CASE COMMENT
Spyridon Roussalis v Romania

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It has been several months since the majority of the Tribunal in Spyridon Roussalis v Romania declined to exercise jurisdiction over Romania’s counterclaims. And yet the debate over whether respondent States may pursue counterclaims in treaty-based arbitrations—a debate in which even the members of the Roussalis Tribunal could not reach consensus—has only just begun. At the forefront are fundamental questions about how to determine the scope of the parties’ consent to arbitrate, what the alternate sources of such consent might be, and whether and to what extent a tribunal should take policy concerns into account, including the efficiency of resolving all related claims in a single forum.

The possibility for counterclaims is expressly recognized in Article 46 of the ICSID Convention. Article 46, which is echoed by Arbitration Rule 40, states:

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

As both the Roussalis majority and its critics seem to agree, Article 46 does not impose an unqualified obligation upon tribunals to decide counterclaims. As a threshold matter, a tribunal must be ‘requested by a party’ to determine counterclaims. Arbitration Rule 40(2) requires a party to present a counterclaim ‘no later than in the counter-memorial, unless the Tribunal, upon justification of the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding’. Under Article 46, a tribunal must also be convinced that the counterclaim ‘arises directly out of the subject-matter of the dispute…’. Consistent with the decisions on counterclaims under the UNCITRAL Rules,4 the Roussalis majority found that the respondent bears the burden of convincing the tribunal that this requirement, along with all others in Article 46, has been satisfied.5

Assuming these two requirements have been satisfied—that a respondent’s counterclaim ‘arises directly out of the subject-matter of the dispute’ and has

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1 Spyridon Roussalis v Romania, ICSID Case No ARB/06/1, Award (7 December 2011).
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4 See eg, Saluka Investments B.V v Czech Republic, Decision on Jurisdiction over the Czech Republic’s Counterclaim (7 May 2004).
5 Roussalis, (n 1) para 860.

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been timely asserted—Article 46 instructs that ‘[e]xcept as the parties otherwise agree, the Tribunal shall’ determine any counterclaims, ‘provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre’ (emphasis added).

When an ICSID tribunal’s jurisdiction is founded on a contract rather than a treaty, determining whether a State’s counterclaim comes within Article 46 can be relatively uncontroversial. Because contractual dispute resolution provisions are generally bilateral, thus allowing either party to the contract to assert claims for breach of the contract’s terms, ICSID tribunals have not hesitated to hear State counterclaims. In Maritime International Nominees Establishment (MINE) v Guinea, for example, the Tribunal not only exercised jurisdiction over Guinea’s counterclaim, but also upheld it—awarding Guinea damages resulting from the Claimant’s initiation of American Arbitration Association proceedings in violation of the parties’ agreement to resolve their disputes through ICSID. In another contract-based arbitration involving Guinea, Atlantic Triton Co. Ltd. v Guinea, the Tribunal rejected the State’s counterclaim on the merits, stating that:

it must be underscored that if Guinea itself considered Atlantic Triton responsible for the significant damages it claims to have suffered, it is surprising that Guinea did not take the initiative and institute arbitration proceedings following the rescission of the Management Agreement but waited until Atlantic Triton filed its request for arbitration before making its claims.7

When an investor accepts a treaty-based offer to ICSID arbitration, the jurisdictional issue becomes more difficult, and tribunals have not always addressed the issue head on. In Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v Estonia, for example, without expressly addressing the issue of jurisdiction, the Tribunal found that Estonia’s counterclaim was belied by contradictory evidence in the record.8 In Gustav F. W. Hamester GmbH & Co. KG v Ghana, where the Tribunal appeared inclined to consider the point, the Tribunal cited the respondent’s apparent abandonment of the counterclaim as a reason not to elaborate on jurisdiction. Respondent Ghana had presented a counterclaim in the relief section of its counter-memorial, but failed to make any further arguments in favour of either jurisdiction or a decision on the merits. The Tribunal highlighted that ‘the BIT recognizes that the State party may be “aggrieved” and “shall have the right to refer the dispute to” arbitration’, but ultimately decided that ‘in the absence of any submissions on the nature of the Respondent’s counterclaim under the BIT, the Tribunal is unable to analyse whether it is capable, in accordance with Article 46 of the ICSID Convention, of falling within the parties’ scope of consent’.9

