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Encountering Counterclaims

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NOTE

Encountering Counterclaims

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I. INTRODUCTION

A study of international arbitral procedures provides a way to gain some insight into questions of international conflict and cooperation. This article considers the role that counterclaims play in international tribunals and the conditions under which counterclaims may be brought.[1] I begin by clarifying the notion of a counterclaim and then discuss what principles govern the admissibility of counterclaims before national and international bodies.

To determine what role counterclaims have traditionally played in international legal process, I will examine various rules on counterclaims: domestic rules, rules of the International Court of Justice, and rules of international arbitral tribunals. After having investigated the different counterclaims rules and the principles which govern their admissibility, I will discuss whether or not human rights counterclaims might be possible.

Some parties may choose not to submit to the jurisdiction of a tribunal if they anticipate encountering human rights counterclaims, but others might be willing to do so in order to clear their names before the

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1. Although the use of counterclaims is a widespread practice in both domestic and international litigation, there is virtually no theoretical discussion of them in the legal literature to date. Some articles of interest include: Larschan & Mirfendereski, *The Status of Counterclaims in International Law, with Particular Reference to International Arbitration Involving a Private Party and a Foreign State*, 31 DEN. J. INT'L L.& POL'Y 1 (1986); M. Whiteman, 12 Digest of International Law, Dept. of State Pub. No. 8586, 1079 (Aug.1971); Tigar, *Automatic Extinction of Cross Demands: Compensation from Rome to California*, 53 CALIF. L. REV. 224 (1965) [*hereinafter* Tigar]; Wright, *Estoppel by Rule: The Compulsory Counterclaim Rule Under Modern Pleading*, 38 MINN. L. REV. 423 (1954) [*hereinafter* Wright]; Scelle, Report on Arbitration Procedure, A/CN.4/18 (March 21, 1950) at 58-59, II Y.B. INT'L L. COMM. (1950) at 136 - 137; Genet, *Les Demandes Reconventionelles et la Procedure de la Cour Permanente de Justice Internationale*, 65 R.D.I.L.C. 145, 178 (1938); Anzilotti, *La Demande Reconventionnelle en Procedure Internationale*, 57 JOURNAL DU DROIT INTERNATIONAL 857 (1930); Anzilotti, *La Reconvenzione Nella Procedura Internazionale*, SCRITTI DELLA FACOLTA GIURIDICA DI ROMA IN ONORE DI ANTONIO SALANDRA 341-360 (1928).

international community. In theory, nothing in the arbitral rules of procedure precludes human rights counterclaims, but in practice social psychological factors such as a nation's fear of being vilified may make it difficult to use counterclaims as a vehicle for advancing human rights. Assuming that counterclaims do have potential for raising human rights issues in international dispute resolution, they deserve serious consideration by the legal profession. Their use may have far-reaching implications for diplomatic relations among nations.

II. U.S. COUNTERCLAIMS

A. Counterclaims in General

A counterclaim has been defined as "a claim presented by a defendant in opposition to or deduction from the claim of the plaintiff."[2] It is distinguished from a defense in that it does not deny the cause of action or the plaintiff's right to recover. Instead, it is an assertion of a separate cause of action against the plaintiff which is intended to offset in whole or in part the original claim. Often counterclaims and defenses are confused because they are based upon the same set of facts. For this reason Rule 8(c) of the United States Federal Rules of Civil Procedure on affirmative defenses provides that "when a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." Most scholars attribute the concept and definition of the counterclaim to David Dudley Field, the prominent nineteenth century legal reformer and codifier. Although the name itself may be modern, the basic idea of the counterclaim is not.[3]

The counterclaim is a legal device designed to enhance judicial efficiency by coordinating the handling of multiple claims at once. Treating the counterclaim and claim simultaneously insures consistent results which would not be guaranteed if the claims were reviewed separately. A counterclaim may serve the purpose of avoiding financial loss which can occur if there is a delay between the adjudication of the original claim and the second claim. Admitting a counterclaim may also yield a more fair result by ensuring that additional facts and legal obligations are not ignored.

B. Compulsory vs. Permissive Counterclaims

There are basically two different types of counterclaims in the United States: compulsory and permissive. A compulsory counterclaim, under Rule 13(a) of the U.S. Federal Rules of Civil Procedure, is defined as any claim that a party to a civil suit in a federal court has which

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2. BLACK'S LAW DICTIONARY 315 (5th ed. 1979)

3. For insightful conceptual and historical analyses, *see* Tigar, *supra* note 1, and Whiteman, *supra* note 1.

"arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction" and "must be pleaded as a counterclaim in that suit, unless such claim is the subject of another pending action at the time the suit commenced". Failure to assert the compulsory counterclaim results in its loss through the doctrine of res judicata.

