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Consenting to Counterclaims
Under the ICSID Convention

Harshad Pathak*

I. INTRODUCTION

A counterclaim is a municipal law concept that is now gaining increasing relevance in the field of international dispute settlement. Often regarded as a point of contact between international law and private law, it is essentially a claim put forward by the respondent as opposed to the original claimant,1 serving a dual purpose. On the one hand, it counters the original claim.2 On the other hand, it simultaneously claims something more, such as a judgment against the claimant in the original proceedings.3 Accordingly, a counterclaim is something more than a simple defence on merits.4 The idea of allowing a counterclaim is to achieve a procedural economy,5 prevent duplication of proceedings, and limit the escalation of transaction costs.6 However, in investment treaty arbitration, a counterclaim serves an additional purpose. It makes investment treaty arbitration a far more attractive proposition for States.

As a dispute settlement mechanism, investment treaty arbitration seeks to remedy the asymmetrical nature of an investor-state relationship by

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2 See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v Yugoslavia), Counter-claims, 1997 I.C.J. Rep. 243, 262, ¶ 1.1 (Dec. 17) (Declaration of Judge Kress) ("[I]t seems to me that the autonomous nature of the counterclaim ... suggests that in relation to the counter-claim, the Applicant’s claim is not the ‘principal’ claim, but simply the initial or original claim.").


4 Olivia Pegna, Counter-claims and Obligations Erga Omnes before the International Court of Justice, 9 EUR. J. OF INT’L. LAW 724, 729 (1998).


granting foreign investors the locus to submit claims against a host State\(^7\) without the intervention of their own government.\(^8\) However, there is now an emerging perception that once arbitration is commenced, it creates a new imbalance in favor of the investors.\(^9\) There is also empirical evidence to argue that till “mid-to-late 1990s, investment arbitration was used to a large extent . . . as a neo-colonial instrument to strengthen the economic interests of developed states” and even today “favors the ‘haves’ over the ‘have-nots.’”\(^10\) Viewed from this perspective, the notion of counterclaims in investment treaty arbitration holds immense significance. It is considered that counterclaims have a potential to nullify these alleged biases and bolster the confidence of States in investment treaty arbitration.\(^11\)

That being said, the multitude of jurisdictional hurdles faced by counterclaims under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICISID Convention) risk dampening the aforementioned potential. It is two of these hurdles emanating from the consensual nature of arbitration that I address herein.

The first hurdle concerns the material scope of the investor’s consent to arbitrate any counterclaims. It rests on the edifice that an investment treaty tribunal’s jurisdiction over any claim is defined by the consent of both the parties to the dispute, which in turn must be determined by reference to the Bilateral Investment Treaty (BIT) in question and the ICSID Convention.\(^12\) Absent such consent, the tribunal may not entertain any counterclaim.\(^13\) The second hurdle concerns the treaty tribunal’s jurisdiction \textit{ratiocina personae} and seeks to identify the parties that had actually consented to arbitrate in the first place. It is based on the settled understanding that a counterclaim can only be directed against the original claimant and not a non-consenting third-party. Certainly, there are other requirements in ICSID jurisprudence relating to jurisdiction and admissibility of counterclaims.\(^14\) However, these do not constitute the focus of this article as they warrant a detailed and independent analysis beyond the purview of what I intend to reflect upon herein.

Part II commences by analyzing the provisions of the ICSID Convention to derive the prerequisites of a valid counterclaim in investment treaty arbitration. Part III examines the first hurdle relating to the scope of an

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\(^7\) \textit{Yaroslau Kryvoi, International Centre for Settlement of International Disputes} 29 (Kluwer Law Intl. 2010).

\(^8\) Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 27(1), Mar. 18, 1965 [hereinafter ICSID Convention].


\(^13\) See, e.g., ICSID Convention art. 25.

\(^14\) See, e.g., ICSID Convention art. 46.
investor’s consent to arbitrate counterclaims and how must this be construed. Thereafter, Part IV discusses the second hurdle concerning the arbitral tribunal’s jurisdiction ratione personae and explores the possibility of a host state filing counterclaims that implicate a non-consenting third-party. Part V concludes.

II. A Valid Counterclaim Under the ICSID Convention

International law has long been familiar with the idea of counterclaims. Provisions for its regulation have existed in the Rules of the International Court of Justice (ICJ) since 1978. However, unlike ICJ proceedings, investment treaty arbitrations are not governed by a single legal instrument. They are regulated by the procedural rules agreed between the parties. The most common of these is the ICSID Convention.

Since its inception in the year 1965, the ICSID Convention has contained provisions that permit a respondent to file counterclaims against the claimant investor. Specifically, Article 46 of the Convention provides that:

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

Accordingly, a valid counterclaim before an ICSID arbitration tribunal must adhere to the following three requirements: (i) it must be within the scope of the consent of the parties; (ii) it must be otherwise within the jurisdiction of the Centre, i.e. satisfy the conditions stated in Article 25 of the ICSID Convention; and lastly, it must also (iii) arise directly out of the subject matter of the dispute. While the first two requirements concern the jurisdiction of an arbitral tribunal over a counterclaim, the latter, referred to as the direct connectedness test, pertains to admissibility of a counterclaim. In addition to this, there is also a fourth requirement inherent in the nature of counterclaims, which stipulates that a counterclaim can only be raised against the original claimant, and not against a third-party that has not consented to

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17 Id.
18 ICSID Convention art. 46.
19 ICSID Convention art. 46 (emphasis added).
21 Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award ¶ 407 (Oct. 4, 2013) [hereinafter Metal-Tech].
arbitration. 22

In light of the above pre-requisites, it is unsurprising that making a valid counterclaim in ICSID investment treaty arbitrations is not a frequent occurrence 23 in as much as the said right has been resorted to by respondent States only to a limited extent 24 Further, a counterclaim may also be dismissed on certain other grounds of admissibility recognized in international law, such as the exhaustion of local remedies, or mootness. 25 However, as stated above, it is only the first and the fourth requirement that I focus on herein.

III. “WITHIN THE SCOPE OF THE CONSENT OF THE PARTIES”

“Like consummated romance, arbitration rests on consent.” 26 Commonly manifested in the parties’ arbitration agreement, it is the single source of a tribunal’s jurisdiction. In other words, an arbitral tribunal’s jurisdiction is confined to those disputes that fall within the ambit of the parties’ consent. 27 It then comes as no surprise that the requirement that a counterclaim must be within the scope of the consent of the parties is deemed to be a fundamental pre-requisite; albeit one that divides opinion amongst tribunals and scholars alike. On the one hand, awards like Spyridon Roussalis v. Romania affirm that the consent to jurisdiction over counterclaims must primarily be determined from the text of the BIT. 28 On the other hand, decisions like Antoine Goetz v. Republic of Burundi hold that such consent can be inferred from an investor’s election to pursue arbitration under the ICSID Convention, which permits counterclaims, notwithstanding the text of the BIT invoked. 29 It is the said dichotomy that I address herein.

