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Three Recent Decisions Further Shaping Investment Treaty Case Law On Counterclaims: Part I

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In the last two years, three tribunals have enriched the investor-state dispute jurisprudence on counterclaims. *Metal-Tech v. Uzbekistan* (ICSID Case No. ARB/10/3, Award, 4 October 2013), *Al-Warraq v. Indonesia* (UNCITRAL, Final Award, 15 December 2014), and *Perenco v. Ecuador* (ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015) are the relevant cases, each of which will be addressed in turn in Part II of this article. However, in Part I, it is worthwhile starting with the text of the ICSID Convention, which makes counterclaims possible in ICSID jurisdiction in the first place.

Article 46 of the ICSID Convention provides that "[e]xcept as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre." Thus, for jurisdictional purposes, three requirements must be met: (1) that the parties consent to submit counterclaims to ICSID arbitration; (2) that the counterclaim arise directly out of the subject-matter of the dispute; and (3) that the counterclaim be otherwise within the jurisdiction of ICSID.

Consent. While the host State's consent is relatively easy to establish (i.e., by virtue of the existence of the bilateral investment treaty ("BIT") or the host State's counterclaim), the investor's consent is harder to demonstrate, since it is not a party to the BIT. At least in theory, the investor can explicitly consent to counterclaims when it submits a Request for Arbitration ("RFA"), although in practice this seldom, if ever, happens; the investor would have no incentive at the time it files the RFA to expose itself to counterclaims by the host State. However, depending on the language of the BIT — which must be interpreted in good-faith and in accordance with its common meaning, purpose and context — the filing of the RFA may be interpreted as the investor's *acceptance* of the host State's *offer* to arbitrate not only claims by the investor, but also counterclaims by the host State. (See *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, ¶¶ 775, 866.) Yet another theory is that, when the two State parties to a particular BIT consent to ICSID jurisdiction, the consent required by Article 46 is "*ipso facto* imported into any ICSID arbitration which an investor then elects to pursue," regardless of the specific language of the dispute resolution clause in the BIT at issue. (See *Roussalis*, Declaration of W. Michael Reisman, 7 December 2011.)

Arising directly out of the subject-matter of the dispute. For the next jurisdictional requirement, the tribunal first needs to identify the subject-matter jurisdiction of the original dispute, and then determine whether the counterclaim arises out of that same dispute. On the one hand, this exercise is relatively straightforward in disputes arising from a contract between the investor and the State; to the extent that the original dispute involved a breach of contract claim, the host State's counterclaim typically would be that the investor (not the host State) breached that contract. On the other hand, the analysis can be more complex in treaty dispute cases; oftentimes, the counterclaim would not rely on the instrument invoked by the investor (e.g., a BIT), but would rather include allegations of the investor's fraud, corruption, or violation of domestic law.

For example, in *Hamester v. Ghana* (ICSID Case No. ARB/07/24, Award, 18 June 2010), the claimant argued that the Ghanian government breached the BIT and the joint venture agreement ("JVA") between the claimant's predecessor and the Ghana Cocoa Board. (paras. 1?3, 22.) Ghana brought a counterclaim, seeking damages for losses Ghana and the Ghana Coco Board had allegedly sustained as a result of the claimant's conduct. (para. 351.) The tribunal rejected the counterclaim because, among other things, it did not arise out of the JVA, to which Ghana was not a party, and because the Ghana Cocoa Board was neither a party to the arbitration nor an organ of the State. (para. 356.)

Tribunals' analyses and decisions in disputes brought under the UNCITRAL Rules of Arbitration are also illustrative on the second jurisdictional prong. In *Saluka v. Czech Republic* (UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004), the claimant argued that the Czech Republic's intervention culminated in the forced administration of the Czech bank in which the claimant had invested, in violation of the claimant's rights under the BIT. (paras. 2, 9?10.) The Czech Republic brought a counterclaim, arguing *inter alia* that the claimant's parent entity violated the Czech Republic's domestic laws and certain provisions of the Share Purchase Agreement ("SPA") it had entered into with a Czech entity, which was not a party to the arbitration. (paras. 47?48.) The tribunal rejected the counterclaim based on the SPA, because the claimant was not a party to the SPA, and because the counterclaim was governed by a mandatory arbitration provision under the SPA. (paras. 50?57.) The tribunal also rejected the counterclaim based on the Czech Republic's domestic laws, on the basis that it did not have a close connection with the original claim and was subject to appropriate procedures under the Czech law, not under the BIT at issue. (para. 79.) In the same way, in *Paushok v. Mongolia* (UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011), the tribunal concluded it lacked jurisdiction to hear Mongolia's counterclaims, as they did not arise out of the investment contract and raised issues of non-compliance with Mongolian public law. (para. 694.)

Otherwise within the jurisdiction of the Centre. The last jurisdictional requirement under Article 46 derives from the general requirement for the Centre's jurisdiction set forth in Article 25: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." Considering the required close connection between the original claim and the counterclaim under the second prong, should the investor's claim fall outside the jurisdiction of the Centre, the host State's counterclaim would also fall outside the Centre's jurisdictional reach. The tribunal in *Metal-Tech v. Uzbekistan* analyzed this last jurisdictional requirement in detail. We will turn to the three recent decisions on counterclaims issued by investment arbitration tribunals in Part II of this article, to follow.

(NB. For a more detailed analysis on counterclaims, see José Antonio Rivas, *ICSID Treaty*

Counterclaims: Case Law and Treaty Evolution, TDM Vol. 11, issue 1.)

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