A permissive counterclaim under Rule 13 (b) provides that a pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. Underlying the provision for permissive counterclaims is the notion that it is not fair to require a party to pay compensation or damages before it has received its due from the party that brought the original claim. It is in the interest of fairness that debts between the parties be settled, whether related or not, before compelling payment in the instant case.

There is a basic difference between compulsory and permissive counterclaims. The compulsory counterclaim is required to be based on a claim arising out of the same transaction or occurrence that was the subject matter of the opposing party's claim. A permissive counterclaim, by contrast, is any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.[4] The term 'transaction' has been the source of much debate and has been the subject of many interpretations. Although U.S. judicial experience indicates that there has been considerable difficulty in fixing a specific meaning on the term, it continues to be utilized both in U.S. and international dispute resolution.[5]

III. INTERNATIONAL COUNTERCLAIMS

A. Jurisdiction

The key criterion for determining the admissibility of counterclaims in international tribunals is the degree to which the counterclaim is re-

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4. The four tests that different courts have used to differentiate between compulsory and permissive counterclaims are as follows:

1. Will substantially the same evidence support or refute both the plaintiff's claim and the counterclaim?
2. Are the issues of fact and law on the claim and the counterclaim largely the same?
3. Would *res judicata* bar a subsequent suit on the defendant's claim absent the compulsory counterclaim rule?
4. Is there any logical relation between the plaintiff's claim and the counterclaim?

For further discussion on these tests, *see* Wright, *supra* note 1, at 438.

5. For further discussion of the transaction definition problem, *see* Draft Convention on Competence of Courts in Regard to Foreign States; *see also* 26 AM. J. INT'L LAW (Supp. 1932), at 493, and Wright, *supra* note 1, at 437.

lated to the original claim. For the most part international tribunals will only consider counterclaims which resemble what U.S. procedure terms 'compulsory'.[6] For compulsory counterclaims there is no real issue of personal jurisdiction because the parties consented to the jurisdiction of the tribunal when the claim was brought. If there are other parties which would have to be included as a consequence of admitting a counterclaim, then there might be some obstacle posed by personal jurisdiction requirements. Generally the tribunal will have jurisdiction over the parties linked to the claim and counterclaim, but this will not automatically provide it with subject matter jurisdiction. Insofar as there is a direct connection between the counterclaim and the claim, the jurisdictional requirement will be satisfied.[7] The main difficulty is to establish standards by which to measure the direct connection. In theory it should be possible to insist upon directness, but in practice it may prove difficult to use that criterion.

It has been asserted that as with compulsory counterclaims in the United States, these types of counterclaims are also subject to the doctrine of res judicata in international litigation. If a party had a counterclaim arising out of the same transaction or occurrence and neglected to raise it, then the party would not be able to do so later. One authority in international arbitration law, Nantwi, takes this view:

> The binding force of arbitration awards may also be found to be similarly based on the principle of res judicata. It is inherent in the institution of arbitration as it is in judicial settlement. The most forthright restatement of the principle in recent arbitration proceedings is to be credited to the *Trail Smelter* Arbitral Tribunal in its final award (1941) where it was expressed as follows:
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> > "That the sanctity of res judicata attaches to a final decision of an international tribunal is an essential and settled rule of international law. If it is true that international relations based on law and justice require arbitral and judicial adjudication of international disputes, it is equally true that such adjudication must, in principle, remain unchallenged, if it is to be effective to that end."[8]

For the most part, however, there will be jurisdiction over claims so long as both parties consent. Therefore, although one suspects that for international litigation there would be res judicata effect, it is not self-evident and remains an open question.

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6. Even though the terminology of 'compulsory' and 'permissive' counterclaims is derived from U.S. judicial practices, it provides a useful framework for classifying counterclaims in the international arena.

7. It was upon the jurisdictional questions and the issue of sufficient connection that the noted publicist Brownlie laid emphasis. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 412 (1966).

8. NANTWI, THE ENFORCEMENT OF INTERNATIONAL JUDICIAL DECISIONS AND ARBITRAL AWARDS IN PUBLIC INTERNATIONAL LAW 74 (1966).

The assumption that permissive counterclaims are not admissible before international tribunals must be questioned. Ordinarily, when the tribunal is one of general as opposed to limited jurisdiction, the arbitrators or judges have greater latitude in determining what falls within the scope of the tribunal's authority. The argument could be made that it is in the interest of justice to allow permissive counterclaims before international tribunals, as the claims might otherwise not be heard. Moreover, in some legal systems, once the tribunal has been convened to hear a dispute, it is considered appropriate to resolve multiple issues and claims at one time.[9] As the objective of dispute settlement is catharsis, claims that might be regarded as permissive counterclaims are allowed in order to restore harmony.