A. The Roussalis-Goetz Dichotomy

1. Spyridon Roussalis v. Romania (2011)

Roussalis was the first instance where a host State’s counterclaim was dismissed for lack of consent on part of the claimant investor. 30 Therein, the

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23 See ANTONOPOULOS, supra note 20, at 363.
24 Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 289 (Sept. 28, 2007).
27 ICSID Convention art. 46.
28 Spyridon Roussalis v Romania, ICSID Case No. ARB/06/1, Award (Dec. 7, 2011) [hereinafter Roussalis].
29 Antoine Goetz and others v. Republic of Burundi, ICSID Case No. ARB/01/2, Award (Jun. 21, 2012) [hereinafter Goetz].
30 Roussalis Declaration.
claimant, a Greek national, was the sole shareholder in a Romanian company, Continent SRL.\textsuperscript{31} The company entered into a share purchase agreement with AVAS, the Romanian Authority for the States’ assets recovery, to purchase its 70% shareholding in a company named Continent SA.\textsuperscript{32} Once the said agreement was concluded, Continent SRL agreed to make an investment of USD 1.4 Million in Continent SA.\textsuperscript{33} While the claimant maintained that such investment was made, the respondent disputed the same.\textsuperscript{34} Consequently, the claimant initiated ICSID arbitration by invoking Article 9 of the Agreement between the Government of Romania and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, which stipulated that:

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.\textsuperscript{35}

It is in these proceedings that Romania asserted counterclaims against the claimant, Continent SRL, as well as Continent SA, emanating from their alleged failure to make the promised investment of USD 1.4 Million.\textsuperscript{36} The claimant objected to this on twin grounds. \textit{Firstly}, that Article 9 of the BIT limited the tribunal’s jurisdiction to only those disputes that concerned an obligation of the host State, and not that of the investor under the treaty.\textsuperscript{37} \textit{Secondly}, under Article 9, it was only the investor, and not host State, that could refer a dispute to arbitration.\textsuperscript{38} On such basis, the claimant contended that the tribunal lacked jurisdiction to entertain Romania’s counterclaim, which did not arise from any of the obligations under the invoked BIT\textsuperscript{39}.

The majority of the tribunal concurred with the claimant. It noted that in investment treaty arbitration, the parties’ consent to arbitrate must be determined in the first place by reference to the dispute resolution clause

\textsuperscript{31} Roussalis, ICSID Case No. ARB/06/1, Award, ¶ 4 (Dec. 7, 2011).
\textsuperscript{32} Id. at ¶ 7.
\textsuperscript{33} Id. at ¶ 8.
\textsuperscript{34} Id. at ¶ 9.
\textsuperscript{35} Id. at ¶ 143.
\textsuperscript{36} Id. at ¶ 747.
\textsuperscript{37} Id. at ¶¶ 828-29.
\textsuperscript{38} Id. at ¶¶ 828-29.
\textsuperscript{39} Id. at ¶¶ 832-34.
contained in the invoked BIT.\textsuperscript{40} Therefore, since Article 9 of the invoked BIT limited the tribunal’s jurisdiction only to claims brought by an investor with respect to the treaty obligations of the host State, it excluded the arbitral tribunal’s jurisdiction to entertain any counterclaims filed by the State.\textsuperscript{51} I refer to this as the \textit{Roussalis} approach.

W. Michael Reisman disagreed with the decision of the majority in \textit{Roussalis}.\textsuperscript{42} In his pointed declaration, he challenged the idea that Article 46 of the ICSID Convention ever required the consent of the parties to be explicitly articulated in the BIT invoked.\textsuperscript{53} Instead, he stated that “when the States Parties to a BIT contingently consent, \textit{inter alia}, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is \textit{ipso facto} imported into any ICSID arbitration which an investor then elects to pursue.”\textsuperscript{54} He also posited that allowing such counterclaims will be procedurally and economically efficient, and thus, in the interests of both the host State as well as the investor.\textsuperscript{35}

2. \textit{Antoine Goetz and others v. Republic of Burundi} (2012)

While Reisman’s declaration in \textit{Roussalis} met with both support\textsuperscript{46} and criticism,\textsuperscript{47} his reasoning was eventually adopted a year later by the ICSID tribunal in \textit{Antoine Goetz and others v Republic of Burundi}.\textsuperscript{48} Therein, the claimant was a principal shareholder in four companies incorporated in Burundi, which were shut down allegedly due to the actions of the government. In an ensuing ICSID arbitration brought under Article 8 of the Agreement between Belgian-Luxembourg Economic Union and The Republic of Burundi on the Mutual Recording and Protection of Investments of 1989, Burundi raised a counterclaim asserting that one of the companies allegedly affected by its measures had not respected the conditions imposed by a free zone certificate.\textsuperscript{49} The claimant objected to it on grounds similar to those raised in \textit{Roussalis}, i.e. the BIT did not grant the host State a right to file counterclaims,\textsuperscript{50} and in any circumstance, the company in question had no obligations under the relevant treaty.\textsuperscript{51}

Despite the similarities with the objections raised in \textit{Roussalis}, the tribunal in \textit{Goetz} arrived at an opposite conclusion. On the strength of Reisman’s dissent, it clarified that it was irrelevant if the BIT explicitly

\begin{itemize}
  \item \textsuperscript{40} Id. at ¶ 866.
  \item \textsuperscript{41} Id. at ¶ 869.
  \item \textsuperscript{42} \textit{Roussalis Declaration}.
  \item \textsuperscript{43} Id.
  \item \textsuperscript{44} Id.
  \item \textsuperscript{45} Id.
  \item \textsuperscript{46} Mark N. Bravin & Alex B. Kaplan, \textit{Arbitrating Closely Related Counterclaims at ICSID in the Wake of Spyidon Roussalis v. Romania}, 9(4) TDM 1, 7 (2012).
  \item \textsuperscript{47} Atanasova et al., supra note 22.
  \item \textsuperscript{48} \textit{Goetz}.
  \item \textsuperscript{50} \textit{Goetz}, ¶ 269.
  \item \textsuperscript{51} Id.
\end{itemize}
conferred on the tribunal the competence to examine counterclaims.\textsuperscript{52} Instead, the tribunal stated that by concluding a BIT providing for ICSID arbitration, Burundi had accepted that counterclaims presented in these proceedings may be examined by it in accordance with Article 46 of the ICSID Convention.\textsuperscript{53} Accordingly, by accepting the offer to arbitrate contained in the BIT, the claimants had accepted this possibility,\textsuperscript{54} and in turn, '[i]his double consent gives the tribunal the jurisdiction to hear counterclaims.'\textsuperscript{55} The tribunal further went on to buttress its conclusions by insisting that any contrary finding will constrain host States to seize their courts with disputes arising out of the investment, which would subsequently compel an aggrieved investor to contest the resulting judgments by initiating new investment arbitrations.\textsuperscript{56} This, according to the tribunal, was contrary to the letter and spirit of the ICSID Convention.\textsuperscript{57}

What is remarkable here is that while Article 8(5) of the BIT authorized the arbitral tribunal to decide a dispute on the basis of, amongst other things, the national law of the Contracting Party where the investment was made,\textsuperscript{58} the right to submit such disputes to arbitration in this case, much like in \textit{Roussalis}, was reserved only with the investor.\textsuperscript{59} I refer to this as the \textit{Goetz} approach.