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6 Maritime International Nominees Establishment (MINE) v Guinea, ICSID Case No ARB/84/4, Award (6 January 1988) [1997] 4 ICSID Rep 79. Although the Award was partially annulled by the ad hoc Committee’s Decision on Annulment of 22 December 1989, the Respondent had not sought annulment of the Tribunal’s decision on the two counterclaims. See MINE v Guinea, Decision on Annulment, para 2.01 (22 December 1989), (1990) 5 ICSID Rev—FILJ 95.
In *Roussalis*, however, the jurisdictional issue was squarely presented to, and decided by, the Tribunal. Essentially a dispute about a dispute, the case centred around Romania's pursuit of various domestic remedies in response to the Claimant’s alleged breach of a share purchase agreement. According to the Claimant, Romania’s actions constituted ‘a series of malicious and unjustifiable acts’ in violation of the 1997 Greece–Romania BIT. Romania denied that it had violated international law (a position the Tribunal unanimously adopted on the merits), and also submitted a counterclaim, alleging that the Claimant had breached his obligations under the share purchase agreement. Romania informed the Tribunal that its counterclaim was ‘intended to avoid inconsistent rulings on common issues of fact raised’ in parallel domestic proceedings. It agreed to suspend these domestic proceedings during the pendency of the ICSID arbitration.

The Tribunal did not resolve the parties’ dispute over the first two Article 46 requirements, namely whether the counterclaims were timely asserted and whether they arose ‘directly out of the subject matter of the dispute’. Instead, it focused its analysis on ‘whether — and irrespective of the particular counterclaims advanced in these proceedings by the Respondent — the Parties consented to have the State’s counterclaims arbitrated’.

Romania argued that by consenting to ICSID arbitration, the investor implicitly also consented to the submission of counterclaims, since such counterclaims were clearly contemplated by Convention Article 46 and Arbitration Rule 40. According to Romania ‘when Claimant resorted to ICSID arbitration for the settlement of his claims, he agreed to settle all disputes relating to Claimants’ investment, including Respondents’ counterclaims’, because Romania’s earlier offer in the BIT was to arbitrate ‘in accordance with the ICSID Convention and Rules, which carries with it the possibility that he would be required to arbitrate the closely related counterclaims’. Romania appeared to concede that the BIT also might be relevant, but solely to exclude the possibility that the parties had ‘otherwise agree[d]’ not to arbitrate counterclaims, given the presumption of arbitrability purportedly established in the Convention and Rules. Consistent with these arguments, Romania argued to the Tribunal that ‘because there is no explicit exclusion of counterclaims in the [Greece–Romania BIT], Claimant has failed to establish that Respondent is precluded from asserting a counterclaim’.

One arbitrator, Professor W Michael Reisman, appeared to accept this approach. In a short partial dissent, Professor Reisman concluded that ‘when the States Parties to a BIT contingently consent, *inter alia*, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is *ipso facto* imported into any ICSID arbitration which an investor then elects to pursue’.

The other two arbitrators—Professors Andrea Giardina and Bernard Hanotiau—did not agree, however. The majority of the Tribunal found that determining ‘the scope of the consent of the parties’ required more than

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10 *Roussalis*, (n 1) para 10.
11 ibid para 757.
12 ibid para 864.
13 ibid para 775.
14 ibid para 759.
15 ibid, Declaration of W Michael Reisman.
rubber-stamping admissibility of a counterclaim because (i) the Claimant had filed at ICSID, where the procedural rules contemplate counterclaims; and (ii) the BIT contained no provision expressly excluding counterclaims. Rather, ‘the scope of the consent of the parties’ must be determined ‘by reference to the dispute resolution clause contained in the BIT. The investor’s consent to the BIT’s arbitration clause can only exist in relation to counterclaims if such counterclaims come within the consent of the host State as expressed in the BIT’.

