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PROBLEMATIC ISSUES OF SUBMITTING OF COUNTERCLAIMS IN INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

The counterclaim institute is one of crucial legal defense options during the dispute settlement in domestic and international jurisdictions; investment arbitration is not an exception. The most famous dispute settlement platform is International centre for settlement of investment disputes (ICSID). One of the key ideas of establishment of such a dispute settlement instrument was an implementation of autonomous and objective system of Investor-states dispte sttlement (ISDS) by the "independent forum". While procedural rights of ISDS parties are conceptually equal.

However, the concept of equal procedural rights of ISDS parties has not been translated into reality. Notwithstanding the fact that the counterclaim institute is an important instrument of ensuring the

objectivity and comprehensiveness of the dispute settlement, tribunal`s approaches are "restrictive" and "cautious".Taking into account that States are "perpetual respondent" in ICSID, problematic issues of submitting of counterclaims influence the realization of interest of the State in ICSID.

Problematic issues of submitting of counterclaims clearly show the imbalance of the exercise of procedural rights by the respondent-state.The article is intended to draw the attention of readers to problematic issues of submitting of counterclaims in ICSID and on the alternative view of the isuue.

Keywords: International centre for settlement of investment disputes (ICSID); Investor-states dispute settlement (ISDS); the counterclaim; foreign investor; Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States on 1965; ICSID Rules; subject-matter of the dispute; precedent; admissibility.

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Проблемні питання подання зустрічного позову у Міжнародному центрі врегулювання інвестиційних спорів

Інститут зустрічного позову є одним із ключових інструментів правового захисту під час розгляду комерційних спорів у національних та міжнародних юрисдикціях, не є винятком і інвестиційний арбітраж. Найбільш відомим форумом вирішення міжнародних інвестиційних спорів є Міжнародний центр врегулювання інвестиційних спорів (далі – МЦВІС). Однією з ключових ідей створення такого інструменту вирішення спорів було впровадження незалежної та об'єктивної системи вирішення міжнародних інвестиційних спорів на «незалежному форумі». Водночас концептуально процесуальні права учасників інвестиційного спору є рівними.

Однак на практиці концепцію процесуальної рівності прав сторін спору не було реалізовано в повному обсязі. Хоча інститут зустрічного позову є важливим інструментом забезпечення об'єктивності та всебічності розгляду спору, підходи трибуналів до тлумачення прийнятності зустрічних позовів у рамках МЦВІС є досить «обмежувальним» та «обережним».

Ураховуючи, що держава є «вічним відповідачем» у МЦВІС, проблематика подання зустрічних позовів безумовно впливає на реалізацію інтересів держави в рамках установи.

Проблематика звернення держави із зустрічним позовом у МЦВІС наочно демонструє дисбаланс у реалізації процесуальних прав державою-відповідачем.

Стаття покликана звернути увагу читачів на проблемні питання подання зустрічного позову в МЦВІС і відображає альтернативний погляд на дану проблематику.

Ключові слова: Міжнародний центр врегулювання інвестиційних спорів (МЦВІС); інвестиційні спори між інвестором та державою; зустрічний позов; іноземний інвестор; Вашингтонська Конвенція 1965 року про порядок вирішення інвестиційних спорів між державами та іноземними особами; Правила МЦВІС, предмет спору; юрисдикція; прецедент; прийнятність.

Problem statement. The rapid popularization of dispute settlement by the arbitration has not bypassed a State. Despite the fact, that the arbitration is used usually for the private commercial dispute settlement, the world community have created a number of arbitration systems with specific competence and subject-matter of the dispute, which operate on the basis of the domestic law on the arbitration and rules created by a certain arbitration institution. In the spirit of the above, one of

ICSID features is that ICSID is created by the international agreement. So, unlike other arbitration systems, ICSID operates under two legal grounds – Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States on 1965 (hereinafter Convention) and ICSID Rules. If you look at the context of Convention and ICSID Rules taking into account the legal effect of above documents, Convention has "framework rules" character while ICSID Rules are intended to specify and interpret such "rules" of Convention. Given that ICSID Rules shall be made by ICSID – only ICSID has the competence to amend ICSID Rules. During its lifetime ICSID repeatedly reformed its own Rules with a view of resolving conflicts, clarifying the provisions of Convention, introduction of new procedural options for disputing parties (for instance the provisional measures institute) and addressing other problematic issues related to the ISDS procedure in ICSID.

