Chapter 2
The Concept of Counterclaims in International Litigation

2.1 Counterclaims as a Municipal Private Law Analogy

"Counterclaims" constitutes a concept of municipal law; more specifically, it is a concept of private law and, in particular, of civil procedure law. Its adoption in international litigation, in general, and in the Rules of Procedure of the International Court of Justice and its predecessor, the Permanent Court of International Justice, in particular, constitutes an exercise in private law analogy in the sphere of international law. The theoretical basis and practical application of this type of analogy in the field of international law has been dealt with by, at least, two eminent authorities.

Judge Sir Arnold McNair in his Separate Opinion in the *International Status of South-West Africa* case expressed the matter in the following terms:

> … What is the duty of an international tribunal when confronted with a new legal institution the object and terminology of which are reminiscent of the rules and institutions of private law? To what extent is it useful or necessary to examine what may at first sight appear to be relevant analogies in private law systems and draw help and inspiration from them? International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38 (1) (c) of the Statute of the Court bears witness that this process is still active … The way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of the "general principles of law". In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions …[1]

[1] *International Status of South-West Africa, Advisory Opinion of July 11, 1950,* ICJ Rep. 1950, 128, at 148.

C. Antonopoulos, *Counterclaims before the International Court of Justice*,
DOI: 10.1007/978-90-6704-790-6_2,

Secondly, Sir Hersch Lauterpacht has demonstrated, in a major classical monograph,[2] not only the theoretical possibility but also the reality of drawing, by way of analogy, concepts from municipal private law in formulating the doctrine of international law and dealing with issues of substantive content of the law both in the practice of States (such as the law of treaties and State succession) and the settlement of disputes by arbitration. In his view, the making of private law analogies has the result of enriching international law and promoting its development rather than undermining its autonomy as a legal system.[3] In this latter respect, he has fiercely attacked the positivist doctrine prevailing throughout the ninetieth and early twentieth centuries that denied any relevance to private law concepts in international law and was as a matter of principle hostile to it lest it undermined international law as a self-sufficient system of law.[4] He has also exposed the total lack of substance of the positivist position, which, as he proved, in reality accepted a significant role of private law concepts in international law under disguise, by devising the term "conceptions of general jurisprudence" to describe it.[5] In Lauterpacht's view, the positivist doctrine of the day introduced "the rejected private law in a disguised form or under a different name" and this reduced positivist theory to "a matter of form and not of substance".[6] An example of the classical positivist doctrine criticized by Lauterpacht is the view expressed by Anzilotti, a leading positivist, on the possibility of making counterclaims before the Permanent Court: "pour nous, il suffira d' observer que, étant donné la possibilité de créer un rapport judiciaire entre deux sujets moyennant la demande unilatéral d' un de ces sujets (demandeur), il est également possible que l' autre sujet (défendeur) demande à son tour quelque chose qui soit plus que le simple rejet de la demande de l' adversaire. … le Réglement se réfère aux *notions de droit généralement admises* et les adopte ainsi dans son propre champ".[7]

Although Articles 38 (3) of the Statute of the Permanent Court and 38 (1) (c) of the Statute of the International Court of Justice that admit general principles of law as a source of international law apparently constitutes a "… final and authoritative abandonment of the misleading doctrine that international law is a self-sufficing doctrine of rules …"[8] they have not dispensed with the issue of private law analogies. For there may be lack of unanimity in interpreting State practice, Article 38 as a treaty provision is "…subject to the vicissitudes to which all treaties are liable …", the application and interpretation of the Statute of the Court is likely to be carried out through the prism of positivism, and analogy is in principle excluded as a result of the difference between the subjects of the two systems of law (municipal

[2] Lauterpacht 1927.

[3] *Id.,* 83–84.

[4] *Id.,* 7–8, 50–51.

[5] *Id.,* 17–23.

[6] *Id.,* 31–37.

[7] Anzilotti 1930, 858, 867 [emphasis added].

[8] Lauterpacht 1927, 67–68, 71.

and international).[9] Lauterpacht has warned, however, that private law analogies have limitations. In the first place, an analogy may not be drawn in relation to concepts "peculiar to a particular municipal law" but only to "general principles of private law recognized by the main systems of jurisprudence". Secondly, "not every relation between States has its counterpart in private law". Thirdly, it is not necessary to seek legal regulation in private law if the rules of international law provide a sufficient basis for it. Finally, the lack of an international court with universally compulsory jurisdiction and a central authority to enforce the law in the international community would result in the inaccuracy of certain analogies without going as far as distorting existing rules of international law.[10]

Counterclaims appear to fall in the first class of "points of contact between international law and private law" identified by Lauterpacht as including "cases in which legal relations normally forming the subject-matter of international law are shaped in accordance with or by analogy to a conception of private law"; in particular, counterclaims constitute part of a contingency where "rules of procedure as developed in the sphere of arbitration between private persons are used as a basis of the procedure of international courts and tribunals".[11] The rules of procedure of private law constitute an indispensable source of international litigation for "the work of international courts was and is impossible without a large measure of recourse to general principles of private law".[12] In this respect they either "complement international law in the absence of rules provided by custom and treaties"[13] or they have been adopted by the International Court and other international tribunals in the exercise of their capacity to formulate their own rules of procedure.[14] The inclusion of counterclaims in a great number of these rules constitutes precisely a realization of this power. Moreover, the fact that the right to make counterclaims is not in principle an indispensable procedural requirement without which the work of an international court would be impossible (such as the principles of *res judicata*, the equality of the parties or the probative value of evidence), its inclusion in many texts of rules of procedure on the international plane is proof of the admission of their pertinence by analogy with municipal law.

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[9] See a revised version of Chapter I of *Analogies* in Lauterpacht 1975, 173, 182–183.

[10] Lauterpacht 1927, 84–87.

[11] Lauterpacht 1975, 173–174.

[12] Lauterpacht 1927, 210–211.

[13] *Id.,* 203 *et seq.*

[14] *Cf.* Rosenne 2000, 476; Rosenne 2007, 293. Rosenne argues that a counterclaim before the ICJ is "a purely self-standing institution following its own logic, its own procedure and its own rules. It is immaterial whether it was initially inspired by one or other system of internal law or by theories of abstract jurisprudence. Its development has followed parallel developments in the Court's general law and practice, particularly as regards its jurisdiction and the seisin of the Court. Analogies drawn from internal law and practice are of little relevance for litigation in the International Court". This view appears not to deny in principle the relevance of an analogy with municipal law in relation to counterclaims and it is akin to Judge McNair's position that resort to general principles of domestic law does not signify their wholesale import into international law.

Indeed, it may be said that the provision of a right to present counterclaims before an international court or tribunal is a private law analogy that aims not simply at making its function possible but constitutes an acknowledgment of and response to the complex and multi-faceted nature of international disputes and the need to address it in a comprehensive and effective fashion[15] and that this is achieved by recourse to private law of procedure is proof of the continuing relevance of Lauterpacht's major contribution to the theory of international law. It is also manifested with respect to the question of the definition of counterclaims.[16]

2.2 Counterclaims in Municipal Law: A Brief Overview[17]

The right of a respondent to bring counterclaims or "cross action" is admitted by virtually all municipal civil procedure legislation.[18] The underlying reason for this is that the parties affected by a certain transaction or occurrence may be reasonably expected to bring claims arising from it. Therefore, if one of them (plaintiff) institutes proceedings asserting a claim against the other (respondent), the latter may have an interest not only in having this claim rejected by the court but also in "obtaining a judgment against plaintiff on his own claim".[19] Moreover, a respondent's counterclaim is not considered as a defence, aiming just at defeating the plaintiff's action, but rather "an independent exercise of his right to bring an action".[20] The rationale for allowing the admissibility of counterclaims rests on grounds of judicial economy because a counterclaim arises from the same legal relationship as the plaintiff's action and this dictates a settlement of both in the course of the same proceedings. Moreover, the presentation of a counterclaim aims at mitigating the effects of the main action.[21]

A counterclaim may be raised only in the course of the proceedings initiated by the plaintiff's action and, for this reason, it is dependent upon it. Thus, the plaintiff must not withdraw his action and the proceedings must not have been terminated by the issuing of a judgment before the filing of the counterclaim. By contrast if a counterclaim is properly raised it ceases to depend on the subsequent fate of the plaintiff's action.[22]

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[15] *Jurisdictional Immunities of the State (Germany v. Italy) (Counter-Claim),* Order of 6 July 2010, ICJ General List No 143 www.icj-cij.org, Judge Cançado-Trindade (dissenting opinion), paras 4, 15, 19. [hereinafter referred to as *Jurisdictional Immunities* case].

[16] See *infra* Chap. 3.

