITRAL Rules. Article 33 further stipulates that the tribunal is to 'apply the law designated by the parties as applicable to the substance of the dispute'. When it comes to the matter on possibilities of respondent counterclaims, Article 19(3), specifying the content of the respondent's statement of defence as a response to the claimant's notice of arbitration, explicitly states that "the respondent may make a counter-claim arising out of the same contract". The new 2010 Rules, however, provide an

[116] UNCITRAL – Information on the UNCITRAL Arbitration Rules https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration accessed 2 January 2024.

[117] Dolzer, Kriebaum & Schreuer p. 347.

[118] UNCITRAL – Information on the UNCITRAL Arbitration Rules https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration accessed 2 January 2024.

updated formulation providing that counterclaims must relate to the parties' disputed contract. The update originates from the fact that the previous wording was considered inappropriate in investment arbitration based on treaties.[119] Another provision that favours the possibility to bring counterclaims under the UNCITRAL Rules from 1976 is that Article 21(3) specifies that if the claimant wants to make a plea against the tribunal's jurisdiction over a counterclaim, it shall not be raised later than in the reply to the counterclaim.

As for the UNCITRAL Rules adopted in 2010, similarly to arbitration under ICSID, Article 23 Rules states that the tribunal has the power to determine its own jurisdiction. Article 1(1) further states that the rules are applicable to disputes between the parties 'in respect of a defined legal relationship, whether contractual or not' when the parties have agreed on arbitration in accordance with the UNCITRAL Rules as a mean of dispute resolution. Furthermore, according to Article 35, the tribunal, also similarly to what applies for arbitration under ICSID, is to apply the law decided by the parties to the substance of the dispute and decide in accordance with the terms of the parties' contract. The UNCITRAL Rules also permit counterclaims in the context of arbitration, as stated in Article 4(2), which requires the respondent to describe in their response to the notice of arbitration any counterclaims they intend to assert against the claimant in the same process. As previously noted, the wording in the 1976 Rules that the counterclaims must arise from the same contract as the initial claim has been removed, and instead requires that it falls under the scope of the tribunal's jurisdiction.[120]

To summarise, it can thus be said that when studying the text of the UNCITRAL Rules, there seem to be possibilities for respondent states to introduce counterclaims in the context of arbitration in accordance with the rules from both 1976 and 2010, provided that these claims are considered to be within the applicable scope of the rules and the tribunal's jurisdiction, which is for the tribunal itself to judge.

3.3.4 Arbitration under ICC International Court of Arbitration

3.3.4.1 Introduction

[119] Brenninkmeijer, Gélinas, II. The current position.
[120] Ibid.

The International Chamber of Commerce (ICC) International Court of Commercial Arbitration was established in 1923 with its seat in Paris. The Court assists in resolving both commercial and investment disputes[121] but does not render awards or judgements itself. Instead, it acts as an administrative body providing assistance to the parties. Moreover, the Court offers a list of arbitrators and will compose the tribunal unless the parties to the dispute agree differently.[122] The first set of arbitration rules were adopted in 1922 but have been updated several times over the decades.[123] The Court's current version of rules on arbitration have been in force since 2021 and regulates cases received by the Court from the same year.[124] Pursuant to Article 6(1) of the 2021 Arbitration Rules, it is presumed that if the parties have agreed to submit the dispute to arbitration under the rules, the dispute shall be resolved in accordance with the version of the rules in effect the date of commencement of the arbitration, unless the parties have agreed otherwise.

3.3.4.2 Jurisdiction and counterclaims under the ICC Arbitration Rules

Article 6 states that the jurisdiction of tribunal, appointed in accordance with Articles 12–13, over the dispute arises from the parties' agreement to submit the dispute to arbitration under the ICC Rules, thereby also accepting that the arbitration will be administered by the Court. Under the mentioned Article, the tribunal also has the power to decide on jurisdiction in the event that any of the parties challenge the existence, validity, or scope of the arbitration agreement. Under Article 21, the parties to the dispute are free to agree on the law to be applied by the tribunal to the merits of the dispute. If the parties have not agreed on applicable law, the rules provide for the tribunal to apply the law it considers appropriate. In its assessment of the dispute, the tribunal shall consider the provisions of the relevant contracts between the parties as well as any relevant trade usages.

[121] ICC International Court of Arbitration – 'Centenary of the ICC Court' https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-international-court-of-arbitration/centenary-of-the-icc-court/ accessed 21 December 2023.

[122] Dolzer, Kriebaum & Schreuer p. 346 f.

[123] ICC International Court of Arbitration – 'Centenary of the ICC Court' https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-international-court-of-arbitration/centenary-of-the-icc-court/ accessed 21 December 2023.

[124] ICC International Court of Arbitration – Information on the 2021 Arbitration Rules https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/#block-accordion-1 accessed 2 November 2023.

The 2021 Arbitration Rules explicitly allow for counterclaims. According to Article 25(5), the respondent shall submit any counterclaims it seeks to raise against the claimant in its answer to the claimant's request for arbitration. When doing so, the respondent shall also provide "a description of the nature and circumstances of the dispute giving rise to the counterclaims and of the basis upon which the counterclaims are made", "a statement of relief sought together with the amounts of any quantified counterclaims and, to the extent possible, an estimate of the monetary value of any other counterclaims" as well as relevant agreements, including any arbitration agreements. The claimant then shall submit a reply to any counterclaims by the respondent within a given timeframe of 30 days, according to Article 25(6).

3.3.5 Arbitration under SCC Arbitration Institute

3.3.5.1 Introduction

The SCC Arbitration Institute was established in 1917 as a part of the Stockholm Chamber of Commerce, but is acting independently in its function in managing both commercial disputes and disputes between investors and states through arbitration.[125] As described in Appendix I to the SCC 2023 Arbitration Rules, the SCC is composed by of the Board and the Secretariat. The SCC Arbitration Institute is the second largest institute globally for investment arbitration after the ICSID. The Institute does not itself render awards but either administer disputes under the SCC Arbitration Rules or act as an appointing authority under for example the UNCITRAL Arbitration Rules. Many investment disputes at the Institute are however resolved in accordance with the SCC Arbitration Rules.[126] The 'main' Arbitration Rules are also accompanied by additional rules such as the Expedited Arbitration Rules, the Mediation Rules as well as the SCC Express Rules.

Over the years, the SCC Arbitration Rules have been updated and new, supplementary rules added. The most recent version of the Arbitration Rules entered into force on 1 January 2023, which will also be the version referred to in this section. If the parties to the dispute refer to arbitration in accordance with the Arbitration Rules of the SCC Institute of Arbitration, it is presumed that the parties intends that the dispute is to be resolved in accordance with

[125] SCC Arbitration Institute – 'About the SCC' https://sccarbitrationinstitute.se/en/about-scc accessed 15 December 2023.

[126] SCC Arbitration Institute – 'Investment disputes' https://sccarbitrationinstitute.se/en/our-services/investment-disputes accessed 18 December 2023.

version of the Arbitration Rules in force at the commencement of arbitration, if the parties have not agreed otherwise.

In investment treaty disputes between investors and states, in addition to the provisions of the Arbitration Rules, Appendix III of the rules also applies according to Article 1 of the Appendix. The Appendix in question addresses issues such as submissions by third persons and submissions by non-disputing treaty parties, but also stipulates provisions on the composition of the arbitral tribunal.

3.3.5.2 Jurisdiction and counterclaims under the SCC Arbitration Rules

Similar to the ICC rules, the tribunal's jurisdiction is based on the parties' arbitration agreement, see for example Article 6(iv). Furthermore, the Board has the power to make decisions required in the SCC administration of disputes, which is stated in Article 6 of the Appendix I to the 2023 Arbitration Rules. The mentioned decisions also include decisions on the jurisdiction of the SCC. The Board has the power to decide to dismiss a case if the SCC manifestly lacks jurisdiction over the dispute according to article 11(i) and 12(i) of the Arbitration Rules. The tribunal shall conduct the arbitration in line with the Arbitration Rules and any agreement between the parties to the dispute, in line with Article 23(1). Further, the tribunal shall apply the rules of law agreed upon by the parties to the merits of the dispute according to Article 27 but has the power to apply the law it considers most appropriate if the parties have not agreed on applicable law. As regards the issue of counterclaims, they are explicitly regulated in Article 9(1), stating that the respondent shall submit an answer to the claimant's request for arbitration, including a statement of any counterclaims and an estimate of the monetary value associated with the counterclaim.