ICSID is from August 2018 in the process of new rounds of negotiations between State parties of Convention, investors and other persons or legal entities, who are involve in ISDS. The purpose of negotiations is to amend ICSID Rules. These amendments are the «grandest» since the beginning of ICSID and are intended to solve already accumulated problems within this institution.

In our view, the total imbalance of procedural rights between foreign investor and State is a "screaming" problem. One of examples is a problematic issue of submitting by the state counterclaims. This article is intended to analyze and synthesize the approaches of the tribunals in a determination on admissibility of counterclaims, to give the legal grounds for the counterclaim and provide legal conclusion, and also to investigate whether the ongoing amendment process of ICSID Rules addresses problematic issues.

Analysis of recent studies and publications. Problematic issues of submitting of counterclaims in ICSID has been studied by many legal scholars. In particular, this has been highlighted by such authors: Schreuer C., Douglas Z., Waibel M., Kaushal A., Chung K.-H., Balchin C., Grebelsky A., Schulz T., Raizman M., Abel B. and Šturma P.

Purpose and objectives of the studies. The purpose of the article is to identify key issues of submitting of counterclaims in ISDS, their comparison with the goals of ICSID, studying of the legal aspects of the admissibility of a counterclaim. The objectives are as follows: analysis and synthesis of current legal approaches to the interpretation of legal rules regarding the admissibility of a counterclaim; identification of problematic issues in counterclaim submitting; its comparison with ICSID goals; providing our own legal opinion on the tribunal's approaches; investigation of proposals of amendments in ICSID Rules, which concerns submitting of counterclaims.

Statement of a parent material. The dispute settlement mechanism in ICSID is criticized during its existence because of imbalance between public and private interests, indicated by absence of equal procedural rights and obligations between investor and state in cases. Therefore, as the dispute settlement mechanism in

ICSID, as other ISDS mechanisms [1, see also 2, 3] are asymmetric, since foreign investor claims are usually satisfied, and as a result states undertake to pay very high monetary compensation that is very sensitive to the State budget, while foreign investors are not responsible for the various consequences of the conduct of their own business (it is intended as social, economic, environmental or other impact).

As noted Prof. Schreuer, the modern ISDS system has quite many critics and is "often portrayed as one-sided, serving the interests of foreign investors who mostly represent big business" [4]. Nevertheless, according *to travaux preparatoires* to Convention, the mechanism was designed to balance interests between states and investors [5, p. 244, 246, 311, 374]. *Travaux preparatoires* clearly demonstrate, that ISDS in ICSID has been established to provide both States and foreign investors have the rights to initiate the procedure of dispute settlement in ICSID, and mechanism offered by Convention may be used regardless who in the claimant – State or foreign investor.

Despite the fact that conceptually the ISDS system in ICSID was supposed to be balanced, practically the thesis of balancing rights and interests is still debatable. As a result, ICSID has repeatedly initiated amendments of ICSID Rules in 1970, 1978, 1984, 2003, 2006 [6]. In particular, during the annual meeting of Administrative Council on October 2016 the Member-States were informed about intention to start consultations in 2017 with a view to amend ICSID Rules.

At the beginning of August 2018 the Secretariat publicized the first Amendments draft of ICSID Rules – Proposals for Amendment of the ICSID Rules [7].As of the date of this article, The Secretariat has publicized the fourth draft of amendments of ICSID Rules – Working Paper No 4 [8].

In view of the ongoing process of amending ICSID Rules, it must therefore be ascertained, how the process of amending the ICSID Rules affects balancing the interests between foreign investor and State in terms of the proposed amendments to provision 40(1) of ICSID Arbitration Rules [9], which governs the procedure of submitting of counterclaims, as well as to determine the place of this provision in the issue of admissibility of counterclaims.