3. \textit{Marco Gavazzi and Stefano Gavazzi v. Romania (2015)}

Just when it appeared that investment treaty arbitration was on course to ease some of these jurisdictional obstacles plaguing the notion of counterclaims, the pendulum again swung in the other direction in 2015 in \textit{Gavazzi v. Romania}.\textsuperscript{60} Therein, the tribunal, by way of majority, interpreted the Italy-Romania BIT of 1990 to decline jurisdiction over Romania’s counterclaims by adopting the \textit{Roussalis} approach.\textsuperscript{61} The tribunal refuted Romania’s contention that a host State’s right to file a free-standing

\textsuperscript{52} Hoffmann, \textit{supra} note 49, at 5.
\textsuperscript{53} Id.
\textsuperscript{54} \textit{Goetz}, ¶ 279 (“Dès lors, peu importe que le TPI ne contienne aucune disposition donnant compétence au Tribunal pour connaître des demandes reconventionnelles.”) (“Therefore, it does not matter that the I.C.I.C.I. does not contain any provision giving the Tribunal jurisdiction to hear counterclaims.”).
\textsuperscript{55} \textit{Goetz}, ¶ 278 (“Ce double consentement donne compétence au Tribunal pour connaître des demandes reconventionnelles.”) (“This dual consent gives the Tribunal jurisdiction to entertain counterclaims.”).
\textsuperscript{56} Id., ¶ 280.
\textsuperscript{57} Id. (“En décider autrement serait aller non seulement contre la lettre, mais contre l’esprit de la Convention de Washington.”) (“To decide otherwise would be to go not only against the letter, but against the spirit of the Washington Convention.”).
\textsuperscript{58} The Agreement between Belgian-Luxembourg Economic Union and The Republic of Burundi on the Mutual Recording and Protection of Investments, B.L.-Burundi, Apr. 13, 1989, art. 8(3).
\textsuperscript{59} Id.
\textsuperscript{60} Gavazzi v. Romania, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, ¶ 154 (Apr. 21, 2015) [hereinafter \textit{Gavazzi}].
\textsuperscript{61} Id.
counterclaim in an investment treaty arbitration should be presumed unless expressly excluded by the BIT.62 Instead, the majority explained that it was the letter of the BIT that bound parties:63 “[w]here there is no jurisdiction provided by the wording of the BIT in relation to a counterclaim, no jurisdiction can be inferred merely from the ‘spirit’ of the BIT.”64 Thus, because Article 8 of the BIT did not entitle Romania, being the host State, to advance a free standing counterclaim, the tribunal declined jurisdiction.65

Notwithstanding the affirmation of the Roussalis approach by the majority, Rubino-Sammartano dissented from its conclusions.66 He explained that while Article 8(2) of the BIT only granted the investor the right to claim against the host State, Article 8(1) of the BIT simultaneously suggested that there can be amicable consultation and negotiations with respect to “any dispute between one Contracting Party and an investor.”67 In such a case, the “absence of an express mention in Article 8(2) that the host State may claim against the investor has to be interpreted under Article 8(3) [providing] that the host State may elaborate its defence against the investor’s claim.”68 Thus, “since the counterclaim is an extension of the Respondent’s defence against the claim” and “Article 46 of the ICSID Convention and Rule 40 of its Arbitration Rules provide for counterclaims”, he urged the majority to “consider whether counterclaims are [already] included within the consent of the Parties to arbitrate before the Tribunal their dispute arising from the investment.”69


Another confirmation of the Roussalis approach arrived in 2016, in Urbaser SA v. The Argentine Republic; albeit with a reversal of fortunes.70 The tribunal interpreted Article X of the Agreement on the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the Kingdom of Spain of 1991 to explain as under:

[Article X] is completely neutral as to the identity of the claimant or respondent in an investment dispute arising “between the parties.” It does not indicate that a State Party could not sue an investor in relation to a dispute concerning an investment . . . This view is confirmed in Article X(3), stating that in certain circumstances the dispute may be

62 Id. at ¶154.
63 Id.
64 Id.
65 Id.
66 Id. at ¶156.
67 Gavazzi v. Romania, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, (Apr. 21, 2015) (Dissenting opinion by Mauro Rubino-Sammartano) [hereinafter Gavazzi Dissent]
68 Id. at ¶42(i).
69 Id.
70 Urbaser SA v. The Argentine Republic, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016).
submitted to an international arbitral tribunal “at the request of either party to the dispute.” It results clearly from these provisions that either the investor or the host State can be a party submitting a dispute in connection with an investment to arbitration.71

On such basis, the tribunal concluded that because Article X envisaged a possibility of a host State submitting a counterclaim to international arbitration, the Tribunal must, when seized with such a claim, assume its competence to adjudicate the same;72 “provided that the requirements defined by the provisions governing such mechanism are met.”73 This is particularly so because the consent given by claimants on the basis of Article X of the BIT was not restricted and covered all disputes in connection with the investments within the meaning of the BIT.74 Therefore, even while asserting its jurisdiction over counterclaims filed by Argentina, the tribunal determined the scope of the parties’ consent by reference to the actual text of the BIT in question.

As evident from the above decisions, the Roussalis and Goetz awards, including their subsequent reaffirmations or criticism, reflect two contrasting approaches for determining the parties’ consent to arbitrate the host State’s counterclaims. While the former approach lends primacy to the text of the BIT, the latter approach asserts that the investor’s consent need not be explicitly spelled out in the said BIT. Consent can well be inferred from its conduct of initiating arbitration under permissive procedural rules such as the ICSID Convention, which contemplate the possibility of counterclaims.

B. Rejecting “Double Consent”

The above variance undoubtedly undermines the already scratched thread of consistency in investment treaty arbitration jurisprudence. And to reconcile the same is a delicate, yet crucial exercise; the first step of which is to understand the precise nature of consent in investment treaty arbitration.

The requirement that the State’s counterclaims be “within the scope of the consent of the parties” essentially relates to the material scope of an investor’s initial consent to arbitration.75 This does not require the tribunal to identify an independent source of the parties’ consent to arbitrate counterclaims but merely ascertain whether the consent already granted by the investor by accepting the host State’s offer to arbitrate includes the possibility of counterclaims.76 It is settled that where a tribunal’s jurisdiction is based on an offer to arbitrate as made by a party, subsequently accepted by

71 Id. at ¶ 1143.
72 Id. at ¶ 1153.
73 Id. at ¶ 1144.
74 Id. at ¶ 1147.
75 See ICSID Convention art. 46.
the other, the parties’ consent to arbitrate exists only to the extent that the offer and acceptance intersect. Naturally, to ascertain whether the said intersection encompasses the notion of counterclaims, one must examine whether the host State’s offer to arbitrate contained in a BIT contemplated the notion of counterclaims in the first place. This method not only supports the correctness of the Rosssais approach of placing primary emphasis on the text of a BIT to determine the scope of the parties’ consent, but also shatters the concept of double consent that was advocated in Goetz. This assertion is corroborated by three further considerations.