3.3.6 Similarities, Differences, and Other Observations

Dolzer, Kriebaum, and Schreuer point out that many of the most widely used frameworks for investment arbitration have some important similarities with each other. For example, the parties often have the option to decide the composition of the tribunal and the law that the tribunal shall apply to the substance of the dispute themselves. Furthermore, the tribunal, in turn, often have the power to decide its own competence as well as the procedural rules for the arbitration in absence of agreement by the parties.[127] We can make the

[127] Dolzer, Kriebaum & Schreuer p. 346.

observation that these elements indeed also apply to the frameworks described above.

Moreover, there are similarities, and some important differences, in terms of how the frameworks regulate the conditions to bring counterclaims in disputes subject to arbitration, as reflected in how granular or fine the regulation of what is considered to fall within the jurisdiction of the tribunal, i.e. the matters that may be subject to the tribunals' assessment. Which, in turn, has an impact on the type of counterclaim that can be pursued by the parties. This is particularly evident when reviewing the ICSID framework, which sets out clear criteria for the nature of the dispute and claims between the parties that can be heard by the tribunal. This approach differs from the ICC and SCC rules, where investment disputes between investors and states are essentially assessed under the same rules and on the same principles as commercial disputes between two private parties. As for the latter two frameworks, the tribunals' jurisdiction over the dispute and the parties' claims clearly arises from the parties' arbitration agreement and the type of dispute and claims subject to the tribunal's assessment in the context of arbitration is not further specified in the text.

After studying the above-mentioned procedural frameworks, I draw the conclusion that there are at least theoretical possibilities for the respondent to introduce counterclaims in the context of arbitration in accordance with each one of the frameworks. However, it is essential to note that the tribunals examine the individual dispute and its merits on a case-by-case basis in the light of the applicable procedural framework. It is the task of the tribunal to determine and interpret the content and meaning of the provisions of the rules before applying them to the facts of the individual dispute. For the respondent to successfully introduce counterclaims, the tribunal ruling the dispute must assess whether all the relevant conditions for counterclaims are met, such as questions on jurisdiction and, where applicable, questions regarding close connection to the initial claim.

When reading the following chapter describing how tribunals have ruled on respondent state counterclaims, the reader notes that I do not discuss any awards issued in accordance with the ICC or the SCC rules. As mentioned earlier, there are a limited number of awards rendered under the ICSID and the UNCITRAL Rules – which are the most widely used procedural frameworks for arbitration – that address counterclaims. Since the ICC and SCC are not as frequently used (but still important) procedural frameworks, it is therefore expected that there are fewer awards rendered under these

frameworks that can be utilised to set clear examples of how tribunals have dealt with the issue of counterclaims. However, as noted in the above study of procedural frameworks, there are several similarities between all the mentioned rules, and therefore we can at least make general assumptions about what conclusions tribunals acting under the ICC and SCC rules would reach when faced with the issue of respondent state counterclaims.

4 Arbitral Awards

In this section, a description of several awards follows, demonstrating how tribunals have addressed and ruled on respondent state counterclaims considering the above discussed procedural frameworks for arbitration. Given the limited scope of the thesis, the description of the awards is limited to aspects that are necessary and relevant to put the issue of counterclaims in its proper light and context.

4.1.1 Saluka Investments B.V. v. The Czech Republic

The case of Saluka Investments B.V. v. the Czech Republic arose from the Czech Republic – Netherlands 1991 BIT. The dispute was finally formally settled in 2006, but the ad hoc tribunal acting under the UNCITRAL 1976 Rules issued their decision on the jurisdiction over the Czech Republic's counterclaims in 2004.[128] From now on, only this decision will be discussed. The arbitration clause of the Czech Republic – Netherland BIT states that:

> Article 8
>
> 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.
>
> […]
>
> 6. 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.

The dispute and subsequent arbitral proceedings are based on investments related to the privatisation of the Czech banking sector, which was centralised and state owned up until 1990. The claimant is Saluka Investments B.V. (Saluka), a Dutch company acting as a subsidiary in the Netherlands of the Japanese merchant banking and financial services group of companies

[128] Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004.

Nomura Group (Nomura).[129] At the centre of the dispute is the Share Purchase Agreement, governing the transaction where one of Nomura's English subsidiaries bought shares in a Czech state-owned commercial bank Investicní a poštovní banka (IPB) from the Czech National Property Fund (NPF) and subsequently transferred the shareholding to Saluka, the Dutch Subsidiary which was established merely to hold said shares.[130] Saluka, the claimant, later initiated arbitration claiming compensation due to the Czech Republic's alleged discriminatory, unfair, inequitable and expropriatory measures resulting in breach of the state's treaty obligations when the shares in IPB were 'forcingly' sold to another state owned bank.[131] The Czech Republic counterclaimed, claiming that Nomura through a number of actions breached the Share Purchase Agreement regarding the purchase of shares in IPB[132] as well as violations Czech law in connection with the investment.[133] Saluka made objections, arguing that the tribunal did not have jurisdiction over the counterclaims.[134]

The tribunal concludes that it in principle has jurisdiction over counterclaims, since the arbitration clause in the BIT read together with Articles 19.3, 19.4 and 21.3 of the UNCITRAL rules (as described above in section 3.3.3) are drafted broadly enough to include counterclaims. Similarly, the term "all disputes" in the arbitration clause was considered broad enough to cover disputes involving counterclaims. Furthermore, for the dispute to fall within the tribunal's jurisdiction, the arbitration clause requires that the dispute must be between a host state and an investor, but the tribunal finds this requirement does not mean that the arbitration clause exclusively applies to disputes where the investor initiates the dispute.[135]

However, the tribunal only finds jurisdiction over the counterclaims relating to breach of contract, and not the counterclaims relating to violations of Czech law.[136] In regard to the relevant connection between the counterclaim and the initial claim, the tribunal finds a 'general legal principle' where the counterclaim is required to have a close connection to the initial claim, which is reflected in Article 46 in the ICSID Convention and in the UNCITRAL Rules as, for example, the counterclaim must "arise directly out of an

[129] Saluka – Decision on Counterclaims para. 1.
[130] Ibid. para 9.
[131] Ibid. para 10.
[132] Ibid. para 48.
[133] Ibid. para 59.
[134] Ibid. para 18.
[135] Ibid. para 39.
[136] Vohryzek-Griest p. 114.

investment" or "directly out of the subject-matter" as well as based on how these provisions had been interpreted in the decisions referred to by the respondent. In other words, a tribunal with jurisdiction over the initial claim may have jurisdiction over a counterclaim if the latter has a close connection with the former.[137] The tribunal further reviewed previous awards, stating that each separate legal source constitutes an indivisible whole, with its own goals and purpose. Therefore, an initial claim and a counterclaim based on separate legal sources, such as the investment protection provisions of a treaty and domestic law respectively, does not constitute an indivisible whole. Thus, the tribunal concluded that the counterclaims regarding violations of Czech law should be settled in accordance with procedures of Czech law and not through treaty arbitration, as the counterclaim could not be considered as an indivisible whole with the initial claim regarding the Czech Republic's treaty obligations towards the investor.[138]

When it comes to the Czech Republic's counterclaims regarding the alleged breach of the Share Purchase Agreement, the tribunal concludes that the investment governed by the agreement is the investment protected by the treaty.[139] However, the Share Purchase Agreement contains its own separate arbitration clause stating that disputes arising from the agreement shall be resolved by arbitration pursuant to the UNCITRAL rules.[140] As the BITs arbitration clause demands that the tribunal is required to take into account special agreements relating to the investment, it cannot overlook the mandatory arbitration clause in the Share Purchase Agreement, requiring a separate arbitration. Thus, the tribunal concludes that it does not have jurisdiction over the contract-based counterclaims invoked by the Czech Republic.[141] The tribunal reaches this conclusions even though counterclaims regarding breaches of contract might otherwise fall within the scope of the tribunal's jurisdiction in accordance with the arbitration clause in the BIT, as the initial claim was based on a dispute related to an investment contract and the counterclaim on the same contract.[142]

4.1.2 Sempra Energy International v. The Argentine Republic

[137] Saluka – Decision on Counterclaims para. 76.
[138] Brenninkmeijer, Gélinas II. The current position; Saluka – Decision on Counterclaims paras 65–79.
[139] Saluka – Decision on Counterclaims para. 47.
[140] Ibid. para. 54.
[141] Ibid. paras 56–58.
[142] Ibid. paras 38–39.