Under current ICSID Rules a party may present a counterclaim, unless otherwise agreed by the parties, subject to the following requirements:

– a counterclaim arising directly out of the subject-matter of the dispute;

– presentation of a counterclaim is within the scope of the consent of the parties;

– presentation of a counterclaim is otherwise within the jurisdiction of ICSID.

Article 46 of the Convention [10] provides that except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine among other things any counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of ICSID.

With the exception of formal changes to provision 40(1) of ICSID Rules, such as changing the provision number from "40" to "48" and the indication that counterclaims, incidental or additional claims are understood as ancillary claims,

there are no substantial changes in a counterclaims admissibility issue [8, с. 319–320]. Nevertheless, from our point of view amendments in the admissibility issue are necessary. As discussed above, the ISDS mechanism in ICSID is imbalanced and such defects primarily affect interests of the Respondent-State. In our view there are sufficient grounds to presume, that the Respondent's right to submite a counterclaim in ICSID should be realized. Firstly, a consideration of a claim and a counterclaim in one proceeding is more economically and procedurally advantageous because of a sufficiently costly dispute settlement in ICSID. Secondly, a consideration of a claim and a counterclaim in one proceeding would be in accordance with principles of justice and independence, because a State will not be required to suit a foreign investor in domestic courts, whose decisions are not necessarily objectively and independently. Thirdly, the counterclaim institute ensures integrity and indivisibility of dispute settlements in ICSID. Obtaining satisfaction for initial claim and counterclaim could equitably reduce the financial burden on the Respondent-State by set-off funds, which are recovered in favour of a Claimant or Respondent respectively.

Notwithstanding the above, the ISDS mechanism is existed solely for the consideration of foreign investor's claims. By contrast a role of a State is a "perpetual respondent" [11, p. 224; 12, p. 577–602]. Such a status quo resulted a negative judicial precedent of counterclaims submitting.

The first counterclaim in ICSID (as in other ISDS) was submited in 1977 in *Adriano Gardella S.p.A. v. Côted'Ivoire* case [13]. Since then tribunals were very "cautious" on the issue of admissibility of counterclaims. Most counterclaims were rejected on the basis of jurisdiction of ICSID, namely without considering merits of counterclaims. At the same time, it should be noted that ICSID Tribunals made recently positive judicial precedents in the admissibility issue. Various counterclaims have been made by its legal nature in ISDS practice. Generally, counterclaims were based on violations from foreign investor's side during their investing on the host State [see 13, 14]. A violation by foreign investor of his/her own contract obligations was a typical ground of counterclaims in 1980. States required to mitigate losses recovered by a tribunal award on an amount claimed in the counterclaim [see 13, 14].

In the *Klöckner Industrie-Anlagen GmbH and Others v. Republic of Cameroon* case [15], which was before ICSID in 1983, the State was submited the counterclaim based on the breach of investment contract. The Tribunal admitted the counterclaim, but denied on the merits because the State had access to other technical support *"by virtue of its position"* and shouldn't to rely solely on the private [foreign] investor.

There are quite often found State's counterclaims with regards to the foreign investor's breach of tax obligations, for instance tax evasions, tax violations, abuses of preferential customs treatment etc [14, 16]. In practice, there are also cases of counterclaims for moral damages. The case *Benvenuti & Bonfant v. People's Republic of the Congo* [14] can be a good example, where the State required to enforce damages for the breach of a refit contract. The second ground of the counterclaim was an unsubstantiated suit to the Tribunal. The identical require was in the *Limited*

Liability Company Amto v. Ukraine case [17]. In both cases, however, Tribunals did not support this position of Respondent-States. In another case – *Metal-Tech Ltd. v. Republic of Uzbekistan* [18], which was decided in 2014, the State submited the counterclaim about losses. Meanwhile, the State argued, that it suffered losses both sovereign and proprietor. As a proprietor it suffered for losses, which the State could obtain on condition of the export of products which in theirs turn had conform to the quality agreed between the parties. As a sovereign the State alleged non-payment of taxes and duties, and also for losses due to bankruptcy proceedings.