Upon examining the dispute resolution clause in the Greece–Romania BIT, the Tribunal concluded that the Contracting State Parties had drafted a narrow offer to arbitrate, and that counterclaims were not a part of that offer. The investor therefore could not have consented implicitly to the admission of counterclaims, simply by accepting this offer and initiating an ICSID proceeding. To this end, the Tribunal noted that Article 9 of the BIT provided that ‘[d]isputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled... If such disputes cannot be settled... the investor concerned may submit the dispute...to international arbitration’. The majority found that this language ‘undoubtedly limit[s] jurisdiction to claims brought by investors about obligations of the host State. Accordingly, the BIT does not provide for counterclaims to be introduced by the host state in relation to obligations of the investor. The meaning of the “dispute” is the issue of compliance by the State with the BIT’.

The majority further acknowledged that pursuant to the BIT’s applicable law provision, the Tribunal was required to ‘decide the dispute in accordance with the provisions of this Agreement [the BIT] and the applicable rules and principles of international law’. The treaty ‘imposes no obligations on investors, only on contracting States. Therefore, where the BIT does specify that the applicable law is the BIT itself, counterclaims fall outside the tribunal’s jurisdiction’. Romania’s attempted invocation of the BIT’s umbrella clause (Article 2(6)) did not justify a different result, as the language of that clause ‘confirms that the host State commits itself to comply with obligations it has entered into with regard to investments of investors. It does not permit that claims be brought about obligations of the investor’.

Thus unconvinced that Romania had satisfied its burden of proving that its counterclaims were ‘within the scope of the consent of the parties’, the majority of the Tribunal held that the counterclaims were ‘beyond its jurisdiction in the present proceedings’.

Based on public discussion of the decision thus far, most commentators appear to be satisfied with the Tribunal’s analysis. But future cases may well reveal additional layers of complexity in this area.

Recall, for example, the language of Article 46 of the Convention. In addition to requiring that a counterclaim be timely asserted and ‘arise directly out of the

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16 ibid para 866.
17 ibid para 868 (emphasis added).
18 ibid para 869.
19 ibid para 870.
20 ibid para 871.
21 ibid para 875 (emphasis added).
22 ibid para 876.
subject-matter of the dispute’, the Article states that ‘except as the parties otherwise agree, the Tribunal shall’ determine counterclaims ‘provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre’. Let us posit that a purported counterclaim fulfils the requirement that it be ‘otherwise within the jurisdiction of the Centre’ by satisfying the general requirements of *ratione personae, ratione materiae* and *ratione temporis*.

Two clauses nonetheless remain: a tribunal must decide a counterclaim (i) if it is within the scope of the parties’ consent; and (ii) if the parties have not otherwise agreed. In *Roussalis*, the majority emphasized the former, while Romania emphasized the latter. Yet both proceeded as if these clauses created only a single composite prerequisite to jurisdiction, for which the two parties emphasized different sides of the same coin, both involving interpretation of the relevant BIT. Romania claimed that the phrase ‘except as the parties otherwise agree’ created a presumption in favour of jurisdiction that could only be overcome by an explicit treaty provision excluding counterclaims. The majority treated ‘within the scope of the consent of the parties’ as the operative phrase, and held that the limited dispute resolution offer in Article 9 of the Greece–Romania BIT did not itself contemplate counterclaims.

Applying the principle of effective interpretation, however, both clauses should be presumed to have meaning, and nothing requires that a single instrument be dispositive of both. In the future, cases may arise involving scenarios where counterclaims arguably are ‘within the scope of the consent of the parties’, but also arguably excluded by a separate document in which the parties agreed that a particular claim by the State would proceed to a different (non-ICSID) forum. For example, many treaties’ dispute resolution clauses extend to ‘all disputes relating to investments’, which could be seen as sufficiently broad to encompass consent to claims brought by the State as well as by the investor. Yet if the nature of the State’s claim is that the investor violated key terms of a concession agreement, the dispute resolution clause of that agreement becomes critically important. If it stipulates that all claims for breach of the agreement will proceed to national courts, or to an alternate (non-ICSID) arbitral forum, then arguably the parties will have ‘otherwise agree[d]’, within the meaning of Article 46, that these particular types of counterclaims may not proceed at ICSID. In these circumstances, a tribunal could find both a general consent to State counterclaims, and a specific agreement between the parties precluding this particular class of counterclaims.