The case of Sempra Energy International (Sempra) v. The Argentine Republic (Argentina) arose from the Argentina – United States of America (US) 1991 BIT and the award was rendered by an ICSID tribunal in 2007. The arbitration clause of the relevant BIT reads:

> Article VII
>
> 1. For 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 (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority (if any such authorization exists) to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
> 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution: […]

The arbitration is based on a dispute relating to Sempra's investment in two natural gas distribution companies in Argentina. Sempra (the claimant) argues that Argentina (the respondent) adopted a number of measures that amended the regime for foreign investors under which Sempra made its investment.[143] When the tribunal discusses Sempra's claims relating to allegations that the measures in question are equivalent to expropriation under the treaty[144], the tribunal notes that the respondent state argues that a number of expectations it had in relation to the investment were not fulfilled by the claimant, and 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 a counterclaim." The tribunal points out that such a counterclaim is in line with the provisions in Article 46 of the ICSID Convention and Article 40 of the Arbitration Rules (as described above in section 3.3.2), but the possibility of invoking such counterclaims was not utilised in the present case.[145]

In other words, the Sempra tribunal clearly expresses that respondent state counterclaims should, in principle, be possible in arbitration under the ICSID Convention and the Arbitration Rules, but that such counterclaims must relate to an alleged breach of the treaty. If there are no provisions in the BIT

[143] Sempra Energy International v. The Argentine Republic. ICSID Case No. ARB/02/16, Award September 28th, 2007.
[144] Ibid. para. 274.
[145] Ibid. para. 289.

regulating any investor obligations towards the host state, counterclaims can thus not be invoked. Vohryzek-Griest further comments on the case, suggesting that the tribunal encouraged a respondent state counterclaim and want to strive to provide the same conditions for the respondent to have its claims assessed as for the claimant, but is prevented from doing so due to the lack of provisions regarding provisions regarding protection of the host state in the BIT.[146]

4.1.3 Desert Line Projects LLC v. The Republic of Yemen

The case of Desert Line Projects LLC (Desert Line) v. The Republic of Yemen (Yemen) arose from the Oman – Yemen 1998 BIT. The ICSID Tribunal issued the final award in 2008. The arbitration clause of the BIT states that:

> Article 11
> Settlement of Investment Disputes
>
> 1. If an investment dispute arises between either Contracting Party and an investor of the other Contracting Party, they shall attempt to settle it amicably.
> 2. If the Contracting Party and the investor are unable to reach an agreement within six months after submitting a written request to conduct friendly settlement talks, the dispute shall be settled by resorting to one of the following means, at the choice of the investor: […]

The arbitration is based on a dispute between Desert Line (the claimant) an Oman construction company, constructing asphalt roads in Yemen (the respondent) on behalf of the state. The parties entered into several contracts governing their affairs.[147] Desert Line claims that Yemen breached its treaty obligations to the company due to a number of issues related to its operations on the state territory, and requested that the tribunal to declare a breach and order Yemen to pay due compensation.[148] Yemen counterclaimed by claiming damages resulting from Desert Line's alleged breach of undertakings in a settlement agreement as well as damages for Desert Lines unfulfilled obligations arising from a previous award which includes damages for unfulfilled construction work and obligations relating to bank guarantees.[149]

[146] Vohryzek-Griest p. 117.
[147] Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award February 6th 2008 paras 1–14.
[148] Ibid. para. 50.
[149] Ibid. para. 216.

The tribunal, however, dismisses the counterclaims on the basis of facts before and without discussing the issue of jurisdiction.[150] Vohryzek-Griest points out that although the tribunal dismisses the counterclaims, it reduced the award in Desert Line's favour with an amount equal to one of Yemen's counterclaims due to the tribunal holding a certain settlement agreement where the respondent was obliged to pay a certain amount to the claimant as "internationally ineffective" and therefore takes this into account when determining the amount the respondent to pay the claimant under the award.[151] Vohryzek-Griest further suggests that the dismissal of counterclaims on a factual basis reflects a pattern of arbitral awards where counterclaims "are either dismissed merits or are dismissed on jurisdictional grounds where they have merit."[152] It is, however, difficult identify a true pattern. Vohryzek-Griest's article was published in 2009 and thus only covers awards issued up until the same year, and after this year the number of accepted counterclaims remains very limited. In the following, I will describe notable awards issued in 2011 and onwards.

4.1.4 Spyridon Roussalis v. Romania

The award of the Spyridon Roussalis v. Romania case was issued by an ICSID tribunal in 2011. The dispute between the parties arose from the Greece – Romania 1997 BIT. The arbitration clause in the BIT provides that:

> Article 9
> Settlement of Disputes between an Investor and a Contracting Party
> 1. Disputes Between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way.
> 2. If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor concerned may submit the dispute either to the competent courts of the Contracting Party in the territory of which the investment has been made or to international arbitration.
>
> Each Contracting Party hereby consents to the submission of such dispute to international arbitration.
> […]

[150] Desert Line paras 222–225.
[151] Vohryzek-Griest p. 111; Desert Line para. 223.
[152] Vohryzek-Griest p. 111.

Roussalis (the claimant) was a Greek national owning the Romanian company Continent SRL. The Romanian government agency called the State Property Fund, which manages privatisation of state-owned businesses, sold its shares in the Romanian company S.C. Malimp S.A. to Continent SRL and the parties to the affair entered into a Share Purchase Agreement. Subsequently, Continent SRL agreed to make an additional investment with its own funds after the purchase of the shares, and registered a pledge of shares in S.C. Malimp S.A., now called Continent SA, in favour of the State Property Fund.[153] Roussalis argued that Romanian authorities had taken a number of measures against his investments in Romania that could be considered indirect expropriation as well as breaches of other substantive provisions under the Greece – Romania 1997 BIT, such as fair and equitable treatment as well as full protection and security.[154] However, Romania, acting on behalf of the State Property Fund as the respondent, counterclaimed by claiming that Roussalis and thus Continent SRL failed its obligation to make the additional investment mentioned above on which the claimant bases his initial investment claim.[155]

The tribunal opens its reasoning regarding the counterclaims by stating that it is the respondent, who claims that the tribunal indeed has jurisdiction over the counterclaims, who carries the burden to establish that such jurisdiction exists.[156] When assessing whether it has jurisdiction over the respondent's counterclaims, the tribunal begins by considered Article 46 in the ICSID Convention and Article 40 of the Arbitration Rules (as discussed in section 3.3.2) and concludes that "the Tribunal shall determine any 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."[157] The tribunal states that it must first determine whether the parties to the arbitration have consented to the inclusion of the state's counterclaims in the arbitration. As the state provided its consent to arbitration through the arbitration clause in the BIT, and the investor in turn provided its consent through accepting the state's offer to arbitrate, the tribunal states that the investor similarly can only be considered to have consented to counterclaims if the state has expressed such consent through

[153] Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1 Award December 7th, 2011, paras 1–8.
[154] Ibid. para. 10.
[155] Ibid. para. 747.
[156] Ibid. para. 860.
[157] Ibid. paras 861–863.