Also there were two cases involving the Republic of Ecuador, which were heard between 2017–2019. The both cases were submited the same counterclaims for losses because of oil well operations. In the first case – *Burlington Resources Inc. v. Republic of Ecuador,* the State required losses for the environmental pollution and for breaches of investment contract. In February, 2017 the Tribunal granted the counterclaim and recovered losses amounting to 41,7 million U.S. dollars, which was credited to the losses for an initial claim [19]. In the second case – *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petryleos del Ecuador (Petroecuador)*, where was the same counterclaim, the Tribunal also granted is and recovered losses amounting to 93 million U.S. dollars [20]. It appears from the foregoing that States have attempted to submite counterclaims during the lifetime of ICSID despite the negative practice on this issue.

In our point of view, such legal position of States is useful and justifiable because a domestic law and investment contracts not only entitle the foreign investor, but impose obligations on him. Thereby, it makes perfect sense to consider the foreign investor's breach of its own obligations in conjunction with the investor's claim-requires.

If we analyze the meaning of Article 46 of Convention given the Rule 40(1) of ICSID Arbitration Rules, there are the three pillars for admissibility of a counterclaim:

1) counterclaim arising directly out of the subject-matter of the dispute;

2) counterclaim is within the scope of the consent of the parties;

3) counterclaim is otherwise within the jurisdiction of ICSID.

If the second and third conditions are more related to the jurisdiction of the arbitral tribunal, the first condition is about the admissibility. The most controversial conditions are the first and the second.

Besides, bilateral or multilateral treaties provisions relating to the dispute settlement include only unilateral State obligations in investment legal relations with foreign investor. As a result, Tribunals took a restrictive interpretation in issue of conformity of counterclaims to consent to arbitration. As to the condition of arising counterclaims to the subject matter of the dispute, the question of what exactly is the relationship between the subject matter of a dispute and counterclaim – arising to the legal or factual basis – is debated.

From our point of view, **the main difficulties encountered by Respondent-States if filing their counterclaims were as follows:**

1) Interpretation by Tribunals of the condition of the compliance between counterclaim and consent of the parties on arbitration proceedings in correspondence with the provisions on the settlement of disputes in the relevant bilateral or multilateral treaties, which include only issue of breach of obligations by a State to a foreign investor;

2) Interpretation by Tribunals of the condition on the connection of counterclaims with the subject-matter of the dispute, as understood as the unity of legal rather that factual ground of such claims;

3) Interpretation by Tribunals of the requirements of Article 46 of Convention in correspondence with the provisions of the bilateral or multilateral treaties, which do not contain provisions on the application of domestic law as such that may be used to settle a dispute between the State and foreign investor.

During examining the condition of the compliance between counterclaim and consent of the parties on arbitration proceedings provided for Article 46 on Convention, the Tribunals shall first refer to the provisions of the bilateral or multilateral treaties governing the settlement of disputes.

In our opinion the case *Spyridon Roussalis v. Romania* demonstrates this complexity the most. In present case the State has filed counterclaim for damages for non-compliance with the terms of a contract between foreign investor and the State. Some of requires were grounded on the domestic law.

In deciding whether to admissibility of the counterclaim, The Tribunal analyzed paragraphs (1) and (2) of Article 9 of the 1997 BIT between Romania and Greece, which found that *disputes concerning the State's investment obligations could be submitted among them to international arbitration* [21, p. 828, 869].

After analyzing the above provisions, the majority of the Tribunal concluded that paragraphs (1) and (2) of Article 9 of the agreement between Romania and Greece limit the parties consent to arbitration only to the foreign investor's claim for breach of the State's obligations under the BIT [21].

The individual opinion of the arbitrator appointed in this case by Romania – Prof. V. M. Raizman deserves attention. According to the text of the opinion, Prof. Raizman objects to the position of the majority of arbitrators on the idmissability of the counterclaim, as the condition of consent provided for in Article 46 of Convention *ipso facto* covers to any ICSID arbitration initiated by a foreign investor.