[17] Cappelletti 1973, 62–69.

[18] A rare exception occurs in the Swiss Canton of *Aargau* the Civil procedure Code of which (Art. 15) does not permit the making of counterclaims. See Cappelletti 1973, 63 (n. 594).

[19] *Id.,* 62.

[20] *Ibid.*

[21] See Beys, Calavros, Stamatopoulos 2001, 344.

[22] Cappelletti 1973, 64–65.

The core requirement for the admissibility of counterclaims appears to be the connection between claim and counterclaim. This connection is premised on the same legal context from which the plaintiff's claim arises. In the *Continental and Romanic legal systems* it is interpreted broadly.[23] Thus under paragraph 33 of the Civil Procedure Code of Germany and Article 36 of the Civil Procedure Code of Italy connection is established even on the basis of a relationship to a means of defence against the plaintiff's action.[24] In addition to connection, admissibility is also subject to the requirement that a counterclaim must be susceptible to the same kind of proceedings as the plaintiff's claim, whereas if the value of the counterclaim exceeds the court's subject-matter jurisdiction then it is possible either to refer the entire proceedings to a higher court or to separate the counterclaim and subject it to special proceedings.[25] Furthermore, a counterclaim is not admissible in the cases where a respondent is not entitled to invoke his right by way of defence, as it is the case with respect to the protection of the rights of possession of the plaintiff.[26] In case of a counterclaim that is totally unconnected to the plaintiff's claim there is no uniformity of regulation. Thus, in French (Art. 70 Civil Procedure Code) and Portuguese (Art. 274 Civil Procedure Code) law such counterclaims are inadmissible.[27] By contrast in Spanish (Art. 542 (2.3) Civil Procedure Code) and most Latin American countries' law (for instance, Art. 357 Argentina Civil Procedure Code; Art. 190 Brazil Civil Procedure Code; Art. 260 Mexico Civil Procedure Code) they are admissible provided they fall under the court's subject-matter jurisdiction.[28] In German and Austrian law the matter is left to the discretion of the court.[29] By contrast, in Greek law (Art. 268 Civil Procedure Code) a connection between the principal action and the counterclaim is not required.[30]

In *English* law counterclaims may be brought under section 39 of the Judicature Act of 1925. There is no requirement of a relationship between claim and counterclaim and the courts have absolute discretion to dismiss or uphold counterclaims in this respect.[31]

In *US* law[32] the bringing of counterclaims is regulated in rule 13 of the Federal Rules on Civil Procedure, which is followed by the civil procedure legislation of the federal units of the USA. The Federal Rules introduce a distinction between

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[23] *Id.,* 63.

[24] *Ibid.*

[25] *Ibid.*

[26] *Id.,* 64.

[27] *Ibid.* n. 608.

[28] *Ibid.* n. 609.

[29] *Ibid.* n. 610.

[30] Beys, Calavros, Stamatopoulos 2001, 347.

[31] Cappelletti 1973, 65.

[32] *Id.* 65, 67–68. Also see Larchan and Mirfendereski 1986–1987, 39 *et seq.*; Renteln 1986–1987, 380–381.

compulsory counterclaims [rule 13 (a)] and permissive counterclaims [rule 13 (b)]. A counterclaim is compulsory for the respondent if it arises from the same transaction or occurrence that constitutes the subject-matter of the plaintiff's action; if he fails to bring a counterclaim, then he is debarred from doing so in the future (even as the subject of a separate action) by operation of the principle of *res judicata.* A permissive counterclaim is one that is not related to the plaintiff's claim, though there is controversy whether its admissibility requires that it falls independently under the federal court's jurisdiction or that jurisdiction over the plaintiff's claim would be sufficient.[33]

Other legal systems do not expressly provide for compulsory counterclaims, except in specialized proceedings concerning particular areas of the law (e.g., family disputes); in all other cases a respondent who failed to bring a counterclaim is not precluded from doing so in the future because of the effect of *res judicata* of a judgment concerning the plaintiff's claim.[34] Moreover, with respect to counter-counterclaims, namely, counterclaims brought by the original plaintiff against counterclaims raised by the respondent against the principal claim there is no uniformity of regulation. Some legal systems do not allow them on the basis of the Canon law principle *reconventio reconventionis non admittitur* while other systems admit them provided that there is a connection between the new claim against the counterclaim and no undue delay is caused for the plaintiff's original action.[35]

2.3 Counterclaims in International Arbitration

Anzilotti[36] has ruled out the possibility of counterclaims in cases of arbitration because the existence of a special agreement submitting a dispute to this particular means of settlement, first, laid down the precise object and boundaries of the dispute and, secondly, it precluded the formal (as opposed to the material) determination of the parties thereto as plaintiff and respondent. As he wrote:

> Il ne pouvait, évidemment, pas être question de demande reconventionelle dans la procédure internationalle, tant que la seule forme judiciaire de solution des litiges entre Etats a été l' arbitrage, au sens étroit du mot. Les demandes que les intéressés voulait soumettre à la decision des arbitres devaient trouver leur expression dans le compromise, lequel établissait donc définitivement l' oblet et les limites de la controverse. Pour que maisse le problème de la possibilité de la demande reconventionelle, il est nécessaire que les parties assument, non seulement matériellement, mais formalement, les roles de demandeur et de défendeur

[33] Cappelletti, 1973, 65.

[34] *Id.,* 67.

[35] *Id.,* 69.

[36] Anzilotti 1930, 857. Also see Anzilotti's comments in the course of the drafting of Article 40 of the PCIJ Rules of Procedure in 1922, *Preliminary Session, 25th Meeting, March 9, 1922,* PCIJ Ser. D No 2 (1922), 139-140, and the revision process of the PCIJ Rules in PCIJ Ser. D No 2 (Third Addendum) (1936), 109.

This extremely strict position, however, does not appear accurate both as a matter of principle and as a matter of arbitral practice. Scelle, in his report to the International Law Commission on Arbitral Procedure took the view that counterclaims were not precluded in principle in the absence of express provision in a *compromis.*[37] There is no doubt that all arbitration is governed by the terms of the special agreement that establishes it. Whether counterclaims may be brought or not by either of the parties is a matter, first, of the terms of the *compromis*. If it expressly excludes the making of counterclaims, then the issue is settled there. But if it is silent, then it is a matter of how the dispute is defined. If this is formulated in narrow and specific terms, then the possibility of raising counterclaims equally narrows to the point of exclusion. However, if it is defined broadly and if it can be deduced from the terms of the special agreement that the intention of the parties is to achieve a final settlement of all outstanding issues pending between them, then counterclaims may not be a priori excluded simply because the method of settlement is arbitration and there is no formal determination of applicant and respondent. Moreover, Anzilotti's position is not supported by the practice of arbitral tribunals, in particular those set up under institutionalized arbitration. Both the Permanent Court of Arbitration (PCA), in existence at the time of Anzilotti's writing, and post-1945 institutionalized arbitration allow the bringing of counterclaims.

2.3.1 The Permanent Court of Arbitration

The original Rules of Procedure of the PCA of 1899 and 1907 were silent on the possibility of bringing counterclaims. Nevertheless, in two cases which were decided in 1913, namely *The Carthage (France v. Italy)* and the *Manouba (France v. Italy)* the PCA addressed the possibility of making counterclaims.[38] Both cases arose as a result of the seizure by the Italian Navy of two French steamers during the Italo-Turkish war of 1911–1912.

On January 16, 1912 a destroyer of the Italian Navy intercepted the French mail steamer *Carthage* on the high seas in the Mediterranean. The commander of the destroyer considered that an aeroplane that was carried by the French steamer and that was to be delivered to a private individual in Tunis constituted contraband of war. The aeroplane could not be trans-shipped on the destroyer and, therefore, the *Carthage* was ordered to follow the destroyer to the Italian port of Cagliari. She was released on January 20, 1912. France requested the tribunal to adjudge compensation to be paid by Italy for breach of its obligations toward neutral shipping and for the losses and damage suffered by private parties "interested in

[37] Report by Georges Scelle (Special Rapporteur) on Arbitral Procedure, Doc. A/CN.4/18 (1950), *Yearbook of the International Law Commission 1950, Vol. II,* 114, at 137, para 78.