the arbitration clause in the BIT under which the investor subsequently consented to arbitration.[158]

To interpret the arbitration agreement contained in the arbitration clause of the Greece – Romania 1997 BIT, the tribunal turns to the general rule of interpretation in Article 31 of the VCLT and to a previous ICSID case. The tribunal finds that the wording of the arbitration clause "disputes […] concerning obligations of the latter" limits the jurisdiction to claims by the investor concerning obligations of the state and that counterclaims thus cannot be invoked by the host state regarding any obligations of the investor. Disputes under the BIT can, according to the tribunal, only concern the fulfilment of the host state's treaty obligations. Furthermore, the tribunal argues that since the arbitration clause specifies that the treaty itself is applicable law to the dispute, and since the BIT exclusively imposes obligations on the state parties towards the investors and not vice versa, the counterclaims fall outside the tribunal's jurisdiction. The parties to the arbitration are thus not considered to have consented to the respondent state's counterclaims being heard in the context of the arbitration.[159]

Linderfalk contrasts the majority's reasoning regarding the question of counterclaims with one of the arbitrator's declaration of dissent, who argue the ruling should have been different.[160] The arbitrator, Professor Reisman, claims 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." Furthermore, Professor Reisman argues that the majority's conclusion to reject ICSID jurisdiction over the counterclaims is contrary to the objectives of international investment law. The tribunal's rejection of jurisdiction over counterclaims requires the respondent state to pursue its claims against the investor – now as the respondent– in national courts, which is the forum that the provisions on dispute resolution in BITs often seeks to avoid. According to Professor Reisman, also leads to duplication of processes as well as inefficiency and

[158] Roussalis para. 866.
[159] Ibid. paras 867–872.
[160] Linderfalk, Ulf, "I. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES TRIBUNAL, SPYRIDON ROUSSALIS v ROMANIA, DECISION OF 7 DECEMBER 2011". International and Comparative Law Quarterly, 62(1), No 1 (2013) 241–250.

costs that could have been avoided if counterclaims were permitted in the same process.[161]

Linderfalk points out that the difference between the majority's and Professor Reisman's conclusions is due to different interpretations of the arbitration clause, namely Article 9 of the BIT and Article 46 in the ICSID Convention. The majority refers to the rules of interpretation in the VCLT. However, only one of the state parties to the BIT – Greece – was a party to the VCLT at the time, which means that customary international law reflected in the relevant provisions of the VCLT was applied, not the VCLT itself, when interpreting the arbitration clause and Article 46. Furthermore, Linderfalk says that the interpretation of the BIT is partly depending on how Article 46 is to be understood, and that the majority based their interpretation on two assumptions regarding the meaning of Article 46. Namely, (1) for the claimant to be able to consent to the inclusion of counterclaims in arbitration, this possibility must be reflected in the BIT and (2) the burden is on the respondent to show that the BIT allows for arbitration of counterclaims, the burden is not on the claimant to show the opposite. Professor Reisman as well as the respondent, however, argue that the investor's request for ICSID arbitration should be understood as including consent to arbitrate counterclaims under the relevant treaty, regardless of whether arbitration of counterclaims is covered by the scope of the treaty.[162]

However, Linderfalk suggests that the conclusion of the majority is the most solid. The state parties to the BIT offer dispute resolution through international arbitration to investors and the procedures are tied the rights and obligations arising from the BIT. The investor cannot create its own jurisdiction over counterclaims but may provide consent if the possibility is entailed by the arbitration agreement. Such possibilities leave room for the investor to choose otherwise, which brings purpose to the wording of "Except as the parties otherwise agree" which begins Article 46.[163]

After addressing the interpretation of Article 46, Linderfalk turns his attention to the interpretation of the arbitration clause – Article 9 – of the BIT. Customary international law provides that treaty text shall be interpreted in accordance with ordinary meaning – in accordance with conventional language. By applying these provisions, the majority concludes that the term 'dispute' in paragraph 2 has a close link to the term 'dispute' in paragraph 1,

[161] Linderfalk (2013).
[162] Ibid.
[163] Ibid.

thus implying that the term 'dispute' in paragraph 2 refers to disputes relating to the obligations of the host state. Linderfalk argues that once it has been concluded that the tribunal's jurisdiction does not extend to respondent state counterclaims due to what follows from the ordinary meaning of the wording of the arbitration clause, the possibilities for success by presenting an alternative interpretation are very slim. To override interpretation when the ordinary meaning of the treaty text is unambiguous by supplementary rules of interpretation it is required by Article 32 in the VCLT (and thus the reflected customary international law) that the ordinary meaning is shown to be "manifestly absurd or unreasonable", which should be difficult to achieve in this case.[164]

Finally, Linderfalk suggests that the conclusions the majority reached based on the wording of the arbitration clause in question may provide a "clear signal" for the relevant stakeholders drafting and reviewing BITs. Even if the tribunal may find other justifications, it is obliged to apply international law on interpretation that follows from customary international law and the VCLT when interpreting a treaty. Otherwise, the tribunal would in its interpretation make undue amendments to the treaty, amendments reserved for the state parties. In case state parties to BITs wish to extend the tribunal's jurisdiction to encompass counterclaims, the arbitration clauses should be drafted accordingly. Linderfalk makes a reference to the case of *Saluka* where the tribunal found the wording of the relevant BIT's arbitration clause to be "in principle wide enough to encompass counterclaims".[165]

4.1.5 Oxus Gold v. The Republic of Uzbekistan

The case of Oxus Gold v. The Republic of Uzbekistan arose from the United Kingdom – Republic of Uzbekistan 1993 BIT. The award was issued in 2015 by an ad hoc tribunal acting under the UNCITRAL 1976 Arbitration Rules. The arbitration clause in the BIT reads:

> Article 8
> Settlement of Disputes between an Investor and a Host State
> (1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written

[164] Linderfalk (2013).
[165] Ibid.

notification to a claim, be submitted to international arbitration if the national or company concerned so wishes.

(2) Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to: […]

Oxus Gold, the claimant, was a UK Company engaged in mining activities in Central Asia[166], including in Uzbekistan through wholly owned subsidiaries.[167] The dispute relates to two separate projects in Uzbekistan which Oxus was engaged in, but they are ruled in the same arbitration procedure.[168] Oxus Gold submitted a request for arbitration claiming that Uzbekistan had taken expropriatory measures and breached obligations of cooperation, good faith, due process and transparency[169], as well as, for example, breaching standards of fair and equitable treatment and full protection and security, and obligations to not impose unreasonable and arbitrary measures on the investor.[170] Uzbekistan counterclaimed, claiming compensation for damage which the claimant was alleged to have caused the respondent through misconduct by "misrepresentation, self-dealing, fraud, and other unlawful conduct, through which it not only systematically failed to perform its investment obligations but also enriched itself and its affiliates to the detriment of Respondent and the Uzbek Parties."[171] The tribunal states that the burden is on the respondent to establish that the required conditions for the tribunal to have jurisdiction are met, that the counterclaims are well founded and to specify their monetary value. To determine whether the tribunal has jurisdiction, it first seeks to determine the respondent's specific claims, and then rule on jurisdiction if it finds the claims sufficiently substantiated.[172]

As the tribunal finds that the respondent's claims were in fact sufficiently substantiated, it moves on to the question of jurisdiction. The tribunal holds that the "Respondent has to establish (i) that the counter-claims fall under the jurisdiction *ratione materiae* of the Arbitral Tribunal, (ii) what are exactly the international obligations that Claimant is said to have breached, and (iii) what are the specific actions of Claimants which are in breach of such international obligations. As conceded by Respondent, a **mere breach of domestic law is**

[166] Oxus Gold v. Republic of Uzbekistan Award December 17th 2015 para. 3.
[167] Ibid. para. 24.
[168] Ibid. paras 25–26.
[169] Ibid. para. 238.
[170] Ibid. paras 685–687.
[171] Ibid. para. 906.
[172] Ibid. paras 921–923.