B. Foreign Sovereign Immunities Act

The first example of the way counterclaims are handled can be seen in the Foreign Sovereign Immunities Act,[10] which entered into force in late 1976:

> S.1607 Counterclaims
> In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim
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> (a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or
> (b) arising out of the same transaction or occurrence that is the subject matter of the claim of the foreign state; or
> (c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

The same language characterizing acceptable counterclaims appears in (b) that the counterclaim arise out of the same transaction or occurrence as the subject matter of the original claim.

The legislative history of Section 1607 explains why immunity is denied in three situations. First, Article I of the European Convention on State Immunity[11] provides that "immunity would be denied as to any counterclaim for which the foreign state would not be entitled to immunity under 1605, if the counterclaim had been brought as a direct claim in a separate action against the foreign state."[12] The second situation in which immunity is suspended is when the counterclaim arises out of the

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9. *See, e.g.*, GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA (1955).

10. Pub. L. No. 94-583, 28 U.S.C.S. 1607.

11. Council of Europe: European Convention on State Immunity and Additional Protocol, Done at Basel, May 16, 1972, *reprinted at* 11 I.L.M. 470 (1972).

12. 94th Cong. 2d sess., *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5522 (1976).

same transaction or occurrence as the main claim despite sections 1604-1606 which grant immunity. Even if the foreign state would ordinarily be entitled to immunity, in this circumstance it is denied because it would be unfair to allow a foreign state to bring or intervene in a particular transaction or occurrence and not face liabilities connected with the same matter. In short, ". . .it should not obtain the benefits of litigation before U.S. courts while avoiding any legal liabilities claimed against it and arising out of the same transaction or occurrence."[13] Third, even if the foreign state is immune under subsections (a) and (b), it is nevertheless not immune from subsection (c), which provides that the amount of the counterclaim may not exceed the amount sought in the underlying claim.[14] In setting out the extent of sovereign liability, the United States made it clear that as far as direct counterclaims are concerned, immunity will not be granted up to the amount of the original claim.

In a provocative article on counterclaims against a sovereign plaintiff, Simmond criticizes the "same subject matter" test as failing to provide an effective definition. He is interested in the question of whether "independent" counterclaims may be asserted against sovereign plaintiffs. While he does not take the position that all counterclaims should be allowed, he does advocate clarification of the "limits within which 'disconnected' or 'unrelated' matters may be brought into, or excluded from a suit through the counterclaim."[15]

C. *International Court of Justice*

Although it is not clear how often counterclaims are asserted before international tribunals, some authorities contend that they have been relatively rare.[16] Historically, the International Court of Justice did not recognize counterclaims. There were no provisions for them in the Hague Conventions of 1899[17] and 1907[18] or by the Statute of the Permanent Court of International Justice,[19] the Convention of 1907 for the Establish-

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13. *Id.*

14. Subsection (c) is the codification of the rule enunciated in National Bank v. Republic of China, 348 U.S. 356 (1955).

15. Simmonds, *Implied Waiver of Immunity: Permissible Counterclaims Against a Sovereign Plaintiff*, 9 INT'L & COMP. L. Q. 334, 340 (1960).

16. *See* Whiteman, *supra* note 1, at 1081; J.H. RALSTON, INTERNATIONAL ARBITRAL LAW AND PROCEDURE 139 (1910). Some of the cases in which counterclaims were used included: Chorzow Factory Case, Series A, No.17, Sept.13, 1928; The Diversion of Water From the Meuse, Series A/B, No.70, June 28, 1937; U.S. Diplomatic and Consular Staff in Tehran (provisional measures), ICJ Reports at 15 (1979).

17. Convention for the Peaceful Adjustment of International Differences, concluded at The Hague on July 29, 1899, *reprinted in* 1 AM. J. INT'L. L. 107 (Supp. 1907). [Hague Convention of 1899].

18. The Hague Convention for the Pacific Settlement of International Disputes, concluded at The Hague on October 18, 1907, *reprinted in* 2 AM. J. INT'L. L. 43 (Supp. 1908).