[38] It is noteworthy that in both cases D. Anzilotti served as counsel for Italy.

the steamer and its voyage".[39] Italy, in her submissions to the tribunal, did not confine herself to requesting the rejection of the French claims, but requested the tribunal to adjudge what amounted to a counterclaim against France: "… that the French Government shall be obliged to pay the sum of two thousand and seventy-two francs, twenty-five centimes, the amount of the expense caused by the seizure of the 'Carthage'".[40] This additional request for compensation meant that Italy requested "something more" going beyond a mere defence for the rejection of the French claim. The tribunal did not consider Italy's counterclaim and finally ruled that Italy should pay 160,000 francs as compensation to France.[41]

The *Manouba*, another French mail steamer, was intercepted by a destroyer of the Italian Navy on 18 January 1912. The Italian crew visited the steamer and discovered among the passengers twenty-nine Turkish individuals, suspected of being members of the Ottoman army. The steamer was subsequently conducted to the port of Cagliari, where the captain of the *Manouba* was ordered to surrender the twenty-nine individuals to the Italian authorities. He refused to comply and the Italian authorities proceeded to seize the *Manouba.* Following the seizure of the steamer its master delivered the twenty-nine Turkish passengers and the vessel was allowed to continue its voyage. France requested the tribunal to adjudge the payment of compensation by Italy for violations of her obligations under the law of war at sea and for losses suffered by individuals interested in the vessel and its voyage.[42] For her part Italy again did not only request the rejection of the French claim. She asked the tribunal to rule that France should pay compensation to Italy, first, for violation of her obligation to respect the right of a belligerent to verify the status of individuals suspected of being enemy soldiers and found on board of a neutral freighter and, secondly, for the expenses incurred with respect to the seizure of the *Manouba.*[43] Again, the submissions of Italy in this respect constituted "something more" than a mere defence intended to reject the French claims and, as such, partook the character of counterclaims. The tribunal ruled that Italy had a right to arrest the Turkish passengers on board the ship and awarded compensation to France only for the loss and damage suffered by private parties with an interest in the steamer and its voyage. However, this compensation was reduced to the extent of the amount due to Italy for the expenses incurred for the custody of the *Manouba.*[44]

These two early cases that were considered by the PCA are illustrations that counterclaims were admissible in spite of the absence of an express provision in the rules of procedure of arbitration conducted within its framework. In fact, in the

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[39] *The Carthage (France v. Italy),* PCA, Award of 6 May 1913, www.pca-cpa.org/upload/files/Carthage%20EN.pdf, 2.

[40] *Id.,* 3.

[41] *Id.,* 5.

[42] *The Manouba (France v. Italy),* PCA, Award of May 6, 1913, www.pca-cpa.org/upload/files/Manouba%20EN.pdf, 3.

[43] *Id.,* 3–4.

[44] *Id.,* 7.

Manouba case the tribunal even upheld the Italian counterclaims, the first partially with respect to the lawfulness of the arrest of the Turkish passengers and the second in its entirety. Therefore, it may be inferred that in the case of silence in regulation of the matter of counterclaims in the rules of procedure of an arbitral tribunal, because of the absence either of a provision expressly allowing them or of a provision expressly prohibiting them, they are admissible, at least, as an analogy with municipal law on civil procedure.

The Optional Rules of Procedure of the PCA currently in force applicable to a wide variety of categories of disputes admit the right to bring counterclaims. Thus, the PCA Optional Rules for Arbitrating Disputes between States (1992)[45] provide in Article 19 (3) that:

> In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same treaty or other agreement or rely on a claim arising out of the same treaty or other agreement for the purpose of a set-off.

In Article 19 (3) of the PCA Optional Rules for Arbitrating Disputes between Two Parties of which only One is a State (1993)[46] it is stipulated that:

> In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

Moreover, Article 19 (3) of the PCA Optional Rules for Arbitration Involving International Organizations and States (1996)[47] provides that:

> In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim, or a claim for a set-off, arising out of any of the items mentioned in article 3, paragraph 3(c).

Furthermore, Article 19 (3) of the PCA Optional Rules for Arbitration between International Organizations and Private Parties (1996)[48] states that:

> In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim, or a claim for a set-off, arising out of any of the items mentioned in article 3, paragraph 3(c).

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[45] Text in http://www.pca-cpa.org/upload/files/2STAENG.pdf.

[46] Text in http://www.pca-cpa.org/upload/files/1STAENG.pdf.

[47] Text in http://www.pca-cpa.org/upload/files/IGO2ENG.pdf. Article 3, paragraph 3(c) states that "The notice of arbitration shall include the following: … (c) A reference to the constituent instrument of the organization and to any rule, decision, agreement or relationship out of or in relation to which the dispute arises. …"

[48] Text in http://www.pca-cpa.org/upload/files/IGO1ENG.pdf. Article 3, paragraph 3(c) states that "The notice of arbitration shall include the following: … (c) A reference to the arbitration clause or the separate arbitration agreement that is invoked …"

Finally, Article 19 (3) of the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (2001)[49] provides that:

> In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim, or a claim for a set-off, arising out of any of the items mentioned in article 3, paragraph 3(c).

All these provisions are premised on the UNCITRAL Arbitration Rules with certain modifications corresponding to the particular category of dispute. In arbitrations conducted within the framework of the PCA the tribunals in the particular disputes have not adopted the optional rules of procedure drafted by the PCA in relation to the right of making counterclaims. They either relied on other existing general set of rules, such as the UNCITRAL rules, or on rules particular to arbitration procedure already provided for within an institutional framework, or introduced rules of procedure, which, though inspired by the PCA Optional Rules, deviate from them in the case of the right to make counterclaims. In the *Bank for International Settlements and Private Parties* case the dispute concerned claims by certain private shareholders against the Bank (BIS) arising out of the decision of the Board of Directors, in September 2000, to restrict the right of private parties to hold shares in the BIS and to amend the Bank's Statute, in January 2001, so as to exclude private shareholders by paying compensation the sum of which had been fixed by the Bank in advance.[50] The applicants invoked Article 54 (1) of the BIS Statutes by virtue of which disputes, *inter alia*, between the BIS and its shareholders shall be submitted to the arbitral tribunal established under Article XV of the Hague Convention on the Complete and Final Settlement of the Question of Reparations (1930). The Rules of Procedure of this tribunal are to be found in Annex XII of the Hague Convention, Article 6 paragraph 2, (4) of which provides that

> Counter-Cases shall contain: … conclusions based on the facts stated; these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Tribunal; …

On 23 March 2001 the tribunal that was constituted to hear the claims, adopted its Rules of Procedure, Article 14 (2) of which (entitled "Statement of Defence") reads:

> The Statement of Defence shall affirm or contest the facts stated in the Statement of Claim and shall present a statement of additional facts, if any, a statement of law and conclusions based on the facts stated. *Those conclusions may include counter-claims, insofar as the*

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[49] Text in http://www.pca-cpa.org/upload/files/ENVIRONMENTAL(3).pdf. Article 3, paragraph 3(c) states that "The notice of arbitration shall include the following: … (c) a reference to any rule, decision, agreement, contract, convention, treaty, constituent instrument of an organization or agency, or relationship out of, or in relation to which, the dispute arises …"

[50] *Dr. Horst Reineccius (Claim No. 1), First Eagle SoGen Funds Inc. (Claim No. 2), Mr. Pierre Mathieu and La Société de Concours Hippique de la Châtre (Claim No. 3) v. Bank for International Settlements,* PCA, Award of 19 September 2003, para 5, http://www.pca-cpa.org.

> *latter come within the jurisdiction of the Tribunal.* The respondent shall list the documents in support and shall attach them to the Statement of Defence (emphasis added)

Thus, Article 14 (2) of the Rules of the arbitral tribunal established under the Hague Settlement Convention is in conformity with the Rules of Procedure introduced by Annex XII of the Convention.[51] The BIS raised a counterclaim against First Eagle's claim alleging a breach of Article 54 of the Bank's Statutes because the claimant sought relief for its alleged financial loss in the courts of the USA. The BIS argued that the submission of claims against it to arbitration was compulsory precluding any recourse to municipal courts. Moreover, the Bank counterclaimed US $ 587,000 as compensation for the expenses it incurred in defending First Eagle's lawsuit before the US courts.[52] The tribunal allowed the counterclaim of BIS and ruled that[53]

> … First Eagle violated its obligations under the Bank's Statutes and unlawfully required the Bank to expend a considerable amount in defending its rights under the Statutes, giving the Bank a right of reparation …

It then proceeded by awarding the Bank damages to the sum of US $ 587,413.49 for the litigation expenses before the US courts and ruled that this compensation was to be off-set against sums owed to First Eagle as a result of the award of the tribunal.[54] The *BIS* case is an illustration that a counterclaim, though *functionally* a means of defence against an original claim, is *substantially* a means of raising an autonomous claim on the part of a respondent (in this case the breach of the applicant's obligation to submit the dispute to arbitration) that may give rise to an entitlement of compensation that, in turn, may be settled by way of a set-off against the applicant's original claim.