not sufficient to trigger an international liability of Claimant under the BIT." (Emphasis added). The respondent argues that the combination of the arbitration clause – Article 8 – in the BIT and Article 21(3) of the UNCITRAL Arbitration Rules constitutes sufficient consent by the claimant to deal with the respondent's counterclaims in the same arbitration as the initial claim. Furthermore, the respondent argues that there is a sufficient close connection between the initial claim and the counterclaims to the extent that the respective claims arise out of the same "transaction or occurrence" and that the respondent's counterclaims "are the direct counterpart" to the initial claims under the BIT. The claimant, however, opposes this view.[173]

As regards the tribunal's assessment, the tribunal agrees that Article 21(3) indeed does provide that counterclaims are admissible, but only if these counterclaims already fall within the scope of the tribunal's jurisdiction. In other words, the article does not create jurisdiction by itself. Instead, the tribunal states that its jurisdiction is defined by the arbitration clause. After reviewing Article 8 of the BIT, the tribunal concludes that since the arbitration clause refers to disputes exclusively "concerning an obligation of the latter" (the host state) "under this agreement", the parties' consent to arbitration only includes investors' claims towards the host states, and not vice-versa. However, the tribunal notes that there are possible exceptions in the case that the counterclaims have a close connection to the initial claim. The tribunal references several cases on which the respondent relies its arguments, such as the previously mentioned Saluka case. The tribunal emphasises, however, that although the tribunal in the Saluka case did find jurisdiction over counterclaims, the wording of the relevant arbitration clause differs from the arbitration clause subject to review in this present case, as it does not refer strictly to disputes regarding the host state's obligations towards the investor. Instead, the tribunal points to the arbitration clause in the Spyridon Roussalis case, where the tribunal did not find jurisdiction over Romania's counterclaims, as its similarly worded as the arbitration clause in the UK – Uzbekistan 1993 BIT.[174]

The tribunal finds that even if it would apply the general legal principle expressed in the Saluka case, namely "a general principle as to the nature of the close connection which a counterclaim must have with the primary claim if a tribunal with jurisdiction over the primary claim is to have jurisdiction also over the counterclaim" the respondent fails to show that there is such

[173] Oxus Gold paras 936–943.
[174] Ibid. paras 944–950.

necessary close connection between the counterclaims and the initial case in the present case. Another hurdle for the jurisdiction of the tribunal regarding the counterclaims is the claim regarding Oxus Gold's breach of contract. A contract containing a separate dispute settlement clause referring the dispute to be settled under Uzbek law and courts, and therefore cannot be overlooked by the tribunal, similar to the circumstances in the Saluka case. In conclusion, the tribunal finds that it does not have jurisdiction over Uzbekistan's counterclaims and consequently rejects them.[175]

4.1.6 Burlington Resources Inc. v. Republic of Ecuador

The case of Burlington Resources Inc. v. Republic of Ecuador arose from the Ecuador – United States of America 1993 BIT. The award was issued by an ICSID tribunal in February 2017. On the same date, the tribunal issued their decision on Ecuador's counterclaims. The arbitration clause of the Ecuador – US 1993 BIT reads:

> Article VI
>
> 1. For 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 (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.
> 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution: […]

Burlington, the claimant, was a corporation established under the laws of the State of Delaware, United States, engaged in activities relating to exploitation of natural resources.[176] The dispute relates to Burlington's investment in service contracts linked to the Ecuadorian oil industry. The concept of service contracts model is described as a system where private investor exploits oil reserves in an area rewarded by the government. The government remains the sole owner of the produced oil but cover the expenses of the contractor and pays an additional monthly fee. Furthermore, the contractor has the right to reserve a share of the exploited oil. Since the government remains as the

[175] Oxus Gold paras 952–959.
[176] Burlington – Decision on Liability December 14th 2012 para. 1.

owner of the oil, the government enjoys the revenues resulting from a price increase of oil.[177] Burlington filed a request for arbitration under the Ecuador – US 1993 BIT in 2008, claiming that Ecuador had breached its treaty obligations relating to unlawful expropriatory measures as well as provisions relating to fair and equitable treatment, full protection and security and treatment no less than required by international law. Burlington demanded damages relating to the alleged breaches of the treaty as well as reimbursement of costs relating to the arbitration.[178]

Ecuador counterclaimed, requiring compensation from Burlington relating to damages on the environment and to infrastructure on the oil fields allegedly caused by the claimant. The counterclaims were based on the argument that Burlington was strictly liable under Ecuadorian law for environmental damages to the oilfields in question, and that Burlington was obliged to maintain the infrastructure on the oilfields under both the service contracts as well as Ecuadorian law.[179] The parties to the dispute entered into an agreement during the proceedings granting the ICSID tribunal jurisdiction over the counterclaims[180], which eliminated the need for the tribunal to consider the question of jurisdiction over said counterclaims. In the agreement, the parties explicitly state that the arbitration is "the appropriate forum for the final resolution of the Counterclaims arising out of the investments made by Burlington Resources and its affiliates […] so as to ensure maximum judicial economy and consistency."[181]

In addition to the parties' agreement of arbitration of counterclaims, the tribunal explores the provisions of Article 46 in the ICSID Convention, and notes that the relevant conditions are fulfilled in accordance with the article: "(i) the counterclaims arise directly out of the subject-matter of the dispute, namely Burlington's investment […]; (ii) they are within the scope of the Parties' consent to ICSID arbitration which is manifested in the agreement just referred to; and (iii) they also fall within the jurisdiction of the Centre as circumscribed by Article 25 of the ICSID Convention (legal dispute arising out of an investment, and nationality requirement)."[182]

As the tribunal's jurisdiction was established due to the parties' agreement, and the conditions under Article 46 were met, the tribunal proceeds to assess

[177] Burlington – Decision on Jurisdiction June 2nd 2010 paras 7 and 9.
[178] Burlington – Decision on Liability para. 67.
[179] Burlington – Decision on Counterclaims February 7th 2017 para. 52.
[180] Burlington – Award February 7th 2017 para. 8.
[181] Burlington – Decision on Counterclaims para. 60.
[182] Ibid. para. 62.

the law applicable to Ecuador's counterclaims. The tribunal makes a distinction between the law governing the proceedings related to the counterclaims and the law applicable to the substance of the dispute. As for the former, the proceedings are governed by the ICSID Convention, the ICSID Arbitration Rules and the tribunal's procedural orders. As for the latter, it is undisputed that Ecuadorian law applies to the counterclaims regarding both environmental damages as well as infrastructure. Ecuador affirms that its counterclaims are based on Ecuadorian tort law, although the party makes references to the services contracts in its interpretation of the investor's strict liability under domestic law.[183]

The tribunal turns to Article 42(1) of the ICSID Convention and decides to apply Ecuadorian tort law to the counterclaims regarding environmental damages, on the provision that the tribunal shall apply the law of the state party to the dispute in absence of the parties' agreement on applicable law. As for the counterclaims relating to infrastructure, Ecuador refers to Burlington's obligations under both the service contracts as well as Ecuadorian law. The tribunal concludes that the relevant contract contains provisions on that Ecuadorian law is applicable, and thus the tribunal, under Article 42(1), apply Ecuadorian law as the law agreed by the parties, as well as contractual provisions in relation to the infrastructure counterclaims.[184] After the tribunal had considered the applicable law and contractual provisions, both of Ecuador's counterclaims were successful, and the tribunal granted compensation to the state accordingly.[185]

What is particularly noteworthy about the Burlington case that it shows an example of how the parties, by agreeing to arbitrate the respondent state counterclaim in the same arbitration as the claimant's treaty claims, granted the tribunal jurisdiction over the counterclaims, irrespective of the provisions of the arbitration clause of the treaty. It should also be particularly noted that the obligations that Ecuador considered Burlington had breached were not contained as investor obligations in the BIT. Instead, the tribunal found that domestic law and contractual obligations were applicable to the substance of the dispute through Article 42(1) of the ICSID Convention and thus the source of the investor's obligations. Hence, in this case, where the tribunal was granted jurisdiction over counterclaims regarding the investor's actions under

[183] Burlington – Decision on counterclaims paras 71–73.