In addition, Prof. Raizman noted the importance of considering counterclaims under arbitration proceedings not only for States, but also for foreign investors, because if counterclaims of the State are rejected, the latter will be forced to file these claims in domestic courts, which is not in line with the investor's desire to resolve disputes on a neutral forum [22]. According to Prof. Raizman, with whom we agree this approach is completely contrary to key ideas of international investment law.

Another example of the bilateral treaties formulation with the restrictive scope of the dispute settlement provisions is the 1996 agreement between Venezuela

and Canada, which was the subject of the Tribunal examination in *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* case [23]. In this case the State filed the counterclaim for compensation for damage caused by a foreign investor to the environment in the course of the State-investor contact.

The counterclaim submitted by the State was rejected on the basis of article XII (1) of the above-mentioned treaty, which provides as follows: *"any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them*" [24].

Another paradigmatic illustration of a dispute resolution provision is article 26 of Convention, paragraph 1 of which provides as follows: *"Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably"* [10]. In *Limited Liability Company Amto v. Ukraine* case, which settled on the basis of ECT, the Tribunal rejected the State`s counterclaim for damages to reputation. The State did not refer to article 26, paragraph 1 of ECT in justifying the need to consider the counterclaim in this case, as set out above, but to paragraph 6 of the same article, which provides as applicable law ECT and rules and principles of international law. The Tribunal, analogous to the *Spyridon Roussalis v. Romania* case, rejected the counterclaim of the State and noted that the State had not provided grounds for counterclaim under article 26, paragraph 6, of ECT [17].

Thus, where there are dispute settlement provisions in the relevant bilateral or multilateral treaties, the tribunal's jurisdiction to deal with State obligations to the foreign investor is effectively limited considering the above practice, which may be described as permanent, the Tribunal will decline to entertain the counterclaim on the basis of the context of article 46 of Convention.

Therefore, the above approach of the Tribunals in interpreting the admissibility of counterclaims is, in our view, too restrictive. We believe that it is possible to provide such a legal basis in investment arbitration to argue the admissibility of counterclaims. If the ordinary meaning is interpreted of the wording of article 46 of Convention: *"except as the parties otherwise agree"* through the lens of article 31 of the Vienna Convention on the Law of Treaties 1969, it should be concluded that, in the absence of a wish by the parties to submit counterclaims to arbitration, such a wish should be made clear and express in the dispute settlement provisions of the relevant BIT or MIT [25]. Consequently, in the absence of such an explicit exception to the consideration of counterclaims, the consent of the parties to the consideration of counterclaims may be implied.

This approach is also shared by B Hanotiau. In addition to the above legal reasoning, B. Hanotiau argues that ICSID was created because of the high level of

politicization of investment disputes, therefore to interpret article 46 of Convention as such that effectively reduces the ISDS system in ICSID to dealing with the foreign investor's claims against the State is not relevant, because under such conditions the state will be forced to «prosecute» the investor in domestic courts [26].

For this issue it may be also relevant to refer to positive judicial precedents. A revolutionary in the admissibility of counterclaims, according to scholars [27, c. 61–90; 25, c. 14], is the approach of the Tribunal in *Urbaser S.A. v. The Argentine Republic* case [29]. Despite the fact that the Tribunal had been denied the merits of the counterclaim, the Tribunal's conclusions on the nature of the protection afforded by international investment law were the latest.

The State's counterclaim consisted of a breach by the foreign investor of its own obligations under a contract for the provision of water and sanitation services. Counterclaim's requirements can be divided into two main groups.

The first group concerned a foreign investor's breach of an obligation to make payments for infrastructure development, according to the State, which violated the principle *pacta sunt servanda*, as prescribed by the domestic and international law.

The second group was grounded on the foreign investor's violation of the human right to clean water.

On this occasion, reference should be made to the wording of the treaty provisions between Spain and Argentina [30], which are not identical to the above-mentioned wordings, were confined to violations by the State of its own obligations to the investor. In particular, the Tribunal did not support the claimant's position that the boundary of the consent of the parties on arbitration proceedings concerned only the foreign investor's claims to the State, arguing that the absence of the direct agreement of the parties to file a counterclaim cannot be interpreted that the State has no right to file a counterclaim. Moreover, the Tribunal also rejected the claimant's key argument about the lack of jurisdiction to consider violations of human rights under article 46 of Convention.