19. *See generally*, FACHIRI, THE PERMANENT COURT OF JUSTICE—ITS CONSTITUTION, PROCEDURE & WORK (1925).

ment of a Central American Court of Justice,[20] or by the Convention of 7 February 1923 for the Establishment of an International Central American Tribunal.[21] The Institute of International Law, in its Rules of 28 August 1875 (Article 17) rejected the principle of admissibility of the counterclaim whenever it had not been provided for in the compromis or accepted by the parties.[22]

The Statute of the Court is silent on the question of counterclaims, but there is provision made for them in the rules. In the 1922 rules, Article 40 elaborated on the elements of cases and counter-cases. The fourth item mentioned under counter-cases was: conclusions based on the facts stated, these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Court.[23] Since the Court has jurisdiction over the claim, if the counterclaim is directly related, there should be no obstacle to jurisdiction. Implicit is that counterclaims not directly related or permissive counterclaims in the American legal system would not satisfy the jurisdictional requirement.[24]

Article 63, which was adopted in the amended 1946 Rules is a more elaborate rule:

> When proceedings have been instituted by means of an application, a counter-claim may be presented in the submissions of the Counter-Memorial, provided that such counter-claim is directly connected with the subject-matter of the application and that it comes within the jurisdiction of the Court. In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the application of the Court shall, after due examination, direct whether or not the question thus presented shall be joined to the original proceedings.[25]

Since the Court may "after due examination" permit the counterclaim to be brought, a permissive counterclaim might be feasible, the only limitation being jurisdiction. The court has jurisdiction over the subject-matter only if both parties consent. Without mutual consent, the Court would have difficulty justifying acceptance of permissive counterclaims. The rules themselves, however, do not preclude the introduction of counterclaims unrelated to the principal claim.

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20. Convention for the Establishment of a Central American Court of Justice, *signed at* Washington, D.C., Dec. 20, 1907, *reprinted in* 2 AM. J. INT'L L. 231 (Supp. 1908).

21. Convention for the Establishment of an International Central American Tribunal, *signed at* Washington, D.C., Feb. 7, 1923, (Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica), *reprinted in* 17 AM. J. INT'L L. 83 (Supp. 1923).

22. *See Solution Pacifique des Differences Internationaux*, I ANNUAIRE DE L'INSTITUTE DE DROIT INTERNATIONAL, 60 (art. 17) (1928 ed.).

23. 1926 P.C.I.J. Acts & Docs. 75 (ser. D) § 7.

24. *See* HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920 - 1942 (1943), at 430.

25. *Rules of the Court*, 1946 I.C.J. Acts & Docs. 54, 74 (ser. D) No. 1. *See also*, DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE, 177 (S. Rosenne ed. 1979).

The Court adopted revised rules once again in 1978 which contain the same substantive content as the 1946 Rule.[26] Furthermore, Section 3 allows for substantially more discretion. The Court can decide whether or not the counterclaim shall survive and for the sake of administrative convenience, the Court may join the proceedings in two or more cases (Article 17). There are no procedural barriers to bringing counterclaims related only tangentially so long as the Court determines that the counterclaim is directly connected.

Article 89 provides that if the course of proceedings began by means of an application, discontinuance depends on the consent of both parties unless the respondent has not yet taken any steps in the proceedings, in which case the removal occurs immediately. If the consent of both parties is required to end consideration of the case, it seems reasonable to assume that the removal of the counterclaim would also require the consent of both, particularly if the opportunity to present a counterclaim depends on mutual agreement by both parties. It might then be possible to remove the claim, but not the counterclaim. Since one purpose of allowing counterclaims is to resolve all aspects of a particular dispute it might not make sense to dismiss one without the other, but it does appear to be procedurally feasible to allow the counterclaim to survive the demise of the original claim.

There is a danger that counterclaims, because they would attract more parties, might discourage the original parties from using the international dispute settlement mechanisms.[27] Article 81(2)(c) provides for third party intervention. Clearly, the more counterclaims which arise, the greater the chances that third parties will wish to intervene.

D. Use of Counterclaims in International Arbitration

1. Model Rules on Arbitral Procedure

Article 19 of the Model Rules on Arbitral Procedure, adopted by the International Law Commission in 1958[28], makes clear the importance of the direct connection standard. Although it addresses the question of

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26. 1978 Rules of the Court, Part III, § D, subsec. 3, Article 80, Counterclaims:
1. A counterclaim may be presented 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 Court.
2. A counterclaim 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 counterclaim and the subject-matter of the claim of the other party the Court shall, after hearing the parties, decide whether or not the question thus presented shall be joined to the original proceedings.

27. *See* T.O. ELIAS, THE INTERNATIONAL COURT AND SOME CONTEMPORARY PROBLEMS: ESSAYS ON INTERNATIONAL LAW 91-92 (1983).