[184] Ibid. paras 74-75; Scherer, Maxi, Bruce, Stuart & Reschke, Juliane, 'Environmental Counterclaims In Investment Treaty Arbitration', *ICSID Review - Foreign Investment Law Journal*, Volume 36, Issue 2, Spring 2021, Pages 413–440.

[185] Burlington – Decision on counterclaims para. 1075.

domestic law and contractual obligations, the respondent successfully introduced counterclaims.

4.2 Further Notes and Comments on the Awards

Vohryzek-Griest, whose article covers awards issued up until 2009, argues that tribunals issuing awards up until that year have permitted counterclaims on the basis that these arise either from an alleged breach of contract or an alleged breach of the "exact same transaction" the claimant's initial investment claim is based on. The author further notes that tribunals seem to find it difficult to permit state counterclaims in the context of disputes arising from BITs, as BITs (at least the ones concluded prior to 2009) generally do not grant the host state any protection from damages as a result of the investor's failure to comply with the host state's domestic law, international law or damages related to the investment that is not within the scope of the investor's initial claim.[186] *Brenninkmeijer* and *Gélinas*, published in 2023, also point out that one well recognised limitation to the possibilities of invoking successful counterclaims is indeed the requirement of a close connection to the investor's initial claim, although this requirement is not always expressed in procedural frameworks. However, Article 46 in the ICSID Convention stipulates an example. As mentioned above, the tribunal in the Saluka case even identified the requirement as a general principle. Brenninkmeijer and Gélinas further believe that the tribunal's reasoning in the Saluka case regarding the requirement for the counterclaim to be an indivisible whole with the initial claim "too strict" when read together with the relevant provisions of the UNCITRAL Rules. Since the BIT in question did not contain any provisions imposing obligations on the investor, the state had no other choice than to base its counterclaims on a different source of law, such as domestic law. Other authors, referenced by Brenninkmeijer and Gélinas, also criticised the Saluka tribunal's emphasis on the counterclaims' "interdependence" with the initial claim rather than the provisions of arbitration clause in the BIT referring to claims "concerning an investment".[187]

Vohryzek-Griest states that a claim before a tribunal in treaty arbitration must be derived from a breach of an obligation in said treaty. The author further refers to certain awards establishing that if the authorities of the respondent state act in breach of domestic law, the action may by extension be considered a violation of a treaty obligation, provided that the conduct results in inability

[186] Vohryzek-Griest p. 86 f.
[187] Brenninkmeijer, Gélinas, II. The current position.

to uphold such obligation. Based on this premise, the author points out that investors are in fact able to bring claims based on the respondent state's alleged breaches of domestic law, but the state is not able to bring equivalent claims towards the investor. Vohryzek-Griest further argues that similar conditions apply to claims regarding violations of international law. The BITs oblige the state parties to comply with international law in relation to investments by the other state party's nationals in their own territory, while investors generally, as previously stated, do not make the same commitments to the host state. To summarise, Vohryzek-Griest suggests that a host state's alleged breach of domestic as well as international law may constitute an eligible treaty claim, while the same does not go for investors alleged breach of the same, as BITs in general exclusively impose obligations on states and not on investors.[188]

Vohryzek-Griest points out that, at the centre of investor-state arbitration under a BIT is instead typically the respondent state's obligations to engage in the proceedings to ensure the state fulfils its commitments and responsibilities in relation to the investments of the other state party's nationals.[189] The author further emphasises that one of the intentions behind the establishment of ICSID, which is the most referenced framework in her article, was to offer a forum for both investors and states to bring claims and resolve investment disputes, and to balance their interests. However, considering the awards referenced by the author up until 2009, ICSID seems to have become primarily a forum for investors, where states have "much to lose" in the disputes and thus resulting in an imbalance between the two.[190] The Sempra case from 2007, described above in section 4.1.2, sets out a clear example of a case where an ICSID tribunal recognises that the ICSID framework explicitly allows for counterclaims, but rejects the respondent state's counterclaims in the specific case, since the tribunal finds that the counterclaims must relate to an alleged breach of the treaty. As most BITs do not contain any investor obligations towards the host state, it is difficult for respondent state to succeed with their counterclaims, even if they are permitted by the rules.

Furthermore, it should be noted that the investor is often granted protection for its investment both at treaty level under a BIT between two states, as well as at contract level through the investment contract between the host state and the investor regulating the specific investment. When the dispute settlement

[188] Vohryzek-Griest p. 113 ff.
[189] Ibid. p. 112.
[190] Ibid. p. 86 f.

clause in the BIT refers disputes under the treaty to international arbitration, while the investment contract in turn contains dispute settlement provisions, this can give rise to complex jurisdictional issues.

Since, as previously mentioned, any investor obligations towards the host state regarding an investment are rarely listed in the BIT itself but are often regulated in the specific investment contract, the investor can bring claims relating to the host state's obligations originating from the investment contract in treaty arbitration due to the 'parallel protection', but the same does not apply for the host state wishing to bring counterclaims towards the investor. An example of such scenario is the Saluka case and the tribunal's decision in the Oxus Gold case regarding one of Uzbekistan's counterclaims. The tribunals found themselves obliged by the procedural frameworks to consider any special agreement between the parties concerning the investment. As a result, the tribunals could not overlook the specific dispute resolution clause in the investment contracts, and thus held that they lacked jurisdiction over the respondent states' counterclaims arising from the investors' contractual obligations. In summary, this structure results in respondent states not being able to bring counterclaims based on alleged breaches of the investor's contractual obligations in treaty arbitration initiated by investors, even when the investors' initial claim may in turn involve issues related to the treaty as well as the investment contract.

4.3 Suggested Solutions

As jurists, we are not only intrigued by problems, but we are also constantly on a quest for solutions, regardless of whether they are formalistic or more pragmatic in nature. Once the difficulties and ambiguities of the issue of the introduction of successful state counterclaims in investment arbitration have been identified and analysed, the question of possible solutions and ways forward remains. In this section, I will present suggested solutions presented by Vohryzek-Griest as well as Brenninkmeijer and Gélinas.

Brenninkmeijer and Gélinas suggest a more "integrated approach" to the issue of the tribunals' assessment of jurisdiction over state counterclaims in treaty arbitration, where the focus is shifted from the parties' consent to arbitrate a claim related to specific provisions under a BIT to consent to arbitrate a dispute. The authors' suggestion of a more integrated approach entails that, when assessing jurisdiction over respondent state counterclaims, the tribunal should concentrate on "whether that counterclaim is part of the same dispute

as the initial claim", and not, as the current view, on that the counterclaim must fit within an explicit provision of the BIT in question.[191]

Vohryzek-Griest also suggests several solutions to the issue of unsuccessful counterclaims, such as a more inclusive interpretation when tribunals are assessing jurisdiction over state counterclaims. The author reaches this conclusion after studying arbitral awards under ICSID and the UNCITRAL Rules but does not discuss in depth what a more inclusive interpretation exactly would entail[192], which can be considered a gap in the author's line of argumentation. However, the author also suggests that state parties who wish to provide broad opportunities for respondent state counterclaims in the event of a dispute should include elements in their investment protection treaties that set out clear requirements for investors to respect both domestic as well as international law as substantive provisions.[193]