Firstly, Article 32 of the Vienna Convention on the Law of Treaties permits recourse to preparatory works of a treaty to confirm the ordinary meaning of a provision, resulting from an application of the general rule of interpretation.77 A brief perusal of the travaux préparatoires of the ICSID Convention reveals that the earlier drafts of Article 46 did not state that counterclaims must be within the scope of the consent of the parties.78 The only requirement in Section 7 of the Working Paper, as also Section 9 of the Preliminary Draft, was that the counterclaims must arise directly out of the subject-matter of a dispute.79 However, Mr. Aron Broches, then General Counsel of the World Bank, pointed out that counterclaims also had to be covered by the consent of the parties and that the provision was not intended to extend the tribunal’s competence.80 It was for this reason that Article 49 of the First Draft was amended to clarify that not only must counterclaims arise directly out of the subject-matter of the dispute, but they must also be “within the jurisdiction of the Centre.”81 This expression, a reference to the present Article 25 of the ICSID Convention, was, therefore, added in the First Draft to introduce the requirement of consent.82 It was eventually due to a proposal made by Mr. Tsai of China that the Revised Draft was then amended, out of abundant caution, to explicitly refer to the requirement of consent for the first time.83

Thus, even the drafters of the ICSID Convention sourced the requirement that parties must have consented to arbitrate any counterclaims to their initial consent to arbitration, as necessitated under Article 25.84 In the context of investment treaty arbitration, this initial consent is found in the text of the BIT invoked by a claimant investor. Crucially, Article 46 was not intended to extend the tribunal’s substantive jurisdiction by itself.85 Therefore, to mount the edifice of double consent, and from there, assert that an investor’s

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79 Id.
81 History of the ICSID Convention, supra note 78, at 204.
82 Schreuer, supra note 1, at 754.
83 History of the ICSID Convention, supra note 78, at 513.
84 ICSID Convention art. 25.
85 ICSID Convention art. 46.
initiation of arbitration under a seemingly permissive ICSID Convention leaves the restricted and non-permissive articulation of the parties’ consent in their BIT immaterial, is erroneous. The fundamental insistence remains that a tribunal’s jurisdiction is circumscribed by the material scope of the parties’ consent, which is reflected in the BIT, and each claim made by either party must fall within its precise contours.\(^86\)

Secondly, Reisman’s declaration in Roussalis is frequently interpreted incorrectly to argue that since Article 46 of the ICSID Convention does not require an investor to state its consent to arbitrate counterclaims in writing, the same may be sufficiently implied on a fair reading of the Convention.\(^87\) At the outset, such an argument is inherently flawed as it mischaracterizes what is essentially a question concerning the material scope of parties’ consent as that of merely its form. Even assuming otherwise, the argument is nonetheless inconsistent with both the text and spirit of the ICSID Convention.

As stated before, the consent requirement under Article 46 of the ICSID Convention is simply an extension of the requirement of consent already stated under Article 25.\(^88\) For this reason, though the requirements that a counterclaim must be “within the scope of the consent of the parties” and “otherwise within the jurisdiction of the Centre” are stated as two distinct requirements in Article 45, many scholars\(^89\) and tribunals\(^90\) consider the latter to already include the former.\(^91\) Significantly, though Article 46 is silent on the form of the parties’ consent to arbitration, Article 25 expressly limits the Centre’s jurisdiction to legal disputes, which the parties consent in writing to submit to it.\(^92\) The implication being that notwithstanding the silence of Article 46 vis-à-vis counterclaims, the parties’ consent to arbitrate must be explicit, and not merely construed.\(^93\)

One may draw an identical conclusion by reference to other relevant procedural rules such as the UNCITRAL Arbitration Rules 2013, even if it does not contain any provision analogous to Article 25 of the ICSID Convention.\(^94\) Article 21(4) of the UNCITRAL Rules 2013 mentions that the provisions of Article 20(2) to (4), which concern the statement of claim, shall also apply to a counterclaim.\(^95\) This includes Article 20(3), which requires a claimant to annex a copy of the arbitration agreement to its statement of claim.\(^96\) Such a requirement presupposes that the arbitration agreement relied

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86 ICSID Convention art. 46.
87 Bravin & Kaplan, supra note 46, at 7.
88 ICSID Convention arts. 25, 46.
89 Schreuer, supra note 1, at 732.
90 Metal-Tech, ¶ 407.
91 ICSID Convention art. 45.
92 ICSID Convention arts. 25(1), 46.
93 Schreuer, supra note 1, at 191; Cable TV v. St. Kitts and Nevis, ICSID Case No. ARB/95/2, Award, ¶ 4 (Jan. 13, 1997).
95 UNCITRAL Arbitration Rules 2013, art. 21(4).
96 Id. at art. 20(3).
upon by the claimant exists in writing. By extension, it follows that even the respondent State is similarly obligated to annex a copy of the arbitration agreement it relies upon as the basis of its counterclaim, along with its statement of defence. It is therefore reasonable to suggest that the standard of consent-in-writing stipulated in both the ICSID Convention and the UNCITRAL Arbitration Rules 2013 extends to counterclaims, thereby discarding the possibility that an investor’s consent to arbitrate may be implied through any inferential means.

Thirdly, in any circumstance, there is no justifiable basis to interpret jurisdictional requirements of a valid counterclaim differently than those relating to the original claim. To put it differently, there is no reason to require a claimant investor to file its claim only if the parties consent to arbitrate in writing but allow a respondent State to file any of its counterclaims by implying consent on part of the investor, even if the same does not exist in writing. Indeed, such insistence would not only be arbitrary but also inconsistent with the very idea of counterclaims, which is simply a claim within the context of consensual arbitral jurisdiction except that it is advanced by the respondent.\textsuperscript{97} Thus, while assessing an objection to the jurisdiction of the tribunal, characterized either as one concerning the form or material scope of the parties’ consent, one must treat counterclaims as regular claims, and not subject them to a relaxed or liberal standard.\textsuperscript{98} In fact, the ICJ in \textit{Bosnia & Herzegovina v. Yugoslavia}\textsuperscript{99} and \textit{Oil Platforms,}\textsuperscript{100} had cautioned that the respondent cannot use counterclaims to impose on the Applicant any claim that it chooses, and it is for this reason that Article 80(1) of the Rules of the Court requires that a counterclaim comes within the jurisdiction of the Court.\textsuperscript{101}

Indeed, a failure to adhere to the above understanding is likely to violate the principle of equality between the parties, which remains a fundamental norm that arbitral tribunals are bound to maintain.\textsuperscript{102} Its purpose is to ensure that the disputing parties are treated the same, and is considered to not be respected if one of the parties has the ability to adjust the rules relating to the jurisdiction of the arbitral tribunal, or any other procedural aspect, after a dispute has arisen.\textsuperscript{103} In this regard, Zachary Douglas fairly acknowledges that allowing a host State to file counterclaims beyond the scope envisaged in the invoked BIT would produce inequality, as a host State may be able to file counterclaims based upon contractual or tort...
obligations in the circumstances where the investor’s primary claims are only limited to the breaches of treaty obligations.\textsuperscript{104} Similarly, allowing a host State to file counterclaims notwithstanding the absence of consent on part of the investor after the proceedings have commenced, would produce further inequality given that an investor is bereft of the same freedom. An investor’s acceptance of the host State’s offer to arbitrate contained in a BIT is after all restricted to the extent to which it accepts the said offer.\textsuperscript{105} Accordingly, it follows that the Goetz approach, which deems the initiation of ICSID arbitration by an investor as an indicator of its consent to counterclaims notwithstanding the contents of the BIT, is incompatible with the investment treaty arbitration framework.\textsuperscript{106} Naturally, such an approach cannot be preferred simply because it may be efficient to do so. In fact, procedural efficiency represents a rather eclectic notion, the interpretation of which varies from one disputing party to another. What may be efficient for a respondent State may not be efficient at all for a claimant investor. As noted by Judge Koroma in his separate opinion in \textit{Bosnia & Herzegovina v. Yugoslavia},\textsuperscript{107} in deciding the admissibility of counterclaims, while the ICJ may be guided by the objectives of procedural economy, it must not lose sight of the interests of main applicant to have its claim decided within a reasonable time period.\textsuperscript{108} Therefore, notwithstanding the perceived benefits of a single arbitration, a tribunal cannot superimpose its own understanding of procedural efficiency over that of a disputing party.\textsuperscript{109}