28. The 1958 Convention was adopted as international law on June 7, 1959. 13 U.N. GAOR Supp. (No. 9) ch. II, U.N. Doc. A/3859 (1958), *reprinted in* 1958 2 Y.B. INT'L L. COMM'N 78, 85.

which counterclaims are admissible in the absence of provisions for a counterclaim in a compromis, it may also suggest what the consensus is as to the admissibility of counterclaims:

> 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.[29]

In 1985 the United Nations Commission on International Trade Law (UNCITRAL) developed a model arbitration law[30], designed to assist nations in drafting laws which adhere to the provisions of the 1958 Convention.

2. Rules of Arbitration Institutions[31]

In the Procedure of the Inter-American Commercial Arbitration Commission, there is a counterclaim provision in Article 19.1:

> In his statement of defense, 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 counterclaim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of set-off.[32]

This provision is narrower in scope than others as it limits counterclaims to those which relate to the same contract rather than the same transaction or occurrence.

The Provisional Rules of Procedure of the Foreign Trade Arbitration Committee of the China Committee for the Promotion of International Trade also provides for counterclaims: "the defendant may file a counterclaim against a claim over which the Arbitration Committee has assumed jurisdiction."[33] The Rules of the Maritime Arbitration Committee of China provide that a defendant may file a counterclaim against the plaintiff in cases "of which the Maritime Arbitration Commission has taken

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29. 1958 Y.B. INT'L L. COMM. 38, 85.

30. The final draft of this model law on International Commercial Arbitration can be found in the Report of the UNCITRAL Law on the Work of its 18th Session, June 3-21, 1985, 40 U.N. GAOR Supp.(No.17) at 82-94, U.N.Doc. A/40/17 (1985). For further discussion, *see* McNerney & Esplugues, *International Commercial Arbitration: The UNCITRAL Model Law*, 9 B.C. INT'L & COMP. L. REV. 47 (1986).

31. Easy access to the rules of several international arbitral tribunals is found in 1 V.WETTER, THE INTERNATIONAL ARBITRAL PROCESS; PUBLIC AND PRIVATE 305-307 (1979).

32. Article 19.3, Rules of Procedure of the Inter-American Commercial Arbitration Commission, (as amended and in effect January 1, 1978), *reprinted in* III YEARBOOK: COMMERCIAL ARBITRATION 235 (P. Sanders ed. 1978).

33. Rule 24, Provisional Rules of Procedure of the Foreign Trade Arbitration Committee of the China Committee for the promotion of International Trade (adopted March 31, 1956), III YEARBOOK: COMMERCIAL ARBITRATION 246 (P. Sanders ed. 1978).

cognizance."[34]

The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce state that any counterclaim or pleading by way of set-off may be based only on a legal relationship covered by the arbitration agreement.[35] Rule 14.1(d) states that a specific counterclaim should be contained in the Statement of Claim or Defense.

The rules of the Permanent Court of Arbitration, in section 1, Article 11, provide that: "the respondent may introduce a counter-claim against the claimant, provided that this counter-claim be directly connected with the subject-matter of the request. The Tribunal, constituted in order to decide on the principal claim, shall likewise decide on the counter-claim."[36] These rules allow for substantial discretion on the part of the tribunal, and thus it is possible that permissive counterclaims might be asserted.

Rule 40 of the rules of the International Centre for the Settlement of Investment Disputes (ICSID) is concerned with ancillary claims, including counterclaims. Carefully constructed, it exemplifies a standard provision for counterclaims in several respects:

> Rule 40 - Ancillary Claims
> (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 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 of the other party, authorizes the presentation of the claim at a later stage in the proceedings.
> (3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.[37]

The ICSID rule stresses that the counterclaim must arise directly out of the subject-matter of the original claim. The Notes elaborate further on

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34. Rule 26, Provisional Rules of Procedure of the Maritime Arbitration Commission of the China Council for the Promotion of International Trade (adopted January 8, 1959). *Id.* at 257.

35. Rule 14.2(d), Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (in force from October 1, 1976), III YEARBOOK: COMMERCIAL ARBITRATION 256 (1978).

36. Permanent Court of Arbitration, Rules of Arbitration and Conciliation for the Settlement of International Disputes between Two Parties of which Only One is a State, § I, Art. 11 (1962), *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION, Doc. I.13 (C. Schmitthoff ed. 1975).

37. Rule 40, Rules of Procedure for Arbitration Proceedings (Arbitration Rules) reproduced from ICSID Regulations and Rules, in 4 V. WETTER, THE INTERNATIONAL ARBITRAL PROCESS 526 (1979).

the direct connection requirement; the factual connection between the original claim and the ancillary claim must be so close that adjudication of the ancillary claim is necessary to achieve the final settlement of the dispute. The object is to dispose of claims arising out of the same subject-matter. The provision that the claim must arise out of the same dispute is a broader requirement than that it arise from the same transaction or contract. Thus, the scope of the subject matter can be partly determined by the phrasing of the source from which it is derived. There must also be consent of the parties and the jurisdiction of the Centre. Section 41(2) provides that the Tribunal "may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence".[38] Since the Tribunal is the judge of its own competence, it ultimately has the discretion to admit whatever counterclaims it wishes.