Conversely, imagine if the circumstances were reversed, such that the investment treaty had a narrow consent clause that does not on its face encompass counterclaims, but the concession contract stipulated that claims for breach could be presented to ICSID. Here, Article 46 would seem to permit the counterclaim to proceed, since the ‘scope of consent’ required by the Article could be sourced independently to the contract, notwithstanding the BIT’s lack of such consent. It would be difficult for a party to argue that the narrow general consent in the BIT constitutes an ‘agreement otherwise’ that trumps the specific contractual consent to counterclaims in the contract itself.

Indeed, the facts in *Roussalis* may have presented the opportunity for a finding along these lines. It appears that in correspondence during the pre-arbitration
consultation period required under the BIT, the Claimant stated that ‘the assertion of a counterclaim pursuant to Article 46 is fully consistent with Romania’s BIT obligations’. According to Romania, the Claimant also argued before Romanian courts that ‘Article 9 of the Treaty required AVAS’s share pledge enforcement action to be decided at ICSID’. It is not clear whether Romania argued, based on these facts, that even if State counterclaims were outside the scope of BIT consent, the Claimants nonetheless had consented to ICSID arbitration of such claims through independent utterances. Certainly, nothing in the terms of Article 46 requires that the investor’s consent to State counterclaims appear in the same instrument as the State’s consent to the investor’s claims. If consent without privity is a hallmark of ICSID arbitration, such that an investor may ‘accept’ a State’s standing offer of ICSID arbitration through a filing years after the original BIT offer was made, could not a State similarly ‘accept’ an investor’s ‘offer’ to accept counterclaims in a single proceeding, even if the original BIT did not contemplate such an outcome? In Roussalis, the Claimant appeared determined to head off such arguments, contending that his representation to the Romanian court in the share pledge litigation that AVAS’s share pledge enforcement action should be decided at ICSID cannot be construed as an agreement that Respondent may submit counterclaims’, and that he in any event ‘expressly objected’ to arbitration of the counterclaim in his pleadings to the Tribunal.

Lurking behind all of these questions of textual interpretation regarding the scope and source of consent are fundamental policy questions about the function and efficiency of investor–State dispute resolution mechanisms. Professor Reisman suggested that tribunals contemplating counterclaims should take such policy considerations directly into account. The effect of the majority’s dismissal of Romania’s counterclaims, he suggested, was to remove a potential benefit to both the respondent State and the investor:

In rejecting ICSID jurisdiction over counterclaims, a neutral tribunal — which was, in fact, selected by the claimant — perforce directs the respondent State to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now constrained to become the defendant. (And if an adverse judgment ensues, that erstwhile defendant might well transform to claimant again, bringing another BIT claim.) Aside from duplication and inefficiency, the sorts of transaction costs which counter-claim and set-off procedures work to avoid, it is an ironic, if not absurd, outcome, at odds, in my view, with the objectives of international investment law.

Commentators have likewise noted the irony in a State’s moving so far towards trust in international arbitration that it is willing to forgo using its own national courts to pursue claims against an investor, only to be sent back to those courts by the very arbitral tribunal the investor convened to resolve other aspects of a related dispute.

In any event, as Professor Reisman noted, the majority’s decision in Roussalis marks the first time that jurisdiction over counterclaims has been rejected based on

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23 ibid para 776.
24 ibid.
25 ibid paras 821–22.
26 ibid, Declaration of W Michael Reisman.
an absence of consent. It remains to be seen whether different tribunals, interpreting different and perhaps broader treaty language, will follow suit. If future jurisprudence does not permit State counterclaims to be resolved in a single efficient forum along with investors’ claims arising from the same subject matter, then the solution may require affirmative action by States, in the form of either ‘interpretative notes’ about existing treaty text, or more specific treaty language about counterclaims in new investment treaties being negotiated.