The *Barbados—Trinidad and Tobago* arbitration concerned the delimitation of the EEZ and continental shelf of the parties under Part XV and Annex VII of the UN Convention on the Law of the Sea (UNCLOS). The Rules of Procedure of the tribunal constituted under Annex VII of the UNCLOS provided in Article 9 (2) (c) that the counter-memorial of Trinidad and Tobago may contain:

> A statement of the relief or remedy sought by the Republic of Trinidad and Tobago

The wording of the provision appears to allow the raising of counterclaims. In submission 3 (c) of its counter-memorial, Trinidad and Tobago requested the tribunal to delimit the continental shelf of the parties to its outer limit, extending beyond the 200 mile distance from the baselines.[55] Barbados objected to

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[51] Article 1 (1) of the Rules for Arbitration between the Bank for International Settlements and Private Parties of 23 March 2001 provides that in case of conflict with, *inter alia*, the provisions of Annex XII of the Hague Convention, the latter shall prevail.

[52] *Supra* n. 50, para 49 *et seq.*

[53] *Id.* para 119.

[54] *Ibid.*

[55] *Barbados and the Republic of Trinidad and Tobago,* PCA, Award of 11 April 2006, www.pca-cpa.org, 58, para 187.

Trinidad's claim as falling outside the tribunal's jurisdiction. In its award of 11 April 2006, the tribunal upheld the claim of Trinidad and Tobago and ruled that the subject-matter of the dispute included the continental shelf beyond the 200 mile limit because

> … (i) it either forms part of, or is sufficiently closely related to, the dispute submitted by Barbados, (ii) the record of the negotiations shows that it was part of the subject-matter on the table during those negotiations, and (iii) in any event there is in law only a single 'continental shelf' rather than an inner continental shelf and a separate extended or outer continental shelf …[56]

This case illustrates the possibility to determine, or rather, clarify the subject-matter jurisdiction of an arbitral tribunal by way of raising a counterclaim. Although it appears that a counterclaim is not admissible unless as a matter of principle it falls within the subject-matter jurisdiction of a tribunal, if the latter is not clearly delineated or if it is defined in broad terms then a counterclaim may serve to elucidate the issue.

A similar contingency appears to have occurred in the *Guyana—Suriname* arbitration of 2007. The dispute concerned the delimitation of the maritime boundary between the two States and was submitted to an arbitral tribunal constituted under Article 287 and in accordance with Annex VII of the UNCLOS with the PCA acting as Registry. Article 9 of the Rules of Procedure of the tribunal was silent on the right to raise counterclaims. Guyana raised the claim of State responsibility against Suriname arising from the use and threat of force by the latter against the territorial integrity of the former and against its nationals, agents and licensees to conduct exploration of natural resources in the disputed maritime area. Guyana alleged that Suriname had violated its obligations the UNCLOS, the UN Charter and general international law. Suriname objected to Guyana's claim asserting that it fell outside the jurisdiction of the tribunal. The tribunal ruled that it had jurisdiction over the claim of Guyana and that it was admissible on the basis of Article 293 (1) of the UNCLOS.[57] Moreover, Suriname argued that Guyana's claim concerning its responsibility could not be submitted to arbitration because Guyana had failed to inform Suriname of the alleged violation of the UNCLOS in accordance with Article 283 thereof and, further, that a claim of State responsibility arising from an incident in a disputed maritime area was inadmissible. The tribunal rejected both objections by Suriname in these terms:

> … This dispute has as its principal concern the delimitation of the course of the maritime boundary between the two Parties—Guyana and Suriname. … The CGX incident of 3 June 2000, whether designated as a 'border incident' or as 'law enforcement activity', may be considered incidental to the real dispute between the Parties. The Tribunal, therefore,

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[56] *Id.,* 65–66, para 213.

[57] Article 293 (1) of the UNCLOS reads: "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with the Convention". See *Guyana and Suriname*, Award of 17 September 2007, 131–132, paras 403–406.

> finds that in the particular circumstances, Guyana was not under any obligation to engage in a separate set of exchange of views with Suriname on issues of threat of force. These issues can be considered as being subsumed within the main dispute.[58] …
>
> … The Tribunal does not accept Suriname's argument that in a maritime delimitation case, an incident engaging State responsibility in a disputed area renders a claim for reparations for the violation of an obligation provided for by the Convention and international law inadmissible. A claim relating to the threat or use of force arising from a dispute under the Convention does not, by virtue of Article 2 (4) of the UN Charter, have to be "against the territorial integrity or political independence" of a State to constitute a compensable violation. Moreover, the Convention makes no mention of the incompatibility of claims relating to the use of force in a disputed area and a claim for maritime delimitation of that area.[59] …

In this case, there was a claim that was raised outside the subject-matter jurisdiction of the tribunal expressly stated in the agreement to submit the dispute to arbitration, namely, the delimitation of the maritime boundary between the parties to the dispute. Although the right to make counterclaims was not expressly stipulated in the tribunal's Rules of Procedure and Guyana's claim was in fact an *additional* claim beyond maritime delimitation as the core subject-matter of the dispute, it is submitted that its consideration by the tribunal provides a useful insight with respect to the substance of the requirements for the admissibility of counterclaims: their connection with the subject-matter of the dispute and their falling with the jurisdiction of a tribunal.[60]

2.3.2 The UNCITRAL Arbitration Rules (1976)

Article 19 (3) of the UNCITRAL Rules provides that

> In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off

In the *Saluka Investments B.V. v. The Czech Republic* the arbitral tribunal dealt with the admissibility of a counterclaim presented by the respondent, the Czech Republic. By virtue of Article 8 (5) of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (1991),[61] the Rules of Procedure of the

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[58] *Id.,* 133, para 410.

[59] *Id.*, 139, para 423.

[60] *Cf.* The position adopted by the ICJ in the *Oil Platforms* case and the views expressed by Judge Higgins (sep. opinion), *infra* Chap. 4.

[61] After the dissolution of the Czech and Slovak Federal Republic on 31 December 1992, the Czech Republic notified the Netherlands that it remained bound by the 1991 Treaty. See *Saluka Investments B.V. v. The Czech Republic,* Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, 1, para 2.

tribunal adopted by the parties were those of UNCITRAL.[62] The dispute arose in the context of the reorganization and privatisation of the former Czech and Slovak (after 1992 Czech) banking sector following the demise of the communist regime. The applicant, Saluka Investments, was a subsidiary of the Nomura group of companies and holder of part of the shares of IPB, a formerly State-owned commercial bank that had had problems with bad debts. In 1998 Nomura acquired the IPB shares from the Czech National Property Fund (NPF) by virtue of a Share Purchase Agreement and then it created the Saluka as holder of these shares. Following the purchase, IPB was placed under forced administration and its assets were sold to another Czech commercial bank (CSOB). Saluka Investments asserted that the Czech Republic incurred responsibility because its conduct surrounding the IPB amounted to discriminatory expropriation in violation of Articles 3 and 5 of the 1991 Treaty.[63] The respondent, the Czech Republic, raised a counterclaim in its counter-memorial to which the applicant, Saluka Investments, objected on the basis of the tribunal's lack of jurisdiction to consider it. The counterclaim was formulated under eleven different headings[64] and comprised claims by the Czech Republic against the Nomura rather than Saluka, the applicant in the arbitral proceedings. The tribunal, first, ruled that it had jurisdiction on the basis of Article 8 of the 1991 Treaty to consider counterclaims. It recalled that Article 8 provided that "(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 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 [stated] period". The tribunal ruled that as a matter of principle

> … the jurisdiction conferred upon it by Article 8, particularly when read with Article 19.3, 19.4 and 21.3 of the UNCITRAL Rules is … wide enough to encompass counterclaims. The language of Article 8, in referring to 'All disputes', is wide enough to include disputes giving rise to counterclaims, so long, of course, as other relevant requirements are also met …[65]

The tribunal, then, assumed (but not ruled) that the relationship between Nomura and Saluka was so close "… as to enable the Tribunal's jurisdiction in proceedings instituted by Saluka to extend to claims against Nomura …",[66] but even if this had been the case, the counterclaim raised by the Czech Republic would be inadmissible. In the first three sections of counterclaim the Czech Republic alleged breaches by Nomura of the Share Purchase Agreement of 1998, between Nomura and the Czech National Property Fund (NFP).[67] The tribunal

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[62] *Saluka Investments B.V. v. The Czech Republic,* Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, 1, para 3.

[63] *Id.,* 3, paras 9–10.

[64] *Id.,* 10, paras 48, 59.

[65] *Id.,* 9, para 39.

[66] *Id.,* 10, para 44.