3. UNCITRAL Arbitral Rules

Of great interest are the counterclaim provisions of the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL prepares new international conventions and model rules and advocates uniform interpretation and application of them, in an effort to harmonize the law of international trade. One of its priorities has been to draft a set of rules for international commercial arbitration, particularly for optional use in ad hoc arbitration. In May 1976, the Commission adopted these UNCITRAL arbitral rules, and in December 1976 the U.N. General Assembly recommended that they be used for the settlement of disputes arising from various types of contracts in international commerce.[39] So, UNCITRAL represents the culmination of efforts to devise a draft set of arbitration rules. Since they may be widely used, the counterclaim provision is important for the purposes of this discussion:

> Article 19
> 1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defense in writing to the claimant and to each of the arbitrators.
> 3. In his statement of defense, 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 counterclaim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.
> 4. The provisions of Article 18, paragraph 2, shall apply to a counterclaim and a claim relied on for the purpose of a set-off.[40]

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38. Rule 41(2), Rules of Procedure, *supra* note 33, at 527.

39. UNCITRAL adopted the Arbitral Rules on April 28, 1976, 31 U.N. GAOR Supp. (No. 17), U.N. Doc. A/31/17, ch. V., § C. The U.N. General Assembly then recommended their use for various contractual disputes in international commerce on Dec. 15, 1976, G.A. Res. 31/98 (1976).

40. UNCITRAL Arbitral Rules, Report of the U.N. Commission on International Trade Law, 9th sess., 12 April - 7 May, 1976, G.A. 31st sess., Supp.No.17 (A/31/17). *Reprinted in* 4

Although the rule reflects a preference for having the counterclaim asserted in the statement of defense, the legislative history makes it clear that it was considered desirable to retain flexibility.[41] The result was a rule which stipulates that the counterclaim be raised in the statement of defense unless circumstances are such that it becomes necessary to raise it subsequently.

The arbitrators have considerable discretion with respect to jurisdiction, when a counterclaim can be raised, and the interpretation of procedures (Article 15(1)), but they are nonetheless constrained by the rules. The respondent may only make a counterclaim which arises out of the same contract for the purpose of a set-off. The counterclaim must, therefore, be directly related to the original claim, since both must be linked to the contract in question. UNCITRAL's is a narrowly defined rule. In addition, claims may not be amended in such a manner that the amended claim falls outside the scope of either the arbitration clause or the separate arbitration agreement.[42] Underlying all the procedural rules is the idea that the scope of the arbitral agreement is limited and not to be expanded by amended claims or counterclaims. The UNCITRAL Rules would most likely allow "compulsory" counterclaims, and disallow "permissive" counterclaims.[43]

The same considerations are reflected in all the arbitral rules; there must be a relationship between the original claim and the counterclaim, the arbitral tribunal must have jurisdiction, and time limits are imposed within which the counterclaim must be presented. It is striking that the discussion is so terse, since their impact can be great.

4. Permissive Counterclaims: The Del Rio Case

Some might object to the proposal to allow permissive counterclaims to be brought up in arbitration on the ground that it would deter nations from utilizing arbitration as a means of dispute settlement. The root of the problem is attitudinal. A fear exists that arbitration will not resemble a judicial process and that the arbitrators may substitute a political decision for a legal one.[44] It is reasonable to assume that additional claims would complicate the dispute settlement process with the possibility that one party might be displeased with the result. If dissatisfied, the party might well allege that the arbitrators exceeded their jurisdictional author-

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V. WETTER, THE INTERNATIONAL ARBITRAL PROCESS, PUBLIC AND PRIVATE 413, 421-2 (1952).

41. *Id.* at 180 - 181.

42. *Id.* at Article 20.

43. For an example of how the UNCITRAL Rules have been applied, *see* the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the U.S.A. and the Government of the Islamic Republic of Iran, Jan. 19, 1981. This Tribunal modified and broadened Rule 19(3) somewhat, and allowed for counterclaims connected to the *occurrence* or *transaction* rather than limiting them to issues arising out of the same *contract*.

44. *See* CARLSTON, THE PROCESS OF INTERNATIONAL ARBITRATION 37 (1946).

ity.[45] Although the challenge to jurisdiction might arise if permissive counterclaims were admitted frequently, this is hardly a problem peculiar to this device.