Analyzing the contextual content of the condition of direct connection with the subject matter of the dispute, enshrined in Article 46 of Convention, we can conclude that there is no clear legal certainty and, consequently, the possibility of double interpretation. The problematic of this condition is the lack of understanding of the nature of this connection. Should this connection be based on the legal unity of the subject-matter of the dispute and the counterclaim (for instance, the legal justification of the counterclaim and the subject-matter of the claim is based on the same source of law), or is the nature of the connection the nature of the facts?

The main difficulty for the admissibility of counterclaims in the context of this sub-topic is the interpretation by the tribunals of this connection as one that represents precisely the legal unity of the subject matter of the dispute and counterclaims.

In our opinion, *Saluka Investments B.V. v. The Czech Republic* [31] case is best demonstrated such difficulty. The subject of this dispute was the creation of

bureaucratic obstacles by the State to the foreign investor during the agreement signature. The claim was based on a 1991 agreement between the Czech Republic and the Netherlands. The state has filed the counterclaim for compensation for unscrupulous actions of the foreign investor during the agreement signature process. Despite the fact that the case was adjucated under UNCITRAL Rules of 1976 (Tribunals are not restricted in the right to use awards of other arbitration insitutions as a source of law), the Tribunal concluded that regardless of which of the rules of the case, their provisions enshrine a general legal principle that any counterclaim should be connected with the subject matter of the dispute. Only if this principle is followed, the Tribunal will have competence to consider the counterclaim [31, par. 76].

Referring to the need to maintain a connection between the counterclaim and the subject matter of the dispute, the tribunal interprets sush connection as the legal unity. Given that the legal basis for the counterclaim was the requirements of domestic law and not the relevant BIT on which the primal claim was based, the Tribunal rejected the counterclaim justifying this by the lack of jurisdiction and stated that the counterclaim should be considered in domestic court proceedings.

This position of the Tribunal has been the subject of heated debate. Some scholars have suggested that such an approach is unacceptable, as this precedent makes it virtually impossible for States to file a counterclaim in cases where the reason for recourse to arbitration is a State's violation of bilateral or multilateral treaties, rather than a specific investment contract.

For instance, in P. Laliva and L. Halonen views [32, p. 143 (7.04), p. 154 (7.40)], 'test", which was formulated in the case *Saluka Investments B.V. v. The Czech Republic* is too strict and leads to the fact that the admissibility of a counterclaim in the ISDS is a nightmare, as such procedural law is practically nullified.

In our view, a more appropriate approach is to interpret a condition of direct connection with the subject matter of the dispute as a single factual rather than legal unity, because this condition is formulated as "*subject-matter of the dispute"*. Meanwhile, a large number of Tribunals perceived this condition as a "*cause of action"*. In doing so, this approach corresponds to both domestic and international procedural requirements, because the thesis that the definitions *"subject-matter of the dispute"* and *"cause of action"* have completely different meanings and perform different functions – would be without proof. Thus, under terms of the interpretation of this condition in our proposed manner, counterclaims must relate to the same investment project to which the primarily claim relate. In addition, the requirement to substantiate primarily claim and counterclaim by the same legal document is debatable, as such a requirement is also not explicitly provided for in Article 46 of Convention and does not correspond to the goal of ICSID creating.

According to Prof. Z. Douglas, the subject of the investment dispute is determined by the rights granted to a foreign investor, arising from the relevant investment project, and different views on the dispute between the investor and the host country on issues of fact and law [33, p. 430].

Also, as noted above, the approach to the legal unity of the subject matter of the dispute and the counterclaim does not correspond to the travaux preparatoires to Convention, which determines that this condition is considered to be met by a very close factual relationship between the initial claim and the counterclaim and as a concequence requires their joint consideration to establish the exhaustive circumstances of the dispute.