[67] *Id.,*11–13, paras 47–58.

pointed that Article 21of the 1998 Agreement contained a mandatory arbitration clause which could not be disregarded by virtue of Article 8 (6) of the 1991 Treaty[68]:

> The Tribunal thus cannot in this arbitration entertain a counterclaim based on a dispute arising out of or in connection with, or the alleged breach of, an agreement which both contains its own mandatory arbitration provision and is an agreement which the Tribunal is expressly required to take into account[69]

The next eight sections of the Czech Republic's counterclaim concerned alleged breaches by Nomura of obligations incurred by an investor under Czech municipal law.[70] The tribunal also rejected all of them as inadmissible on the basis of lack of connection between the principal claim and counterclaim. At the outset, the tribunal outlined the position in law, as it perceived it, in these terms:

> In relation specifically to counterclaims, it is necessary that they must also satisfy those conditions which customarily govern the relationship between a counterclaim and the primary claim to which it is a response. In particular, a legitimate counterclaim must have a close connexion with the primary claim to which it is a response. In this arbitration the primary claim involves Saluka's investment in the Czech Republic through its share-holding since October 1998 in IPB, and its treatment by the Respondent in circumstances which Saluka claims involve breaches of Articles 3 and 5 of the Treaty.
>
> ….
>
> The nature and extent of the necessary close connection may be variously expressed. No single attempt to define this requirement with universal effect is likely to be satisfactory, since so much will always turn on the particular circumstances of individual cases, including not only their facts but also the relevant treaty and other texts[71]

After reviewing the case-law of the Iran-US Claims Tribunal and the arbitral tribunals constituted under the framework of the ICSID Convention the tribunal found that the combined effect of Article 19 (3) of the UNCITRAL Rules, Articles 25 (1) and 46 of the ICSID Convention and Article II (1) of the Iran-US Settlement Declaration reflected

> … a general legal principle as to the nature of the close connexion 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 Tribunal considers that Article 8 of the [1991] Treaty has to be understood and applied in the light of this general legal principle …[72]

This "general legal principle" with respect to the connexion between primary claim and counterclaim is that the counterclaim must constitute an

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[68] Article 8 (6) of the 1991 Treaty required of the Tribunal to take into account, among others, "the provisions of special agreements relating to the investment". In the tribunal's view the 1998 Agreement (including Article 21) constituted such a special agreement. *Id.,* 12, para 56.

[69] *Id.,* 12–13, para 57.

[70] *Id.,* 13, para 59.

[71] *Id.,* 13–14, paras 61, 63.

[72] *Id.,* 17, paras 76–77.

> 'indivisible whole' with the primary claim asserted by the Claimant, or as invoking obligations which share with the primary claim 'a common origin, identical sources, and an operational unity' or which were assumed for the 'accomplishment of a single goal, [so as to be] interdependent'[73]

This was not the case in relation to sections four to eleven of the Czech Republic's counterclaim as they were premised on an alleged failure to abide by obligations under municipal law which, "… are applicable, as a matter of the general law of the Czech Republic, to persons subject to the Czech Republic's jurisdiction …"[74] By contrast, to be admissible under the requirement of connexion, the Czech Republic's counterclaims should have been premised narrowly on the legal relationship between itself and Saluka that was established by the 1991 Treaty, namely, the investment that Saluka made in the Czech banking sector.

2.3.3 The Iran-US Claims Tribunal

The Iran-US Claims Tribunal was established on 19 January 1981 by virtue of the General Declaration[75] and the Claims Settlement Declaration which was issued by the government of Algeria and adhered to by Iran and the USA.[76] Article II of the Claims Settlement Declaration provides:

> 1. An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and *any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject-matter of that national's claim, if such claims and counterclaims outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights,* excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of 19 January 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding

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[73] *Id.* para 79.

[74] *Ibid.*

[75] Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments made by Iran and the United States of America, 19 January 1981, *20 ILM 224 (1981)*; see generally Aldrich 1996; Marossi 2006.

[76] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981, text in *20 ILM 230 (1981)*.

> contract between the parties specifically providing that any disputes there under shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position. [emphasis added]
>
> 2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.

Article III (2) of the Declaration provides that the Tribunal shall settle disputes in accordance with the UNCITRAL rules "… except to the extent modified by the parties or by the Tribunal to ensure that this agreement can be carried out …" Article 19 (3) of the UNCITRAL Rules has been modified to read "… if such counterclaim or set-off is allowed under the Claims Settlement Declaration …"[77] The latter does expand the basis of presenting counterclaims beyond the original UNCITRAL provision (that a counterclaim must arise only out of the same contract) to include "transaction or occurrence".

The presentation of counterclaims by Iran, the respondent in the overwhelming majority of cases, has been a frequent occurrence in the jurisprudence of the Tribunal. The reason lies in the fact that Article II (1) excludes from the jurisdiction of the Tribunal claims by either Iran or the USA against nationals of the other State. Therefore, the making of counterclaims is the only route of raising claims by either party to the Claims Settlement Declaration, especially Iran, against nationals of the other party; the only alternative to this course of action would be the bringing of claims before the domestic courts of either Iran or the USA. In the *A/2* case the Tribunal dealt with a request by Iran on whether the General Declaration made by Algeria and the Claims Settlement Declaration had established its jurisdiction over claims by Iran against nationals of the USA. The Tribunal replied to the request in the negative and ruled that

> … It can easily be seen that the parties set up very carefully a list of the claims and counterclaims which could be submitted to the arbitral tribunal …
>
> They mentioned only on that list … claims which would be made by nationals of one of the two States. Certainly, they admitted the counter claims submitted by Iran or the United States against nationals of the other State, but under restrictive conditions which are detailed in paragraph 1 of Article II of the Claims Settlement Declaration.
>
> Such a right of counter claim is normal for a respondent, but it is admitted only in response to a claim and it does not mean, by analogy, that each State is allowed to submit claims against nationals of the other State. It means, a contrario, just the opposite. Certainly also, several specified sorts of claims are expressly excluded by the same paragraph, but such exclusion is in "the framework" of this paragraph, i.e.: concerning claims made by citizens against States. Such specific exclusions do not mean that, outside of that framework, any claim which has not been excluded, should be admitted …[78]

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[77] Iran-US Claims Tribunal Rules of Procedure, 3 May 1983, text in www.iusct.org/tribunal-rules.pdf.

[78] *Case A/2, Request for Interpretation: Jurisdiction of the Tribunal with respect to claims by the Islamic Republic of Iran against nationals of the United States of America,* Decision No DEC1-A2-FT, 1 Iran-US CTR 101 (1982), 2.

The Tribunal has also had the opportunity to discuss the issue of counterclaims in the context of inter-State claims between Iran and the USA which are regulated by Article II (2) of the Claims Settlement Declaration. This provision makes no express stipulation whether the respondent State may bring counterclaims ("official counterclaims") against the applicant (State). The issue arose in the *B/1* case[79] where Iran raised several claims against the USA arising from transactions concerning the purchase of military equipment by the former from the latter. The USA brought a counterclaim in which it alleged that Iran had violated its contractual obligation concerning the security of classified information in relation to the military equipment sold to it by the US. Iran raised four preliminary objections to the counterclaim.[80] In the first preliminary objection Iran contended that the Tribunal did not have jurisdiction to hear "official counterclaims" under the Claims Settlement Declaration.[81] The Tribunal interpreted this instrument by applying the basic rule of treaty interpretation in Article 31 of the Vienna Convention on the Law of Treaties (1969) and ruled on the basis of the practice of both States subsequent to the Claims Settlement Declaration that "official counterclaims" were admissible under Article II (2) of the Declaration.[82] In the course of its reasoning, the Tribunal has taken the opportunity to elaborate on the concept of counterclaims. In fact, the Tribunal appears to consider the right of a respondent to bring counterclaims as a general principle of law or an analogy of municipal private law. In particular, the Tribunal has adopted the view that the silence of a tribunal's Statute with respect to the making of counterclaims does not imply an exclusion of a respondent's right to do so; by contrast, depriving a respondent of his right to bring counterclaims requires express provision in a Statute. The Tribunal ruled that

> … Accordingly, the fact that Article II, paragraph 2, of the Claims Settlement Declaration does not refer to 'counterclaims' is not the end of the matter, even if it could weigh in favor of the view that official counterclaims are excluded. But even this is uncertain.
>
> The Tribunal stated in Case No.A2 that 'a right of counter claim is normal for a respondent.' On that view, an explicit authorization of counterclaims would be unnecessary; on the contrary, express language would be necessary to exclude counterclaims. In this connection, it is noteworthy that prominent international tribunals with jurisdictional grants similar to Article II, paragraph 2, of the Claims Settlement Declaration (i.e., jurisdictional grants that permit parties to bring claims against one another on an equal footing) have considered that they could entertain counterclaims, even if their constituent instruments did not expressly refer to counterclaims. For instance, the respective Statutes of the PCIJ, the ICJ and the International Tribunal for the Law of the Sea ("ITLOS") do not expressly refer to counterclaims. Yet, these institutions determined that they could entertain counterclaims and adopted rules governing them. Similarly, the treaties

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[79] *The Islamic Republic of Iran v. The United States of America, Case No. B 1(Counterclaim), Interlocutory Award, 9 September 2004,* Award No. ITL 83-B1-FT, 2004 WL 2210709.