One reason for allowing those counterclaims which are directly related to the subject-matter of the original claim is that it is efficient in cost and in time to settle both claims at the same time. Since a counterclaim that is not directly related would not be efficient, it is likely that if the efficiency rationale is primary, permissive counterclaims would not be accepted. The efficiency rationale is not served by permissive counterclaims.

There are very few cases in which the issue of permissive counterclaims has arisen. One example, however, is the *Del Rio* case, where a Mexican-Venezuelan Commission was set up to examine and decide claims of Mexican citizens against Venezuela.[46] According to the protocol of Washington, February 26, 1903, the Commission did not have jurisdiction to decide claims of the Government of Venezuela presented against the Mexican Republic. The Commission, in an attempt to extricate itself from the difficulties of the international agreement, sought the consent of the two parties to consider Venezuelan counterclaims. After an exchange of notes and telegrams, the Commission received authorization to examine and decide the counterclaims presented by Venezuela against the Mexican government. The case demonstrates that it is possible to enlarge the scope of jurisdiction. A tribunal may extend its competence beyond that of the original subject matter if the parties consent and waive subject matter deficiencies. Since the consent of the two parties can confer jurisdiction, it is possible that counterclaims of any kind could theoretically be brought before a tribunal. This is an important observation because it indicates that even though counterclaim rules offer a narrow definition of what counterclaims are admissible, the parties may consent to the presentation of counterclaims that do not fit the rule.

5. Drafting Agreements to Provide for Counterclaims

An important reason why a provision for counterclaims should be determined before the international arbitration gets underway is that parties may have different concepts of counterclaims. When two parties and their counsel come from different legal cultures, there is a danger that conflict may arise. "Where countries having different legal systems are represented before a tribunal, the use of technical procedural concepts from the one or the other legal system is a dangerous matter."[47] To avoid

45. "The arbitrator has such powers of decision as the parties confer upon him. Unless his powers are clearly stated and the exact question at issue is precisely stated, dissatisfaction with his award may easily provoke the charge that he has exceeded his jurisdiction." *Id.* at 33-34.

46. Del Rio case, Venezuelan Arbitrations of 1903, Jackson H. Ralston, Senate Doc. No. 316, 58th Congress, 2d sess., at 879 - 888 (1904).

47. A.H. FELLER, THE MEXICAN CLAIMS COMMISSION 228 (1935).

clashes between parties, it is advisable to include provisions for likely points of contention. Carlston stresses the need for careful planning: "Disputes and misunderstandings will inevitably arise because of clashes caused by varying national backgrounds. If arbitration is to carry out successfully its task of solving amicably such disputes, the utmost consideration must be given to its procedural aspects."[48] It is not impossible to overcome the problem of national differences. Lowenfeld argues that a commitment to the fair administration of justice can allow arbitrators to overcome the effect of different types of legal training: "Even if their legal traditions are different, they must have a common belief in the integrity of the judicial (or arbitral) process."[49] If the parties can agree on a counterclaim rule, then there is some hope that the arbitrators could follow it even if it differed from the rule with which they were familiar.

IV. HUMAN RIGHTS COUNTERCLAIMS: THE U.S.-POLAND ARBITRATION

The potential for using counterclaims to raise human rights issues has not yet been realized. On December 13, 1981, General Jaruzelski imposed martial law in Poland.[50] In response, President Reagan announced that the United States would impose economic sanctions on Poland, one of which was the suspension of Polish civil aviation privileges in the United States.[51] The U.S. decision to suspend Polish landing rights and the subsequent demand by the Polish government for arbitration provide a context in which to discuss the possibility of allowing the presentation of human rights counterclaims.

There was strong reason to believe that the U.S. action was in violation of a provision of the 1972 U.S.-Polish agreement on civil aviation, which required that one party notify the other at least one year in advance of any termination or suspension of any provision.[52] The Polish government demanded that the U.S. enter into an arbitration to determine what damages LOT, the Polish airline, suffered as a result of the suspension of its landing privileges. Unfortunately, even though the U.S. and Poland each appointed an arbitrator, the two arbitrators could not agree on a third to make up the tribunal, and so there was no progress.[53]

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48. Carlston, *supra* note 40, at 6-7.

49. A.F. Lowenfeld, *The U.S.-Iranian Dispute Settlement Accords: An Arbitrator Looks at the Prospects for Arbitration*, 36(3) ARB. J. 7 (1981).