C. Determining Implied Consent

Notwithstanding the imperfections of the Goetz approach, even if one assumes that an investor’s consent to arbitrate counterclaims can be implied, it is doubtful whether the same can be cogently inferred on the basis of its decision to initiate arbitration under the ICSID Convention. What the Goetz approach effectively suggests is that since the ICSID Convention under Article 46 grants the respondent host State a right to file counterclaims, an investor’s acceptance of this procedural framework also automatically translates as its consent to arbitrate any counterclaims that the host State may raise in such arbitration.\textsuperscript{110} In other words, to refer back to Reisman’s declaration in \textit{Roussalis}, “when the States Parties to a BIT contingently consent, \textit{inter alia}, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is \textit{ipso facto} imported into any ICSID

\textsuperscript{104} Zachary Douglas, \textit{The International Law of Investment Claims} 257 (2009).

\textsuperscript{105} Schreuer, \textit{supra} note 1, at 756.

\textsuperscript{106} Goetz.


\textsuperscript{108} Id. at 276.

\textsuperscript{109} Id.

\textsuperscript{110} See Goetz, ¶ 278; ICSID Convention art. 46.
arbitration which an investor then elects to pursue.”\textsuperscript{111} However, such an insistence is ambitious, and cannot be endorsed for reasons below.

When an investor initiates an ICSID arbitration, it constitutes an acceptance of the procedural framework provided for by the ICSID Convention, including all the rights prescribed therein.\textsuperscript{112} However, many of these rights, including a right to file counterclaims enshrined in Article 46 of the ICSID Convention, are conditional in nature because these rights can only be exercised with certain pre-requisites.\textsuperscript{113} For instance, Article 46 does not give the respondent State an absolute right to file counterclaims, but merely provides it a procedural framework to do so by fulfilling the various requirements stated therein.\textsuperscript{114} The first requirement is that its counterclaim be within the scope of the parties’ consent,\textsuperscript{115} which must naturally be independently fulfilled. Therefore, the mere acceptance of the ICSID Convention does not itself imply that the said investor has also consented to arbitrate the host State’s counterclaims, which would effectively grant the respondent host State an unconditional right to file counterclaims regarding the consent component. This is especially so when the scope of the parties’ consent articulated in the BIT clearly indicates to the contrary, as was the case in both \textit{Roussalis} and \textit{Goetz}.

In any circumstance, to assert as in \textit{Goetz} that by initiating ICSID arbitration, a claimant impliedly consents to the tribunal’s jurisdiction over counterclaims negates the text of Article 46 of the ICSID Convention.\textsuperscript{116} This suggests that an investor’s consent to arbitrate the host State’s counterclaims is implicit in every ICSID arbitration,\textsuperscript{117} rendering the language—“provided they are within the scope of the consent of the parties”—in Article 46 redundant.\textsuperscript{118} This could not have been the intention of the drafters of the ICSID Convention.\textsuperscript{119}

Instead, it is far more logical and appropriate to interpret the consent requirement in Article 46 as suggested by the majority in \textit{Roussalis}.\textsuperscript{120} In other words, where the invoked dispute resolution clause in a BIT is sufficiently broad to encompass all disputes relating to the investment, then it is likely to reflect the parties’ consent to arbitrate counterclaims to the extent so permitted. Article 8(2) of the Italy-Romania BIT of 1990, which was in issue in \textit{Gavazzi}, stands as a prominent example.\textsuperscript{121} On the other hand, narrowly worded clauses such as those in \textit{Roussalis} and \textit{Goetz}, which limit their scope to claims concerning treaty obligations imposed upon the State or

\textsuperscript{111} \textit{Roussalis Dissent}.
\textsuperscript{112} ICSID Convention art. 44.
\textsuperscript{113} See \textit{id.} at art. 46.
\textsuperscript{114} See \textit{id.}
\textsuperscript{115} Bjorklund, \textit{supra note} 9, at 471.
\textsuperscript{116} Atanasova et al., \textit{supra note} 22, at 367.
\textsuperscript{117} \textit{id.}
\textsuperscript{118} ICSID Convention art. 46.
\textsuperscript{119} Atanasova et al., \textit{supra note} 22, at 367.
\textsuperscript{120} \textit{Roussalis}, ¶ 869.
\textsuperscript{121} See \textit{Gavazzi}, at ¶¶ 159–62.
confining the right to advance a claim to an investor, are inadequate.\textsuperscript{122} In such cases, unless an investor foregoes its right to raise a jurisdictional objection and expressly consents to arbitrate counterclaims, as was the case in \textit{Burlington v. Ecuador},\textsuperscript{123} a host State’s counterclaims do not fall within the scope of the consent of the parties.

\section*{IV. Jurisdiction Ratione Personae}

The first hurdle about the parties’ consent to arbitrate counterclaims appears to warrant a permissibly pro-investor approach.\textsuperscript{124} However, the second hurdle in this regard, concerning an arbitral tribunal’s jurisdiction \textit{ratione personae}, poses a different dilemma.

It is well accepted that the respondent has a right to file a counterclaim only against the original claimant who has consented to arbitration.\textsuperscript{125} As cautioned by the ICI in \textit{Bosnia & Herzegovina v. Yugoslavia}, the respondent cannot use counterclaims to exceed the limits of a court’s jurisdiction as recognized by the parties.\textsuperscript{126} In the context of investment treaty arbitration, this limits a respondent State’s autonomy by constraining itself to parties that are determined by the claimant investor. This is consistent with the principle of \textit{dominus litis}, which posits that the plaintiff/claimant is the person to whom the civil action belongs, including discretion to determine the parties to the proceedings.\textsuperscript{127} As reasonable as it may appear at first glance, this limitation is criticized as another manifestation of the pro-investor bias in investment treaty arbitration;\textsuperscript{128} an allegation better explained through an illustration.

Let us assume that there exists a BIT between countries A and B. Often a foreign investor belonging to country A, either under the force of law or simply for commercial convenience, invests in the host State, i.e. country B, by incorporating a local subsidiary company. Though this company constitutes a distinct legal entity, it remains controlled by the foreign investor for all purposes, and is even recognized by all parties as a national of country A. In such circumstances, in case of a dispute between the locally

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\textsuperscript{122} See \textit{Roussakis v. Goetz}.


\textsuperscript{124} Atanasova et al., supra note 22, at 363.