[80] *Id.,* 2, para 2.

[81] *Id.,* 5, para 15.

[82] *Id.*, 20–25, paras 106–135. See Article 31 (3) (b) Vienna Convention on the Law of Treaties (1969).

> establishing the mixed arbitral tribunals after the First World War did not refer to counterclaims, but the majority of these tribunals considered that they could entertain counterclaims; the few arbitral tribunals that prohibited counterclaims adopted express rules to that effect. …
>
> The fact that Article II, paragraph 1, of the Claims Settlement Declaration refers to 'claims' and 'counterclaims', whereas paragraph 2 of the same Article refers only to 'claims', does not necessarily imply that the Parties sought to exclude counterclaims in official cases, because there are particular reasons why express mention of counterclaims was required in paragraph 1 but not in paragraph 2 of Article II of the Claims Settlement Declaration. Article II, paragraph 1, of the Claims Settlement Declaration confers on the Tribunal jurisdiction over 'claims of nationals of the United States against Iran and claims of nationals of Iran against the United States' but the Tribunal has no jurisdiction over claims of one government against the nationals of the other State. Without express mention of counterclaims in Article II, paragraph 1, of the Claims Settlement Declaration the Tribunal would have been prevented from hearing any type of claims by a State party against nationals of the other State. By contrast, since each Party could file claims against the other under Article II, paragraph 2, of the Claims Settlement Declaration, the same rationale does not apply to that provision. Based on the foregoing the Tribunal determines that the absence of any reference to counterclaims in Article II, paragraph 2, of the Claims Settlement Declaration, without more, does not warrant the conclusion that official claims are not permitted under that provision …[83]

It may be inferred from the above rulings that at first sight the *raison d' être* of counterclaims as a concept of municipal private law is somewhat curtailed in the context of the Iran-US claims Tribunal. Under this concept the subject of counterclaims may constitute the subject of separate claims. They are admissible as counterclaims for reasons of fairness and procedural economy. The right to present counterclaims before the specific arbitral tribunal does not have, by virtue of express provision of its statutory instrument, a counter-part in the right to present separate claims by Iran or the USA against nationals of the other State. Therefore, the admission of the right of a respondent State to make counterclaims goes beyond procedural economy, in fact it seems unrelated to it altogether, and is restricted only to fairness. Indeed, it appears that a respondent State in litigation before the Tribunal, in practice Iran, would be disproportionately placed in a position of disadvantage if its lack of right to bring claims against US nationals would be accompanied by its logical conclusion: a lack of a right to bring counterclaims. In a framework of settlement of disputes arising from economic transactions and investment, the respondent State facing claims based on State responsibility by private parties but being unable to assert its own claims that unavoidably may arise in the context of this type of relations would be excessively one-sided in favor of investors. On the other hand, the Tribunal's position that the right of a respondent to make a counter-claim is "normal" but must not be seen as allowing the bringing of claims by a State against the nationals of the other State is not to be taken to represent a statement of principle. It is rather to be seen strictly within the settlement framework of the Tribunal, as agreed by the interested States, in relation to claims of private parties (namely, citizens of Iran or the USA) against

[83] *Id.,* 17–18, paras 86–87, 89.

either Iran or the USA. Indeed, the general historic and political context surrounding the establishment of the Iran-US Claims Tribunal consists of the consequences of the Islamic Revolution in Iran upon the property rights of and large-scale private investment by US nationals. The redress of claims (principally against Iran) that were generated clearly occupies a position of priority in the framework of settlement agreed by the USA and Iran. At the same time, this priority is maintained, though counterbalanced, by the expressly conferred right to the respondent (again, principally Iran) to make counter-claims because the latter to a large extent depends on the original claim in relation to its admissibility and substantive content. By contrast, in the context of official inter-State claims the situation is more straightforward: a right to bring counter-claims need not be expressly conferred for it is premised on a general principle of law. In fact, as long as either Iran or the USA may raise claims against each other, the State that in a particular dispute finds itself in the position of respondent may bring counter-claims the admissibility of which is regulated by the Tribunal's Rules of Procedure only (Article 19 (3)).[84]

The Tribunal has dealt with counter-claims in its voluminous jurisprudence concerning claims by private parties against, principally, Iran. George Aldrich, former Judge and President of the Tribunal, has formulated a number of principles that have crystallized as a result of this jurisprudence[85]:

(a) *Jurisdiction over counter-claims depends on jurisdiction over the original claims*. In *Reliance Group Inc. v. National Iranian Oil Company* et al. the Tribunal dismissed the Applicant's claim for lack of jurisdiction because it was not satisfied that it constituted a claim by a US national. On the respondents' counter-claim it ruled that "… [T]he Counter-claim is similarly dismissed since it arises out of the same contract as the Claim and is dependent on the Jurisdiction of the Tribunal over the Claim…"[86]
(b) *Withdrawal of a claim does not affect jurisdiction over a counter-claim*[87]
(c) *The jurisdiction of the Tribunal over counter-claims is not exclusive.* This implies that a respondent is not compelled to bring a counter-claim to the Tribunal and that he has the right to pursue it in other forums.[88]
(d) *The amount of a counter-claim may exceed that of a claim.*[89]
(e) *The Tribunal has jurisdiction over set-offs if they meet the requirements for counter-claims.*[90]

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[84] *Id.,* 12, 19, 25, paras 52, 98, 139.

[85] Aldrich 1996, 110 *et seq.*

[86] *Reliance Group Inc. v. National Iranian Oil Company* et al., Award No. 15-90-2, 8 December 1982, 1 Iran-US CTR 384; Aldrich 1996 111(n. 225). Also see *Thomas K. Khoshravi v. The Government of the Islamic Republic of Iran,* Award No. 571-146-3, 20 June 1996, 1996 WL 1171806, para 75.

[87] Aldrich 1996, 111 (n. 226).

[88] *Id.* (n. 228).

[89] *Id.,*112 (notes 230, 231).

[90] *Id.,* 112 (n. 232).

(f) *The Tribunal does not have jurisdiction over counter-claims that do not arise from the same contract, transaction or occurrence as a claim.* In the *Owens-Corning Fiberglass Corp.* case the Tribunal ruled that if a claim is based exclusively on a contract or arises from an occurrence (such as an act of expropriation) the counter-claim must arise out of the same contract or the same occurrence. As for transaction the Tribunal took the view that if a business transaction results in a number of contracts, a counter-claim would be within the jurisdiction of the Tribunal even if it arose from a contract of the same transaction other than the contract on which the claim was based.[91] However, the jurisprudence of the Tribunal has not been consistent with respect to counter-claims based on contracts different from the contracts under which the principal claims were brought. In the *Pomeroy*[92] and *Morrison-Knudsen*[93] cases the Tribunal rejected for lack of jurisdiction counter-claims because they did not arise from the same contracts as the claims but were presented under contracts preceding those that formed the basis of the principal claim. In these cases the Tribunal declined to accept the argument that all contracts formed part of the same transaction and, hence, counter-claims based on earlier contracts were admissible as arising from the same transaction. By contrast, in the *American Bell*[94] and *Westinghouse*[95] cases the Tribunal reached the opposite conclusion by ruling that counter-claims arising from contracts other than those on which the principal claims were based were admissible as arising from the same transaction because "as a practical matter, both Parties were committed to the transaction in its entirety."[96]

(g) *The Tribunal does not have jurisdiction over counter-claims for taxes or social security contributions.* The Tribunal has consistently rejected for lack of jurisdiction this type of counter-claims by ruling that they arise under Iranian law and not contracts.[97]

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[91] *Owens-Corning Fiberglass Corp. v. The Government of Iran* et al., Interlocutory Award No. ITL 18-113-2, 13 May 1983, 2 Iran-US CTR 322, 324 cited in Aldrich 1996, 113 (n. 234).

[92] *R. N. Pomeroy* et al. *v. The Government of the Islamic Republic of Iran,* Award No. 50-40-3, 8 June 1983, 2 Iran-US CTR 372, at 379 cited in Aldrich 1996, 113 (n. 235).