50. Dam, *Extraterritoriality and Conflicts of Jurisdiction*, 83 DEPT. STATE BULL. 48 (June 1983).

51. The President's News Conference of Dec.17, 1981, Presidential Doc. Vol.17, at 1379; Christmas and the Situation in Poland: Address to the Nation, Presidential Doc. Vol.17, at 1404 - 1407 (Dec.23, 1981); Development in Europe, Committee on Foreign Affairs, 97th Cong., 2d Sess., App.4 at 42 (Feb.9, 1982).

52. Air Transport Agreement, July 19, 1972, U.S.-Poland, 23 U.S.T. 4269, T.I.A.S. No. 7535., *see also* Malamut, *Aviation: Suspension of Landing Rights of Polish Airlines in the United States*, 24 HARV. INT'L L.J. 190 (1983).

53. In the interim, the U.S. gradually removed the sanctions. In January 1984 the U.S. decided to allow 88 charter flights, and then in July 1984 lifted the suspension of landing

Had the arbitration commenced, however, the U.S. could have asserted the violation of Polish citizens' human rights as a counterclaim. This would have been an extremely interesting development. Not only would human rights violations have been raised as a counterclaim, but even more significant would have been the U.S. counterclaim on behalf of the Polish citizens. Ordinarily a state has standing to present claims and counterclaims for its own citizens, but this action might have created a landmark arbitral decision by allowing one state to raise a counterclaim alleging the human rights violations of citizens of the state which brought the original claim.

It was arguably in Poland's best interest not to insist upon arbitration. Poland was, and still is, trying to ameliorate diplomatic relations in order to gain aid for its ailing economy. In the field of international human rights the "finger of shame"[54] can be a tremendously powerful weapon. The U.S. could have made greater efforts to facilitate the arbitration, as it was only the need for a third arbitrator which led to the stalemate. A more compromising approach might have made the arbitration possible. It has been suggested that the reason the U.S. sought to avoid arbitration was that it expected to lose.[55]

The suspension of the U.S.-Polish civil aviation "illustrates the conflict between the great principles of international law, the inviolability of treaties and the fundamental nature of human rights".[56] The U.S. reluctance to pursue the arbitration may indicate that the former takes precedence in the international context. Perhaps this is the assumption that must be changed before counterclaims can be used effectively to champion human rights.

V. CONCLUSION

Having arranged a forum to settle claims, the parties might see fit to consent to admitting counterclaims, compulsory or permissive. Cognizant of a potential counterclaim, a nation might refuse to submit the original claim to an arbitral tribunal. If, for instance, the counterclaim were the violation of human rights of members of the other party's family or country, it is easy, on the one hand, to imagine how rapidly the nation would withdraw its claim. On the other hand, the country might welcome the

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rights for regularly scheduled flights by LOT. On April 16, 1985, in Warsaw, The U.S. and Poland concluded a new Transport Agreement, there was an exchange of diplomatic notes and a Memorandum of Understanding, and Poland agreed not to pursue the arbitration. Letter of November 7, 1986, from John R. Byerly, Office of the Legal Adviser, U.S. Dept. of State. *See also* the Polish Diplomatic Note, Warsaw, April 16, 1985, certification of translation May 28, 1985 by Jorge R. Perez, Assistant Chief, translating branch, Dept. of State.

54. This approach has been advocated most strongly by Professor Frank Newman of Boalt Hall, University of California at Berkeley, a leading human rights activist and scholar.

55. Malamut, *supra* note 52, evaluates possible arguments that the U.S. might have advanced, such as fraud, voidability, *rebus sic stantibus*, and human rights, and implies that none of the arguments would have fared well in arbitration.

56. *Id.* at 198.

opportunity to clear itself of charges. It is not obvious whether or not the nation would automatically reject arbitration. If the country had no idea that the counterclaim would be asserted, then the question becomes one of time limits for withdrawing the original claim. There is little reason to be optimistic about the future of permissive counterclaims before international arbitral tribunals, even if allowing them would be a good idea in theory. The result of admitting them might be to discourage international arbitrations.

Inefficiency may be the reason given for disallowing human rights counterclaims, but the underlying motivation is more likely to be the nation's overall attitude towards human rights. Human rights abuses may not be solved through the legal process until such attitudes change. Theoretically, however, counterclaims could provide an avenue to champion human rights. International arbitration is sometimes the only feasible method of dispute resolution, and it does have the advantage of usually being a private, rather than a public, process. For these reasons, it may be possible to induce states to confront allegations of human rights violations in an arbitral forum, through the procedure of permissive counterclaims. This may sound idealistic, but in practical terms the incentive is monetary. If a party wishes to collect an award through the arbitral process, it might be more willing to agree to procedures that allow the human rights violations to be heard. Individuals may not be able to change ingrained social attitudes by legal procedure alone, but the use of human rights counterclaims may be one step in the right direction.