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incorporated company and the host State in relation to the investment in question, the foreign investor may initiate arbitration against the host State pursuant to the arbitration clause contained in the BIT between A and B, without necessarily enjoining the local company that it controls.\footnote{The illustration is based on the factual matrices in Mobil Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶¶ 150, 160 (June 10, 2010) and Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Decision on Jurisdiction, ¶ 142 (Sept. 27, 2001) [hereinafter Autopista].}

Notwithstanding its correctness, ICSID jurisprudence reveals that failing any contrary wording, the BIT and the ICSID Convention encompass actions of indirect shareholders for their damages.\footnote{See, e.g., Camuzzi Int’l S.A. v. Argentine Republic, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction (May 11, 2005); Cont’l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Decision on Jurisdiction (Feb. 22, 2006); GAM1 Inv., Inc. v. Government of the United Mexican States, Final Award (Nov. 15, 2004); Maffetini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award (Jan. 25, 2000); Noble Energy, Inc. v. Republic of Ecuador, ICSID Case No. ARB/05/12, Decision on Jurisdiction (Mar. 5, 2008); Nykomb Synergetics Tech. Holding AB v. Republic of Latvia, Arbitral Award (Dec. 16, 2003); Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Objections to Jurisdiction (Aug. 25, 2006).}

However, whether this entitles the host State to file a counterclaim in such investment treaty arbitration, implicating the conduct of the local company that is not party to the proceedings, is a far more convoluted question.\footnote{CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, ¶ 48 (July 17, 2003); see also CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (Sep. 25, 2007).} It is also important since there is commonly no direct legal relationship between the host State and the investor in investment treaty arbitration.\footnote{See Atanasova et al., supra note 22, at 390.}

In such a situation, if the host State files a counterclaim, then the claimant investor is likely to object to the tribunal’s jurisdiction to entertain the same. There exists some confusion regarding the characterization of this objection. On the one hand, investors have often attempted to characterize it as an objection concerning the jurisdiction ratione personae to assert that an arbitral tribunal does not have jurisdiction over third parties that did not consent to arbitration.\footnote{Id.} This objection was also unsuccessfully raised by the claimant in \textit{Roussalis};\footnote{Saluka Invs. B.V. v. Czech Republic, Decision on Jurisdiction over the Czech Republic’s Counterclaims, ¶ 25 (May 7, 2004), https://www.italaw.com/sites/default/files/case-documents/italaw0739.pdf [hereinafter Saluka Investments].} On the other hand, the tribunal in \textit{Klöckner Industrie-Anlagen GmbH and others v. Republic of Cameroon}\footnote{\textit{Roussalis}, ¶ 764 (finding “[t]he Tribunal also has jurisdiction ratione personae under the Treaty to adjudicate counterclaims against Continent SRL and Continent SA.”).} chose to characterize this objection as that concerning a tribunal’s jurisdiction ratione materiae, i.e. whether the tribunal had jurisdiction to decide counterclaims emanating from an agreement between the State and a third
party. I consider the former characterization to be more appropriate. In this framework, I propose that in exceptional circumstances, a host State must be allowed to file counterclaims which implicate a non-consenting third party so long as such third party bears “sufficient closeness” with the claimant.

A. The Test of Sufficient Closeness

The proposed test of sufficient closeness concerns an arbitral tribunal’s jurisdiction ratione personae. Based on the principles of good faith and lifting the corporate veil, the test first found mention in the 1992 UNCITRAL award in Saluka Investments B.V. v Czech Republic. Therein, the claimant was a Dutch company belonging to one Nomura group, a Japanese merchant banking and financial services group of companies. After the separation of the Czech and Slovak Republics in 1992, one Nomura subsidiary in the UK (“Nomura UK”) agreed to purchase from NPF, a third company, its shareholding in one of Czech Republic’s state-owned banks, IPB. The shareholding was eventually transferred to the claimant company, incorporated solely for this purpose. However, once IPB was forced into administration, the claimant investor initiated arbitration against the Czech Republic under Article 8 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic 1991. Its claim was that the measures adopted by the Czech Republic against IPB were discriminatory, unfair, inequitable, and expropriatory. Importantly, it did not arraign Nomura UK as party to the proceedings.

While the Czech Republic refuted each of the aforementioned allegations, it also filed a counterclaim against the claimant, based on the share purchase agreement as executed between Nomura UK and NBF. Unsurprisingly, the claimant objected to the same, stating that the counterclaim was essentially directed against Nomura UK but the tribunal did not have jurisdiction over such non-consenting third party. However, instead of addressing the said objection, the tribunal proceeded on the assumption that the relationship between Saluka and Nomura was “sufficiently close” so as to enable it to extend its jurisdiction to the claims directed against Nomura UK as well.

The tribunal ultimately dismissed the counterclaim for lacking a direct

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137 Id.
138 Saluka Investments, ¶¶ 25, 27, 31.
139 See id. at ¶¶ 61-76.
140 Id. at ¶ 1.
141 Id. at ¶ 9.
142 Id.
143 Id. at ¶ 2.
144 Id. at ¶ 10.
145 See generally id. at ¶ 11.
146 See id. at ¶ 12.
147 Id. at ¶¶ 13, 27, 31.
148 Id. at ¶ 44.
connection with the original claims, and thus, refrained from opining on the claimant’s initial objection.¹⁴⁹

On a bare reading, the award in Saluka does not appear to provide any assistance in terms of its final decision. However, it is nonetheless important. The rationale underlying the assumption of ‘sufficient closeness’ made by the tribunal is the acknowledgment that, in select circumstances, an investor may share a close relationship with another entity so as to make both a part of the same economic reality. If so, then a State may be permitted to file counterclaims that are directed against the claimant, even if doing so implicates the interests of a third party.

The above assertion is similar to August Reinsch’s suggestion, in the context of the principle of lis pendens, that arbitral tribunals must adopt an “economic approach” with regard to the issues of separate legal personality and vis-à-vis economic unity.¹⁵⁰ Much like the group of companies doctrine in commercial arbitration,¹⁵¹ this would require arbitral tribunals to lift the corporate veil and objectively identify whether the entities that have initiated parallel arbitrations constitute a part of the same economic reality. If they do, then both such arbitrations must be considered initiated by the same party for the purposes of lis pendens.¹⁵² Reinsch’s suggestion found further favor with the International Law Association (“ILA”), which in its Report on Lis Pendens and Arbitration defined the expression “parallel proceedings” as proceedings initiated by parties “that are the same or substantially the same, rather than in terms of the triple identity test.”¹⁵³ This is consistent with the reasoning expounded by the ICJ in Barcelona Traction, which asserted that the process of lifting the corporate veil has a role to play in international law.¹⁵⁴ The veil may be lifted to prevent the misuse of the privileges of legal personality and to prevent evasion of legal requirements or of obligations.¹⁵⁵

Interestingly, the ICSID Convention adopts a similar pragmatic criterion in defining who may constitute a national of another contracting state.¹⁵⁶ Under Article 25(2)(b), the Convention acknowledges that in exceptional circumstances, a juridical person having the nationality of a host State, but under foreign control, may constitute a national of the Contracting State from which it is controlled, if the parties so agree.¹⁵⁷ Undoubtedly, the requirement that the parties must have an agreement to this effect is

¹⁴⁹ Id. at ¶ 83.
¹⁵¹ See Dow Chemicals v. Isover Saint Gobain, ICC Case No. 4131, Interim Award (Sept. 23, 1982).
¹⁵² Reinsch, supra note 150.
¹⁵⁵ Id.
¹⁵⁶ ICSID Convention art. 25(2).
¹⁵⁷ ICSID Convention art. 25(2)(b).
essential. The practice of ICSID tribunals, however, shows an increasing readiness to accept an implied agreement to this effect as long as foreign control is evident.