4.3.1 Consent to Arbitration and Different Drafting of Arbitration Clauses

According to Brenninkmeijer and Gélinas, another important element is the element of consent. As previously explained, the parties' agreement to arbitrate is rarely contained in one single legal instrument but is established as a combination of the host states' offer to arbitrate, usually through the arbitration clause in a BIT, and the investors' acceptance by, for example, initiating proceedings accordingly.[194] A counterclaim must always fall within the scope of the tribunal's jurisdiction, which is always restricted to the parties' consent to arbitration. Brenninkmeijer and Gélinas refers to the majority's reasoning in the Roussalis case, which seems to be adapted by subsequent tribunals, stating that although the arbitration rules may allow for counterclaims, the parties' consent to arbitrate counterclaims must be inferred from the arbitration clause of the relevant BIT. The authors efficiently point out regarding the tribunal's jurisdiction: "the limits of its scope are fixed by the State parties' definition of the term 'dispute' and more specifically by the extent to which it encompasses investor obligations." This reasoning directs the parties to draft the provisions of the arbitration clause in a way that it could encompass respondent state counterclaims. The authors suggests that an arbitration clause phrased as "all disputes arising out of an investment" strongly indicates that also respondent state counterclaims are covered by the consent of the parties to arbitrate and thus the tribunal's jurisdiction, whereas

[191] Brenninkmeijer and Gélinas, I. Introduction.
[192] Vohryzek-Griest p. 111 ff.
[193] Ibid. p. 121.
[194] Brenninkmeijer and Gélinas, I. Introduction.

arbitration clauses that refers to disputes regarding the treaty obligations of the host state towards the investor narrows down the legal basis on which a respondent state may invoke counterclaims, and thus limits the tribunal's jurisdiction.[195]

4.3.2 Closing Gaps in BITs Regarding Treaty Obligations

Vohryzek-Griest point to the issue that BITs, or at least those concluded before 2009 when her article was published, generally do not impose any obligations on investors – and therefore offer no protection to the host state. Furthermore, it is usually possible for investors to invoke claims based on the host state's alleged breach of domestic law, but not for states. The author therefore suggests that state parties to international investment agreements such as BITs should incorporate substantive provisions requiring investors to comply with domestic and international law in the lines of:

> Investors must comply with international law and the law of the host State, as well as equitable principles under international law, to the extent that those laws and principles do not represent BIT violations. Any violation of the aforementioned laws constitutes a violation of this agreement.[196]

If the parties to the BIT choose to include investor obligations in the treaty, Vohryzek-Griest suggests, the respondent states would have the opportunity to present their counterclaims arising from the investor's violation of domestic and international law as treaty claims in the arbitration.[197]

There are examples of such provisions in BITs concluded after 2009. An example of this is the India – Belarus 2018 BIT which third chapter is dedicated to the investor's obligations. For example, under Article 11 the investor is obliged to comply with domestic law and regulations, with further emphasis on certain aspects such as taxation and anti-bribery measures. Furthermore, Article 12 states that the investor shall "endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility". Such responsibilities may include labour, environmental issues as well as human rights and anti-corruption provisions. The same type of obligations to comply with domestic law can be found in Article 3 and 4 in the Indonesia – United Arab Emirate 2019 BIT.

[195] Brenninkmeijer and Gélinas II. The current position.
[196] Vohryzek-Griest p. 118.
[197] Ibid. p. 113 f.

4.3.3 Less Restrictive Approach to the Requirement of Close Connection

Brenninkmeijer and Gélinas argue that a restrictive reading of the requirement of close connection between the counterclaim and the initial claim similar to the Saluka tribunal's reasoning "may inappropriately curtail the parties' broad consent to arbitration, which most often refers to 'any dispute relating to the investment" and that investment arbitration by its nature involve more complex issues than, for example, pure contractual obligations based on a single legal system. The authors argue that a restrictive reading should not be favoured "as it does not reflect the reality of investment disputes, and because it continues to uphold a dichotomy of domestic and legal orders that is artificial and inefficient in this context".[198]

Having that said, Brenninkmeijer and Gélinas argue that we are moving in a direction where scholars as well as tribunals adapt a more open approach, not excluding claims that do not share the same "legal identity" or that are based on domestic law. For example, one approach is that the subject matter of the dispute is the investment itself and that tribunals thus should be able to establish jurisdiction over counterclaims arising from the same investment as the initial claim. This approach would, according to the authors, "simplify" the requirement of a close connection.[199]

[198] Brenninkmeijer and Gélinas II. The current position.
[199] Ibid.

5 Findings

In this thesis, I have examined the legal conditions governing if and under what conditions counterclaims can be raised by the respondent state in investor-state arbitration arising from a BIT, and the role the arbitration clause in the treaty plays. My study covers arbitration clauses in numerous BITs, several frameworks for arbitration, as well as a number of tribunal decisions and awards illustrating how tribunals have addressed and judged the question of counterclaims in light of the provisions of the BITs, together with the applicable framework for arbitration. I have furthermore utilised relevant literature of international law to further enrich my study by, for example, presenting authors' suggested solutions to increase the possibilities for respondent states to successfully introduce counterclaims in investment arbitration.

By presenting my study of the above-mentioned material, I have answered my sub-questions regarding how arbitration clauses are typically phrased in BITs, how counterclaims are regulated in the most widely used frameworks for investment arbitration; ICSID, UNCITRAL, ICC and SCC, and finally how international arbitral tribunals have assessed the issue of counterclaims in light of the arbitration clauses and relevant procedural frameworks.

An important element of the arbitration clauses in BITs, except from given prerequisites for arbitration as seen in section 3.2.1 and choice of procedural framework described in section 3.2.2, is the regulation of the nature of the dispute to be ruled by the tribunal, which is described further in depth in section 3.2.3. Although the definitions of what type of dispute that can be subject to the judgement of the tribunal vary in detail, it can be generally said that there are two types of definitions that reoccur. The arbitration clause may refer to "disputes", "all disputes" or "any disputes" between the host state and an investor regarding the investors' investment in the territory of the state. As the arbitration clauses rarely define what is more specifically covered by these definitions, we may look to how tribunals have assessed them, which will also be discussed further on in this section. In contrast, the arbitration clauses may refer to disputes between investors and host states concerning an alleged breach of an host state obligation under the treaty of the state, causing loss or damage to the investor or its investment. These two different types of definitions could be referred to as more 'open' or 'narrow' arbitration clauses depending on what limitations they set for the tribunal to assess the parties' disputes.

After studying a selection of the most widely used procedural frameworks of arbitration – ICSID, UNCITRAL, ICC and SCC – as described in section 3.3.6, all the mentioned frameworks allow for counterclaims in arbitration. There are, however, some important differences in terms of how the frameworks regulate the conditions to invoke counterclaims that should be noted. These differences generally relate to how detailed the regulation of what falls within the scope of the tribunals' jurisdiction, or in other words, what may be subject to the tribunals' assessment and judgement. For example, the ICSID Convention sets out clear criteria for both the type of claim that fall within the jurisdiction of the tribunal and the type of counterclaims that can be heard by it – the claims shall arise directly out of an investment in general and any counterclaims shall specifically arise directly out of the subject matter of the dispute. This can be contrasted with the ICC or SCC rules, which instead state that the tribunals' jurisdiction over claims arises from the parties' arbitration agreement, but do not specify any requirements regarding the nature of the counterclaims. It is furthermore important to notice a difference between the UNCITRAL Rules from 1976 and 2010, where in the most recent version the requirement that the counterclaims must arise from the same contract as the initial claim has been removed, as the wording was deemed inappropriate in investment arbitration.

However, as emphasised in section 3.3.6, it is essential to consider that the tribunal assess each dispute and related counterclaim on a case-by-case basis in the light of the relevant procedural framework. Each tribunal is independent in its ruling and must consider whether all the requirements and conditions for successful counterclaims are met in terms of jurisdictional questions, and sometimes when required, the interdependency between the initial claim and the counterclaim. As for tribunals' assessment of respondent state counterclaims, which are described in chapter 4, it can be said that both ICSID tribunals as well as ad hoc tribunals acting under the UNCITRAL Rules have generally rejected counterclaims, either on the basis of a lack of jurisdiction, on its merits without entering into a discussion of jurisdiction, or, when it is required, because of an absence of a close connection to the investor's initial claim. Vohryzek–Griest pointed, as previously mentioned, to the lack of successful counterclaims under the ICSID and UNCITRAL frameworks up until the year of 2009, where her study ends. After studying awards issued after 2009, it appears that the issue persists. A notable exception is the case of Burlington v. Ecuador from 2017, described in section 4.1.6, where the tribunal found jurisdiction over Ecuador's counterclaims which were based on domestic law and contractual obligations. The reason

why the tribunal found jurisdiction irrespective of the provisions in the arbitration clause was that the parties to the dispute had during the proceedings concluded an agreement that Ecuador's counterclaims would be heard by the tribunal in the same arbitration, an agreement which the tribunal was obliged to honour.