[93] *Morrison-Knudsen Pacific Ltd. v. The Ministry of Roads and Transportation* et al., Award No. 143-127-3, 13 July 1984, 7 Iran-US CTR 54, at 82–84 cited in Aldrich 1996, 114 (n. 237).

[94] *American Bell International, Inc. v. The Government of the Islamic Republic of Iran,* Interlocutory Award No. ITL 41-48-3, 11 June 1984, 6 Iran-US CTR 74, at 83–84 cited in Aldrich 1996, 114 (n. 236).

[95] *Westinghouse Electric Corp. v. The Islamic Republic of Iran* et al., Interlocutory Award No. ITL 67-389-2, 12 February 1987, 14 Iran-US CTR 104 cited in Aldrich 1996, 115 (n. 239). But the opposite conclusion was reached in *Westinghouse Electric Corp. v. Islamic Republic of Iran Air Force,* Award No. 579-389-2, 26 March 1997, 1997 WL 1175782 (Iran-US Cl. Trib.), paras 423–432.

[96] Aldrich 1996, 116.

[97] Aldrich 1996, 116–118.

(h) *The Tribunal does not have jurisdiction over counter-claims by or against non-Parties.* In this respect the Tribunal rejected counter-claims against the parent-company in cases between a subsidiary and Iran.[98]

(i) *A contractual prohibition of counter-claims does not affect the jurisdiction of the Tribunal.* In the *Anaconda-Iran* case the Tribunal held that a contractual obligation between claimant and respondent to submit disputes to the International Chamber of Commerce coupled with an express prohibition of counter-claims, did not affect its jurisdiction over counter-claims because it was stipulated in the international agreement between Iran and the USA and not in the agreement of the parties to the arbitration.[99]

(j) *The jurisdiction of the Tribunal is not affected by the fact that claims are indirect*[100]

A further aspect of the Tribunals contribution to the jurisprudence on counter-claims concerns the consideration of the issue of bringing counter-claims against counter-claims, in other words of a principal claimant's counter-counterclaims against a respondent's counter-claims. In the *Westinghouse Electric Corp. v. Islamic Republic of Iran Air Force* case the Tribunal faced Westinghouse's counter-counterclaims against the Iranian Air Force's counter-claims. Westinghouse's counter-counterclaims were based on a contract other than the four contracts constituting the basis of the principal claim and to which the respondent raised counter-claims.[101] At the outset, the Tribunal declined to treat the counter-counterclaims of the original applicant as amendments to its initial statement of claim because this would be contrary to the deadline for filing claims provided in Article III (4) of the Claims Settlement Declaration.[102] Moreover, the Tribunal took note of its Interlocutory Award of 12 February 1987 where it ruled that the Iranian Air Force's counter-claims under contracts other than the claim's contracts were within its jurisdiction as arising from the same transaction and ruled that it would evaluate the performance of Westinghouse under the counter-claims contracts. It then ruled that it would consider the counter-counterclaims of Westinghouse but it would "limit Westinghouse's potential recovery thereon. Thus, in allocating the parties' losses, the Tribunal will consider the extent of

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[98] See, for instance, *American Bell International, Inc. v. The Government of the Islamic Republic of Iran,* Interlocutory Award No. ITL 41-48-3, 11 June 1984, 6 Iran-US CTR 74, at 82 cited in Aldrich 1996, 118 (n. 247). *Cf. Kimberley-Clark Corp. v. Bank Markazi* et al. Award No. 46-57-2, 25 May 1983, 2 Iran-US CTR 334, where a non-respondent made a counter-claim and the Tribunal allowed the applicant to amend its statement of claim so as to include the counter-claimant as a respondent, cited in Aldrich 1996, 118 (n. 248).

[99] *Anaconda-Iran, Inc. v. The Government of the Islamic Republic of Iran* et al., Interlocutory Award No. ITL 65-167-3, 10 December 1986, 15 Iran-US CTR 199, at 221–226, cited in Aldrich 1996, 119 (n. 250).

[100] Aldrich 1996, 119 (notes 252, 253).

[101] *Westinghouse Electric Corp. v. Islamic Republic of Iran Air Force,* Award No. 579-389-2, 26 March 1997, 1997 WL 1175782 (Iran-US Cl. Trib.), para 16.

[102] *Id.* para 320.

Westinghouse's performance under the counter-claims contracts, but only to a limited degree—that is, only to reduce or satisfy the Air Force's counter-claims on those contracts, without allowing Westinghouse to recover any amounts in excess of the Air Force's recovery of its counter-claims".[103] Thus, it appears that a counter-counterclaim would be considered as having the function of a set-off; in its conclusion the Tribunal stated that Westinghouse's counter-counterclaims would be considered "as part of the Tribunal's determination of the financial consequences of the frustration of the contract".[104]

2.3.4 The World Trade Organization Understanding on Rules and Procedures Governing the Settlement of Disputes

Article 3 (10) of the WTO Dispute Settlement Rules does not admit the right to make counter-claims because the dispute settlement procedure is premised on conciliation and is not considered as a form of contentious process. The relevant passage of this provision reads: "It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked."[105]

2.3.5 The International Centre for Settlement of Investment Disputes (ICSID)

Article 46 of the ICSID Convention (2003) provides:

> Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims 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.

Moreover, Article 40 of the ICSID Arbitration Rules provides:

> (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
> (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection

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[103] *Id.* paras 321–322.

[104] *Id.* para 326.

[105] Text in http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm.

> by the other party, authorizes the presentation of the claim by a later stage in the proceeding.
>
> (3) …

The jurisprudence of ICSID tribunals reveals that the making of counter-claims by respondent States is not a frequent occurrence. As an ICSID tribunal found, in the *Sempra Energy International v. Argentina* case, the respondent stressed its expectations with respect to the investment that "were not met or were otherwise frustrated" and noted 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 counter-claim. While this right has been resorted to by respondent States only to a limited extent in cases submitted to ICSID tribunals, nothing prevents its exercise in the light of Article 46 of the Convention and Rule 40 of the Arbitration Rules. This right was not exercised in the present case. …[106]

Be it as it may, the ICSID tribunals case-law on counter-claims reveals that counter-claims are ruled to be admissible if they fall within the Centre's jurisdiction, namely, if they arise under an investment agreement (Article 25 ICSID Convention) and are directly related to the subject-matter of the particular dispute under litigation concerning a specific investment. In *Bevenutti and Bonfant SRL v. People's Republic of Congo* case the respondent raised a counter-claim that covered a number of headings: (a) compensation for non-payment of duties and taxes for imports under cover of the investment holder of goods destined for third parties; (b) overpricing of raw materials; (c) compensation for defaults in the execution of the supply agreement; (d) defects concerning the construction of the fertilisers plant and (e) compensation for moral damage.[107] The tribunal ruled that under Article 40 (1) of the ICSID Arbitration Rules the counter-claim was admissible because it related directly to the object of the dispute and the tribunal's competence had not been disputed.[108]

At the same time, the validity of a settlement-of-disputes agreement is a crucial factor in relation to the admissibility of counter-claims raised by a respondent State. In *Desert Line Projects LLC v. Yemen* an ICSID tribunal applied the concept of estoppel and rejected the respondent's counter-claims relative to "unperformed remedial and other works … as well as to the compensation related to the failure of

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[106] *Sempra Energy International v. The Argentine Republic* ICSID Case No. ARB/02/16 (Award), 2007 WL 5540331 (APPAWD), para 289. The issues that could form the bases of counter-claims by the respondent were "the expectation that the investor would bear any losses resulting from its activity, work diligently and in good faith, not claim extraordinary earnings exceeding by far fair and reasonable tariffs, resort to local courts for dispute settlement, dutifully observe contract commitments, and respect the regulatory framework".

[107] *Bevenutti and Bonfant SRL v. People's Republic of Congo,* ICSID Case No. ARB/77/2 (Award), 1980 WL 371579 (APPAWD), para 101.

[108] *Id.* para 104.

the Claimant to maintain the bank guarantees after 31 December 2004…" The tribunal reasoned that

> … the Respondent cannot claim benefit from the nullity of a document—i.e., the Settlement Agreement—that it imposed on the Claimant. In the present case, the doctrine of estoppel *(venire contra factum proprium)* serves as a shield to prevent the Respondent from obtaining compensation for the failure of the Claimant to execute its maintenance and repair obligations as well as for its failure to maintain the two bank guarantees. The Respondent—while imposing the Settlement Agreement that provided for the release of all these obligations—had clearly and unmistakably represented that it no longer treated the Claimant's aforementioned obligations as extant …[109]

In other words, the fact that a settlement agreement was forced upon an investor by a respondent State under duress precludes the latter from the right to raise counter-claims asserting the performance by the former of obligations arising from an investment agreement.