The practice of ICSID tribunals in this regard is not isolated, and finds some support in the jurisprudence developed by the ICJ in the context of diplomatic protection. In the Case Concerning Ahmadou Sadio Diallo, the ICJ had opined that even though Mr. Diallo, a Guinea national, was fully in charge of the companies he incorporated in Congo, the companies nonetheless remained distinct legal entities, and their rights and assets were distinguishable from his. However, in their joint dissenting opinion, Judges Al-Khasawneh and Yusuf critiqued the majority's findings. They explained that once it was ascertained that these companies incorporated by Mr. Diallo in Congo had become one-man-companies, the Court ought to have provided him redress as a matter of equity. To support their opinion, they ironically took inspiration from the reach coverage of bilateral investment treaties, and condemned how the ICJ had missed an opportunity to raise the protection offered by customary international law up to the standard of investment law.

The test of sufficient closeness, or to borrow Reinisch’s terminology of “economic approach,” furthers the above ideas, albeit in a reverse paradigm. Instead of expanding the definition of the claimant in investment treaty arbitration, the test encourages an arbitral tribunal to discard a rigid and overly-formal scrutiny of its jurisdiction ratione personae in favor of a more substantive approach. It relies on the principles of equity and good faith to enable the host State to file, and an investment treaty tribunal to assert jurisdiction over a counterclaim directed against the claimant investor. This stands true, even if it encompasses the interests of a third-party forming a part of the same economic reality. Beyond the obvious benefits of procedural efficiency, this test precludes an investor from extending the benefit of the protection afforded by BITs and investment treaty arbitration to a closely connected entity, while simultaneously shielding it from potential liability.

158 See Tanzania Electric Supply Co. Ltd. v. Independent Power Tanzania Ltd., ICSID Case No. ARB/98/8, Award (Jul. 12, 2001); see also Amco Asia Corp. and others v Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 14 (Sept. 25, 1983) [hereinafter Amco Asia].
159 Schreuer, supra note 1, at 301; see also Amco AsiaCorp. and others v Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 14 (Sept. 25, 1983) [hereinafter Amco Asia].
161 Id.

164 See id.
under the same instrument. Conversely, it does not require a tribunal to claim jurisdiction over a non-consenting party because the counterclaims are still directed against the claimant investor.167 The core emphasis, however, remains on the former aspect. After all, notwithstanding the field of international law, it is critical to not just strive for the rule of law, but also ensure that it is applied reasonably.114 From this perspective, the test of “sufficient closeness” or the “economic approach” empowers an investment treaty tribunal to break free from the formal shackles imposed by an investor, being the dominus litis (the master of the suit), and identify the entities whose interests are adequately represented in a treaty arbitration.

Such an equitable approach, bereft of an explicit foothold in the ICSID Convention, is rare; however, it is certainly not unprecedented. As the subsequent heads demonstrate, the approach derives strength from the gradual relaxation of rules concerning the identity of parties, and recognition of equity as a general principle within the framework of investment treaty arbitration.168

B. The Way Forward

Principles of equity are not alien to investment treaty arbitration.169 Where so required, arbitral tribunals have addressed complex disputes on the basis of equity either within the parties’ choice of applicable law,170 or on the basis of an explicit agreement to this end.171

No decision exemplifies this approach better than the ICSID award in Klöckner.172 In Klöckner, the claimant had executed a Protocol Agreement with Cameroon for the erection of a turnkey fertilizer factory, which was to be operated by a Cameroonian joint venture company, SOCAME.173 Crucially, the claimant held 51% of the shares in SOCAME.174 The claimant, SOCAME, and Cameroon had also executed several agreements in this context; one of which was the Establishment Agreement between Cameroon and SOCAME.175 Both the Protocol Agreement and the Establishment Agreement included arbitration clauses providing for ICSID arbitration.

Upon the occurrence of certain disputes stemming from a dismal profitability of the factory, the claimant initiated ICSID arbitration against

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167 But see id. at 219 (concluding that a good faith argument can challenge the jurisdiction of a tribunal).
168 See id.
169 Kaj Hobér, Investment Treaty Arbitration and Its Future—If Any, 7 Y.B. ADR & MEDIATION 58, 58 (2015) (“Today, fair and equitable treatment is the most frequently relied upon standard of protection.”).
171 ICSID Convention art. 42; See Atlantic Triton Co. Ltd. v. People’s Revolutionary Republic of Guinea, No. ARB/84/1, Award (Apr. 21, 1986), https://www.italaw.com/cases/3461.
172 Klöckner.
173 Id.
174 Id.
175 Id.
Cameroon and SOCAME under the Protocol Agreement. In these proceedings, Cameroon filed counterclaims against the claimant identifying the arbitration clause in the Establishment Agreement as one of the jurisdictional bases. Unsurprisingly, the claimant objected to the tribunal’s jurisdiction over such counterclaims because it was not party to the Establishment Agreement. However, the tribunal rejected such objections by adopting a pragmatic approach that focused on the substance of the intricate relationships between the three relevant entities, as opposed to endorsing a formalistic understanding of corporate legal personality. The tribunal held that the Establishment Agreement in question, though signed by SOCAME, was in fact negotiated with Cameroon by the claimant to preserve its interests. In fact, at the time of contract conclusion, the claimant was a majority shareholder in SOCAME. Thus, even though the agreement was not formally signed by the claimant, it reflected a contractual relationship between the claimant and Cameroon. On such basis, the tribunal asserted its jurisdiction over Cameroon’s counterclaims by reasoning:

[I]t would be inequitable to accept that Klöckner, having benefited . . . from the existence of the ICSID arbitral clause, underlying the legal, economic, financial, and fiscal advantages and guarantees granted in the Establishment Agreement, be allowed today to contest ICSID jurisdiction with respect to questions relating to the application of the same Agreement . . . when the arbitration clause is invoked by the Government which consented to it.

Thus, for the purposes of determining its jurisdiction, the tribunal viewed SOCAME and the claimant as one common identity. It is important to clarify that while the award in Klöckner was eventually annulled, the arbitral tribunal’s reasoning in repelling the objection to its jurisdiction over counterclaims was not faulted by the ad-hoc committee. In fact, the committee acknowledged that the award-debtor had chosen not to criticize the tribunal’s reasoning on this issue, as it was difficult to comprehend what complaints it could have made.

Nonetheless, it is understandable that the decision in Klöckner belongs to

\[176\] Id.
\[177\] Id.
\[178\] Id.
\[179\] Id. at 77.
\[180\] Id.
\[181\] Id. at 78.
\[182\] Klöckner.
\[184\] Klöckner.
\[185\] Klöckner Annulment.
a different era altogether. Even if an investment treaty tribunal were to adopt
an economic approach, it would need to distinguish several investment treaty
arbitration decisions since then that continue to adhere to a formalistic
understanding of corporate legal personality. Yet, while this remains a
daunting challenge for investment treaty tribunals, one may still simultaneoulsy derive encouragement from various recent ICSID decisions
on this issue, albeit rendered in different contexts.