As for my main research question, if it is possible, based on consideration of the abovementioned material, to assess how an arbitration clause could be phrased to increase possibilities of successful respondent state counterclaims in investment arbitration, and if that is the case, what the characteristics of such a clause are, the following can be said. In my view, it is possible to assess and draw conclusions about how an arbitration clause could be phrased to increase the possibilities of successful counterclaims. My conclusion, which is in line with the suggestion that Brenninkmeijer and Gélinas provide in section 4.3.1, is that a 'wider' arbitration clause that contains a wording stating that "all disputes arising out of an investment", or similar, can be referred to arbitration can also encompass a consideration of the respondent state's counterclaims. What characterises such an arbitration clause is that it does not restrict the parties' definition of 'dispute' and agreement to arbitrate, and thus the tribunal's jurisdiction, to matters exclusively relating to the host state's treaty obligations towards the investor and its investments, but leaves open the possibility of considering, for example, contractual obligations and compliance with domestic law. This is also consistent with Linderfalk's reasoning regarding the majority's decision in the Roussalis case – parties who wish to extend the tribunal's jurisdiction to counterclaims should draft the arbitration clause accordingly. He further points to the reasoning of the tribunal in the Saluka case, where the tribunal found the wording of the relevant arbitration clause "all disputes […] relating to an investment" of the investor wide enough to encompass counterclaims (yet rejecting them on other grounds).

The suggested 'wide' wording of the arbitration clause may also make Vohryzek–Griest's suggestion, described in section 4.3.2, to introduce investor obligations in the provisions of the BIT and thus removing them from the jurisdiction of domestic courts, superfluous as the wording may already provide for other legal bases than strictly treaty obligations for the respondent state to base its counterclaims on. Even if investor obligations are introduced into the BIT, the wording of the arbitration clause must allow for the tribunal to hear claims based on them. The wording must therefore not stop at the host state's treaty obligations towards the investor. Nevertheless, since BITs

incorporating investor obligations have been concluded at least since 2009, it remains to be seen how tribunals will address counterclaims based on them.

However, even if the wording of the arbitration clause itself is wide enough for the tribunal's jurisdiction to encompass counterclaims, the requirements in the relevant procedural framework that need to be met for the introduction of counterclaims may lead to rejection by the tribunal. According to the 'general legal principle' found by the tribunal in the Saluka case, the counterclaim is required to have a close connection with the initial claim, which, according to the tribunal is reflected in the UNCITRAL Rules and the ICSID Convention as arising "directly out of the subject-matter" of the dispute or "arise directly out of an investment". If the requirement is read in a restrictive way, as the Saluka tribunal did, it entails that if the initial claim and the counterclaim are based on separate sources of law, such as treaty provisions and domestic law, they do not have a sufficiently close connection and shall therefore be rejected. However, Brenninkmeijer and Gélinas argue (and advocate for), as stated in section 4.3.3, that both scholars and tribunals seem to be adopting a more open approach, meaning that the requirement of close connection is not limited to claims sharing the same "legal identity" but that it is sufficient if the initial claim and the counterclaim both arise out of the same investment. It may therefore be that the requirement of a close connection will not be as significant an obstacle to valid counterclaims in the future, provided that the arbitration clause grants the tribunal jurisdiction over counterclaims.

To conclude, it can thus be said that it is possible to comment on what might be more or less favourable preconditions for successful counterclaims, such as a 'wide' or 'narrow' wording in the arbitration clause in regard to what the term "dispute" entails. However, the fact remains that the tribunal always must make an independent and objective assessment in each individual case when interpreting and applying the provisions in BITs and the procedural frameworks for arbitration and when it considers the merits of the dispute. We could therefore envisage that, on a case-by-case basis, there may be occasional discrepancy between what could be considered as the strictly principal prerequisites for counterclaims, such as the way the question is regulated in BITs and procedural frameworks, and what the outcome is in practice when the parties submit the dispute to a tribunal for adjudication.

6 Concluding Reflections and Remarks

To conclude this thesis, I would like to bring the issue of respondent state counterclaims into a broader perspective and return to the purpose of investment arbitration. As described in the introduction of my thesis, I set out to study the conditions under which counterclaims may be successfully introduced by respondent states in investment arbitration. Although the reader of this thesis may also be able to draw conclusions on under what circumstances tribunals have rejected state counterclaims and thus when they have not been successful, my approach to the issue may be seen as an indication of what my position is regarding the role of state counterclaims in investment arbitration.

Even though it appears that tribunals have so far taken a restrictive approach, counterarguments against more inclusive and extensive possibilities for the introduction of counterclaims in arbitration can be identified. In a scenario where state counterclaims would be generally and widely permissible, it is, in my view, possible to envisage a situation where respondent states with dubious intentions could decide to invoke unfounded or ambiguous counterclaims only to obstruct and stall the arbitral proceeding in question. Such a scheme could be considered as contrary to the purpose of offering the investor efficient remedy through treaty arbitration, and therefore also unfavourable from the perspective of procedural economy.

Another purpose of removing investment disputes from the jurisdiction of the host state's domestic courts is indeed to avoid actual (or perceived) irregularities and eventual obstruction from the host state. The possibility for the host state to assert claims against investors in its domestic courts remains even when the investors' claims regarding the host state's treaty obligations are resolved through international arbitration. It should also be recalled that the investment treaty regime is structured in a way that is intended to provide investors a strong protection from any state misconduct. It can therefore be argued that the investor's interest in an efficient remedy should weigh more heavily than the host state's interest of having its counterclaims heard in the same arbitration. These are certainly important aspects to consider and reflect upon.

On the other hand, it is also possible to argue that very limited possibilities for respondent states to successfully introduce counterclaims may have a negative impact regarding aspects such as efficiency and procedural economy. A duplication of proceedings in which different claims based on

essentially the same circumstances and factual issues are reviewed in arbitration and domestic courts respectively may in turn lead to lengthy and thus costly processes compared to reviewing both parties' claims in the same proceeding. We may also recall the work of the UNCITRAL Working Group III to reform procedural aspects related to investment arbitration which includes state counterclaims, pointing to procedural efficiency and balance between the parties as discussed in section 3.1.1. It remains to be seen what the proposals will result in and what effect and influence a potential UNCITRAL reform has on investment arbitration in a broader perspective.

Moreover, as Professor Reisman points out in his dissenting opinion in the Roussalis v. Romania case, it can be argued that duplication of proceedings, where the investor instead becomes the respondent in the host state's domestic courts in a dispute regarding the state's claims, is precisely the situation that dispute resolution under BITs seeks to avoid and would ultimately be contrary to the objectives of international investment law.

Furthermore, it can also be recalled that the parties to the dispute often together control the composition of the tribunal and can therefore appoint arbitrators in whom they have confidence. It must be assumed that the tribunal, by virtue of its independence, has a strong ability to impartially address and reject illegitimate claims – regardless of the party bringing them – in accordance with the procedural rules under which it operates.

Lastly, I consider a less restrictive approach to hearing state counterclaims in the same arbitration as the investor's initial claim to be well in line with the principle of equality of the parties and thus the requirement of good administration of justice. The arbitral tribunal must treat the parties equally, which is also expressed in the discussed procedural frameworks and was a particularly important consideration in the drafting of the ICSID Convention, although ICSID tribunals, as mentioned, have taken a restrictive approach to state counterclaims.

The final word on the matter is, of course, not yet said. It remains to be seen how future tribunals will assess the issue of counterclaims in each individual case in the light of the provisions provided by the specific arbitration clause and other aspects such as the selected procedural framework and the merits of the dispute.

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