This approach has also been endorsed by some Tribunals. For instance, in the case *Urbaser SA v. The Argentine Republic* explicitly states that for the consideration of counter and initial claims by one and the same tribunal, it is sufficient to have a *de facto* unity between such claims [29, para. 1151].

In February 2017, an award was made regarding the State's counterclaim in *Burlington Resources Inc. v. Republic of Ecuador* case, which supported the approach of the factual unity of the counterclaim with the subject matter of the dispute [19]. It should be also noted that in this case the parties directly agreed in the procedural agreement on the existence of the right to file counterclaims. The Tribunal, examining the admissibility of the counterclaim, found that the condition that the parties agree to file a counterclaim under Article 46 of Convention was met. However, in examining the condition of the relationship between the initial and counterclaims, the Tribunal did not raise the question of the existence of a legal relationship at all. The counterclaim was based on the domestic law of the State, but, given that the counterclaim concerned the same investment project, the Tribunal decided that the counterclaim was admissible.

This approach is continued in the case *Perenco Ecuador Ltd. v. The Republic of Ecuador* and *Empresa Estatal Petry leos del Ecuador (Petroecuador)* [20], in which the Tribunal referred to the case *Burlington Resources Inc. v. Republic of Ecuador.*

The problematic of this issue is related to both of the above issues and, accordingly, may manifest itself both in the context of the interpretation of the condition of falling counterclaims under the dispute settlement agreement [17, 21] and in the context of interpreting the condition of the relationship between counterclaims and the subject matter of dispute [31].

First of all, this issue stems from the dispute settlement provisions of the respective bilateral or multilateral treaties, which usually provide for a reference either directly to the rights granted to the foreign investor by the relevant agreement or to international law. Thus, there is usually no reference to the domestic law of the host State. This wording of the provisions bilateral or multilateral treaties is interpreted by the Tribunals as limiting the possibility for States to impose counterclaims based on domestic law. For instance, in the *Spyridon Roussalis v. Romania* case [22], which we discussed above, the Tribunal referred not only to the dispute settlement provisions in the BIT but also to the condition of the applicable law. From the content of BIT, it is seen that the applicable law is the agreement itself, which does not impose obligations on the investor. In addition, this BIT does not contain references to domestic law. Thus, the Tribunal concluded that it was impossible to consider Romania's counterclaims based on domestic law.

In another case – *Paushok v. Mongolia* [34], the counterclaim was also justified by domestic tax law. The 1995 BIT between the Russian Federation and Mongolia [35] had no references at all to the rules of applicable law, in the absence of which the Tribunal concluded that the dispute should in any case be dealt with under the relevant BIT and international law. It is also wondering in this context that, in the opinion of the Tribunal, the State, by submitting the counterclaim based on domestic law, is trying to achieve their implementation in an international forum. The Tribunal concluded that, if the Tribunal examines the counterclaim on the merits, Mongolia's domestic law could become extraterritorial, which is unacceptable.

In view of the above, there is a clear difficulty for the respondent States to submite counterclaims where the relevant BIT or MIT does not provide for the domestic law as applicable.

At the same time, in the context of this issue there are positive trends. For instance, in the *Urbaser S.A. v. The Argentine Republic* case [29, para. 1200], which was discussed above, the Tribunal concluded that the BIT should be interpreted in harmony with other rules of international law, in particular human rights.In addition, the Tribunal concluded that corporations do not have "immunity" from being considered subjects of international law, and, as a consequence, to be bearers of international legal obligations [29, 1195].

Another noteworthy case is *David R. Aven and Others v. The Republic of Costa Rica* case [36]. In analyzing the provisions of the laws justifying Costa Rica's counterclaim, the Tribunal came to the groundbreaking conclusion that the Dominican Republic-Central America Free Trade Agreement (hereinafter CAFTA-DR) indirectly imposes obligations on foreign investors. This is especially true of compliance with the national environmental law of the host country [36]. In accordance with Article 10.11 of CAFTA-DR, States Parties shall have the right to carry out in their territories any activities aimed at the protection of the environment. The Tribunal thus concluded that the provision also applied to foreign investors. So the latter have obligations under section A. 10 CAFTA-DR and require compliance with the national environmental law of the receiving State. A foreign investor has no right to disregard these provisions, and failure to comply with them is a violation of both domestic and international law [36].