For instance, in his dissenting opinion in Gavazzi, Rubino-Sammartano
endorsed a similar view in 2015 in relation to res judicata, issue estoppel, and
state responsibility. He stated:

[U]nder international law (and not only if one follows an
economic approach), a State is liable for the conduct of its
agencies and instrumentalities if they act pursuant to the
sovereign authority of that State. Because of the attribution
of the relevant acts to the State, there is a “sufficient degree
of identification between such parties”, i.e. between the
agency and the State. As AVAS’ acts and omissions are
attributable to Romania, Romania must be considered as
identical to AVAS. There is consequently identity of the
parties in the two proceedings.186

An identical approach was also adopted by the ICSID tribunal in 2017 in
Supervision Y Control S.A. v. Costa Rica.187 There, the host State contested
the arbitral tribunal’s jurisdiction on grounds that the claimant had already
submitted the same dispute before the Administrative Contentious Court in
Costa Rica.188 However, the claimant insisted that the administrative
proceedings were initiated by a local company, Riteve, which was a separate
legal entity.189 It argued that there was no common identity of the parties
between the administrative proceedings in Costa Rica and those before the
tribunal.190 However, the tribunal disagreed. It did not construe the separate
legal existence of Riteve as a sufficient reason to render the claims
admissible.191 It reasoned that the claimant held 55% of the total capital of
Riteve, which was only a corporate vehicle acting on the claimant’s
instructions.192 Since Riteve was under the control of the claimant, all
proceedings initiated by it in Costa Rica were effectively filed by the
claimant.193 Consequently, to the extent the claims formed the litis of the
administrative proceedings in Costa Rica, the tribunal found them to be

186 Gavazzi Dissent, ¶ 23.
Supervision].
188 Id. at ¶ 134.
189 Id. at ¶ 144.
190 Id.
191 Id. at ¶¶ 325-29.
192 Id.
193 Id. at ¶ 529.
inadmissible.¹⁹⁴

Such reasoning was previously endorsed in 2010 by the ICSID tribunal in *Grynberg v. Grenada*.¹⁹⁵ In *Grynberg*, the tribunal bound three claimant shareholders under collateral estoppel based on determinations made in a previous arbitration involving the claimant’s corporation. The tribunal explained that the fact that the three individual claimants were not parties to the prior arbitration was irrelevant because they were, at that time, the three sole shareholders of the concerned corporation.¹⁹⁶ Consequently, the claimants were also bound by the determinations made therein.¹⁹⁷ Crucially, in a refreshingly unabashed manner that is uncharacteristic in investment treaty arbitration, the tribunal cautioned that:

It is true that shareholders, under many systems of law, may undertake litigation to pursue or defend rights belonging to the corporation. However, shareholders cannot use such opportunities as both sword and shield. If they wish to claim standing on the basis of their indirect interest in corporate assets, they must [also] be subject to defences that would be available against the corporation.¹⁹⁸

Most recently, in 2017, the ICSID tribunal in *Orascom TMT Investments v. Algeria* adopted a similar economic approach with respect to corporate legal personality: this time in relation to abuse of process.¹⁹⁹ There, the claimant argued that it was not party to a certain Share Purchase Agreement or the arbitration arising from it.²⁰⁰ As such, the party argued that it could not be bound by the settlement of the arbitration that had resolved the questions it now sought to raise.²⁰¹ However, the tribunal held to the contrary.²⁰² After examining the shareholding structure of the corporation that had settled the previous arbitration referred to above, it reasoned:

[T]he existence of several legal foundations for arbitration does not necessarily mean that the various entities in the shareholder chain could make use of the existing arbitration clauses to assail the same measures and to recover the same economic loss under any circumstances. Indeed, the purpose of investment treaty arbitration is to grant full reparation for the injuries that a qualifying investor may

¹⁹⁴ Id. at ¶ 331.
¹⁹⁶ Id. at ¶ 7.1.5.
¹⁹⁷ Id. at ¶¶ 7.1.5-7.1.8.
¹⁹⁸ Id. at ¶ 7.1.7.
¹⁹⁹ *Orascom TMT Investments S.á.r.l. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, ¶ 454 (May 31, 2017) [hereinafter *Orascom TMT Investments*].
²⁰⁰ Id.
²⁰¹ Id. at ¶¶ 454-57.
²⁰² See id. at ¶¶ 494-95.
have suffered as a result of a host State’s wrongful measures. If the harm incurred by one entity in the chain is fully repaired in one arbitration, the claims brought by other members of the vertical chain in other arbitral proceedings may become in-admissible [sic] depending on the circumstances.²⁰³

Based on the above observations, the tribunal proceeded to dismiss the claims as inadmissible for having been already settled in a previous arbitration by a company that occupied a higher position in the vertical corporate hierarchy to which the claimant belonged.²⁰⁴ Significantly, it observed that “an investor who controls several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host [S]tate measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host [S]tate.”²⁰⁵

Thus, the approach adopted by ICSID tribunals for disentangling the intricacies of corporate legal personality show a better way forward for addressing the fourth jurisdictional hurdle for counterclaims in ICSID jurisprudence. Each such instance is merely another manifestation of the economic approach, or the test of “sufficient closeness” as indicated in Saluka.²⁰⁶ Notwithstanding the nomenclature, the “sufficient closeness” test is a relevant consideration in investment treaty arbitrations under the ICSID Convention. It is premised on the general principle stated in Amco Asia Corp. v. Republic of Indonesia²⁰⁷ that “any convention, including conventions to arbitrate [such as the ICSID Convention] should be construed in good faith . . . by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged.”²⁰⁸ Thus, even the ICSID framework permits a host State to file counterclaims implicating the interests of a non-consenting, but sufficiently closely connected, third party.

V. CONCLUSION

The notion of counterclaims in investment treaty arbitration is significant not only from a purely legal perspective, but also due to its political significance in making investment treaty arbitration a friendlier proposition for the host States. However, the goal of ICSID is to provide a balanced forum for conflict resolution and depoliticize settlement of investment disputes.²⁰⁹ Therefore, any political benefits of counterclaims, no matter how

²⁰³ Id.; See Saluka Investments, ¶¶ 61-76.
²⁰⁴ Orescom TMT Investments, ¶ 523.
²⁰⁵ Id. ¶ 542.
²⁰⁶ See Saluka Investments, ¶¶ 61-76.
²⁰⁷ Amco Asia, ¶ 63.
²⁰⁸ Id.
enticing, must be ignored while assessing the jurisdictional hurdles as arrayed above.

With respect to the first jurisdictional hurdle regarding the material scope of investor consent, a depoliticized outlook implies a preference towards the Roussalis approach that lends primacy to the wording of the dispute resolution clause contained in the BIT. This is not only consistent with the letter and spirit of investment treaty arbitration framework, but also ensures that efficiency concerns do not trump the limits of the parties’ consent to arbitration.

In regard to the second hurdle of jurisdiction ratione personae, there is a visible need to adopt a conceptual, sound, and pragmatic approach—devoid of formalism—in addressing issues of corporate legal personality and the identity of parties to arbitration. Indeed, the notion of consent is central to investment treaty arbitration under the ICSID Convention, and even generally so. But equity and good faith warrant that in exceptional situations, a host State may file counterclaims against the claimant investor even if they implicate the interests of any related third-party. The sole caveat being that this third party must share “sufficient closeness” with the investor to form part of the same economic reality. Indeed, this would be consistent with observations made by the Executive Directors of the ICSID Convention that “the provisions of the Convention maintain a careful balance between the interests of investors and those of host States.”\(^\text{210}\) Consequently, it is paramount that this balance is not distorted by means of corporate restructuring.