Furthermore, in *Klöckner v. Cameroon* an ICSID tribunal ruled that an investment agreement between the host State and a company incorporated under this State's law falls under the jurisdiction of the Centre and the respondent's counter-claims are admissible if at the time consent to the ICSID dispute settlement procedure was expressed; the applicant foreign investor had a majority interest in it. The subsequent loss of majority control does not affect the tribunal's jurisdiction once consent to the ISCID process has been conferred. In this case the tribunal found that although the investment agreement had been concluded between Cameroon and SOCAME, a Cameroonian company, it had been negotiated between Cameroon and Klöckner and "concluded in the interest of Klöckner, at a time when Klöckner was SOCAME's majority shareholder."[110] In the same case, the tribunal ruled that if ICSID is validly seized, namely, on the basis of the parties' consent, the subject-matter of the dispute may be extended "at any time, even in written submissions to the Tribunal (*'forum prorogatum'*) provided that this is met by the consent of the parties'.[111]

In *MINE v. Guinea* an ICSID tribunal upheld in principle the right of a respondent to make counter-claims for legal costs incurred in litigation improperly pursued by an applicant outside the ICSID framework, provided that the respondent timely objects to the applicant's improper course of action.[112]

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[109] *Desert Line Projects LLC v. Republic of Yemen,* ICSID Case No. ARB/05/17 (Award), 2008 WL 2912764 (APPAWD), para 224.

[110] *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon and Société Camerounaise des Engrais* (SOCAME), ICSID Case No. ARB/81/2 (Award), 1983 WL 510000 (APPAWD), p 6. See also, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, 2008 WL 4819868 (APPAWD), para 284.

[111] *Id.,* 4.

[112] *Maritime International Nominees Establishment ("MINE") v. Republic of Guinea*, ICSID Case No. ARB/84/4 (Award), 1988 WL 1103627.

Counter-claims concerning tax and duties obligations of an investor toward a host State may be admissible in litigation under the ICSID framework of settlement of disputes if it is proved that they arise directly out of an investment, in the sense of being expressly contracted, in accordance to Article 25 (1) of the ICSID Convention. Otherwise, they are dismissed for lack of jurisdiction. In *Amco v. Indonesia (Resubmitted case)* an ICSID tribunal considered a counter-claim by Indonesia concerning an allegation of tax fraud by the applicant and found that

> … In fact, both parties agree, as does the Tribunal, that tax claims may be within the ICSID's jurisdiction and that claims in relation thereto would be available to both parties to an investment dispute. The issue is, therefore, whether this particular claim falls within Article 25 (1) of the ICSID Convention. In answering this question the Tribunal believes that it is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State's jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host State. Legal disputes relating to the latter will fall under Article 25 (1) of the Convention. Legal disputes concerning the former in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention. The obligation not to engage in tax fraud is clearly a general obligation of law in Indonesia. It was not specially contracted for in the investment agreement and does not arise directly out of the investment. For these reasons the Tribunal finds the claim of tax fraud beyond its competence *ratione materiae* …[113]

In the same case the tribunal drew upon the distinction between a defence and a counter-claim with respect to Indonesia's claim of tax fraud against Amco. This argument was raised during the first proceedings of 1984, and the issue before the second proceedings of 1988 was whether Indonesia's claim had already been decided by the fist tribunal or was a new claim. The second tribunal relied on Article 40 of the ICSID Arbitration Rules and found that before the first tribunal,

> … The fact that argument was exchanged on the question of tax fraud, in the context of justifying the revocation of the licence and in support of an "unclean hands" argument, does not mean that tax fraud was a claim in existence before the first tribunal. For that to have been so, it would have been necessary for it to have been advanced as a counter-claim or as an additional claim under Rule 40 …[114]

The tribunal did not explain the substantive content of the distinction between a "defence" and a "counter-claim", and indeed, this does not appear to have been the issue. What is implicit, however, in the particular section of the award, is that an argument of "unclean hands" aimed at exculpating Indonesia, the respondent, from State responsibility for breach of the investment agreement did not have the character of a "claim" or "counter-claim" for the latter is, at least, subject to certain formal procedure.

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[113] *Amco v. Republic of Indonesia,* ICSID Case No. ARB/81/1 (Resubmitted Case: Decision on Jurisdiction), *27 ILM 1281 (1988)*, 1309–1310, paras 124–127.

[114] *Id.*, para 120.

2.3.6 The International Chamber of Commerce (ICC) Rules of Arbitration (1998)

Article 5 (5) of the ICC Arbitration Rules states that

> Any counter-claim(s) made by the Respondent shall be filed with its answer and shall provide: (a) a description of the nature and circumstances of the dispute giving rise to the counter-claim(s); and (b) a statement of the relief sought, including, to the extent possible, an indication of any amounts(s) counterclaimed.

This provision is remarkable for its generality of formulation and all-inclusiveness. There seem to be no specifically circumscribed requirements for the admissibility of counter-claims: there is no condition concerning the tribunal's subject-matter jurisdiction, neither is there any provision with respect to connection with particular contract, transaction or occurrence. It appears from the few ICC cases in which counter-claims were raised that tribunals evaluate them exclusively on the merits and that no issue of admissibility had arisen because the counter-claims were directly connected with the original claims. In *Case No. 3779*[115] a Swiss seller (applicant) concluded three contracts with a Dutch buyer (respondent) for the supply of whey powder. The product met the requirements agreed upon according to the method of analysis prevalent in North America but failed to meet these requirements under the European method. As a result, the respondent canceled the third contract which had not been executed and, when the claimant instituted the ICC arbitration proceedings (for damages arising from the cancelation of the third contract), he counterclaimed for loss arising from the first two contracts that had been executed. The tribunal applied Swiss law and ruled that all three contracts, "from an economic point of view … constituted one group". It, however, rejected the respondent's counter-claim on the merits because the first two contracts had been confirmed by him and payment had been made after the discovery of the error. Moreover, in *Case No. 8486*[116] the tribunal rejected a counter-claim by the respondent for restitution of advance payment, again on the merits, namely, that the respondent was not released from his contractual obligations by reason of unforeseen and fundamental change of circumstances. Finally, in *Case No. 4567*[117] the tribunal considered various counter-claims by a US supplier (respondent) against a West-African applicant (buyer) in the dispute concerning a claim of recovery of payment made for the purchase of a defective High Power Microwave Amplifier, as well as incidental and consequential damages. The counter-claims were rejected because the tribunal ruled that the applicant had the right to recover incidental damages to which no limitations applied and that these damages were assessed by it acting as *amiable compositeur.*

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[115] *Award in Case No. 3779 of 13 August 1981,* ICCA Ybk, Vol. IX (1984), 124–130.

[116] *Award in Case No. 8486 (1996),* ICCA Ybk, Vol. XXIVa (1999), 162–173.

[117] *Award in Case No. 4567 (1985),* ICCA Ybk, Vol. XI (1986), 143–147.

2.3.7 The International Law Commission's Model Rules on Arbitral Procedure (1958)

Article 19 of the ILC Model Rules provides that

> In the absence of any agreement to the contrary implied by the undertaking to arbitrate or contained in the *compromis,* the tribunal shall decide on any ancillary claims which it considers to be inseparable from the subject-matter of the dispute and necessary for its final settlement.

The use of the generic term "ancillary matters" in the text includes the right to make counter-claims if a special agreement to arbitrate is silent on the issue.[118] As the general commentary of the Commission[119] indicates, the use of the term has a dual purpose. First, it aims at overcoming definitional problems and, secondly, it introduces the rationale of disposing of the "grounds of dispute between the parties arising out of the same subject-matter". It, thus, appears to support, if not encourage, the final settlement of all aspects of a dispute. In this respect, the presentation of counter-claims, being a means to bring additional matters of the same dispute to the attention of an arbitral tribunal, is as a matter of principle allowed. The only requirement introduced for the admissibility of counter-claims is their inseparability from the subject-matter of the dispute, an issue to be decided by an arbitral tribunal in every specific case.

2.4 The International Tribunal for the Law of the Sea (ITLOS)

Article 98 of the ITLOS Rules of Procedure provide for the right to make counter-claims in terms similar to the Rules of procedure of the ICJ:

1. A party may present a counter-claim provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Tribunal.
2. A counter-claim shall be made in the counter-memorial of the party presenting it and shall appear as part of the submissions of that party.
3. In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party the Tribunal shall, after hearing the parties, decide whether or not the question thus presented shall be joined to the original proceedings.

To this date there has not been a case where counter-claims were presented.

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[118] Larschan and Mirfendereski 1986–1987, 28.

[119] *Yearbook of the International Law Commission 1958, Vol. II,* 87, para 34.

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