Apart from the fact that Costa Rica's counterclaim had not been met, the conclusions drawn by the admissibility of the counterclaim were undoubtedly revolutionary and would make it possible for counter-claims to be made successfully in the future.

Conclusions. At first glance, it seems that the problem of submitting counterclaims lies outside the ICSID Arbitration Rules. First of all, the problem lies in the interpretation by the Tribunals of the provisions of article 46 of Convention and the corresponding BIT or MIT.

However, bearing in mind that the current paragraph 40(1) of ICSID Arbitration Rules actually duplicates the provisions of Article 46 of Convention rather than interpreting it properly in accordance with the purposes that guided States in extablishing the ICSID system, it can`t be considered that the provision of the

Arbitration Rules does not in any way affect the approach of the Tribunals to the admissibility of counterclaims.

The mechanism for specifying the provisions of Convention in accordance with the relevant provisions of ICSID Arbitration Rules is fully implemented, for example, in the formation of an arbitration panel. In fact, the Rules explain the question of what exactly is the «shortest period of time» in the understanding of Article 37 of Convention, how to act in case one of the parties does not implement measures of appointment of an arbitrator and so on [9]. However, ICSID Arbitration Rules do not play such a role in the admissibility of counterclaims. There is no doubt that States should take advantage of the opportunity offered by the revision of the current ICSID Rules to focus the requirements for counterclaims on a legitimate interpretation of Article 46 of Convention.

Paragraph 40(1) of ICSID Arbitration Rules should be drafted in such a way as to guarantee the right to review of the State's counterclaims. For instance, such a guarantee could be achieved by indicating what is meant by a direct link to the subject matter of the dispute and how the parties' agreement to arbitration on the admissibility of counter-claims is explained. Considering that paragraph 40(1) of ICSID Arbitration Rules essentially duplicates the requirements already provided for in article 46 of Convention, ICSID Arbitration Rules have no function with regard to the admissibility of counterclaims, which is usually subject to the arbitration rules of any arbitration institution in the world.

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Проблемные вопросы подачи встречного иска в Международном центре по урегулированию инвестиционных споров

Институт встречного иска является одним из ключевых инструментов правовой защиты при рассмотрении коммерческих споров в национальных и международных юрисдикциях, не является исключением и инвестиционный арбитраж. Самой известной площадкой решения международных инвестиционных споров является Международный центр по урегулированию инвестиционных споров (далее – МЦУИС). Одной из ключевых идей создания такого инструмента разрешения споров было внедрение независимой и объективной системы решения международных инвестиционных споров на «независимом форуме». Но концептуально процессуальные права участников инвестиционного спора являются равными.

Однако на практике концепцию процессуального равенства прав сторон спора не было реализовано в полном объеме. Несмотря на то, что институт встречного иска является важным инструментом обеспечения объективности и всесторонности рассмотрения спора, подходы трибуналов к толкованию приемлемости встречных исков в рамках МЦУИС является достаточно «ограничительными» и «осторожными».

Учитывая, что государство является «вечным ответчиком» в МЦУИС, проблематика подачи встречных исков безусловно влияет на реализацию интересов государства в рамках учреждения.

Проблематика обращения государства со встречным иском в МЦУИС наглядно демонстрирует дисбаланс в реализации процессуальных прав государством-ответчиком.

Статья призвана обратить внимание читателей на проблемные вопросы подачи встречного иска в МЦУИС и на альтернативный взгляд на эту проблематику.

Ключевые слова: Международный центр по урегулированию инвестиционных споров (МЦУИС); Инвестиционные споры между инвестором и государством (ИСИГ); встречный иск; иностранный инвестор; Вашингтонская Конвенция 1965 года о порядке разрешения инвестиционных споров между государствами и иностранными лицами; Правила МЦУИС; предмет спора; юрисдикция; международное право; прецедент; допустимость.

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