

May 2020

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Bradley Larschan

Guive Mirfendereski

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Recommended Citation

Bradley Larschan & Guive Mirfendereski, The Status of Counterclaims in International Law, with Particular Reference to International Arbitration Involving a Private Party and a Foreign State, 15 Denv. J. Int'l L. & Pol'y 11 (1986).

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The Status of Counterclaims in International Law, With Particular Reference to International Arbitration Involving a Private Party and a Foreign State

BRADLEY LARSCHAN* AND GUIVE MIRFENDERESKI**

I. INTRODUCTION

States generally make and receive counterclaims¹ when they wish to settle sovereign accounts.² Not all these accounts, or disputes, involve some alleged wrong done by one State against another State. Most disputes between States arise out of one State's public acts (*jure imperii*)

* M.A.L.D., The Fletcher School of Law and Diplomacy; J.D., Boston College Law School, Ph.D. candidate, The Fletcher School of Law and Diplomacy; Mr. Larschan practices international trade law with Busby, Rehm and Leonard, Washington, D.C.

** M.A., M.A.L.D., Ph.D., The Fletcher School of Law and Diplomacy. Dr. Mirfendereski is a J.D. candidate at the Boston College Law School.

The authors are grateful to Richard Stern, Deputy General Counsel, Overseas Private Investment Corporation, Washington, D.C., whose conceptual guidance was invaluable in the preparation of this paper. They also wish to thank Miss Karen Powell for her assistance in researching portions of this article. Finally, the authors are deeply indebted to former Dean Richard Huber of the Boston College Law School for his support in the research and preparation of this article.

1. For the purpose of this commentary, the term "counterclaim" is taken to mean "[a] claim presented by a defendant opposition to or deduction from the claim of the plaintiff." BLACK'S LAW DICTIONARY 315 (5th ed. 1979), citing Federal Rule of Civil Procedure 13. It is recognized that a counterclaim is either an offensive or defensive plea. The former means that the counterclaim is a cause of action and seeks affirmative relief, whereas the latter seeks to defeat the plaintiff's cause of action and does not admit of affirmative relief to the defendant. *Id.* It is also recognized that the terms "counterclaim," "set-off" and "recoupment" tend to be used interchangeably in municipal and international legal practice even though some argue that each term has a distinct legal meaning. For a discussion of the difference between a set-off (*demande de compensation*) and a counterclaim (*demande reconventionnelle*) before international arbitral tribunals, see, e.g., J.L. SIMPSON & H. FOX, INTERNATIONAL ARBITRATION 178, note 2 (1959) [hereinafter cited as SIMPSON & FOX]. See also 4 A. CORBIN, CORBIN ON CONTRACTS 896 (3d ed. 1967). According to Corbin, a counterclaim "mean[s] that the plaintiff has committed a breach of duty to the defendant. Each party has done wrong; each is entitled to a remedy, although there must be an adjustment of remedies." *Id.* A set-off is a "limited form of counter-claim, in . . . which the adjustment of remedies takes place by the mere process of subtraction." *Id.* Recoupment means "an adjustment of remedy, but without necessarily indicating that the plaintiff has done wrong so that the defendant can establish a separate and independent claim to a remedy against the plaintiff." *Id.*

2. See, e.g., 1 M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 248-284 (1937) [hereinafter cited as 1 WHITEMAN].

and private acts (*jure gestiones*)³ involving a national of another State.⁴ The settlement of a private party-foreign State dispute may be sought through negotiation, litigation or arbitration.

An aggrieved private party's initial recourse is to seek redress in the State which committed the wrong. Such recourse would include the exhaustion of both administrative and judicial remedies.⁵ If the injured private party still believes it has been denied justice in the State which committed the wrong, it may then ask the State of which it is a national to espouse its claim at the inter-state level.⁶ If the State of the aggrieved private party agrees to espouse the claim,⁷ the dispute is raised to a purely international level.

At the international level, the dispute may also be resolved through negotiation, litigation or arbitration. The negotiated settlement of sovereign accounts, for example, either through diplomatic correspondence or actual bargaining, provides a flexible mechanism, especially insofar as the making and receiving of counterclaims are concerned. This stems from the fact that negotiation does not prohibit States from making and receiving counterclaims unrelated to the original claim.⁸ To this extent, it may be argued convincingly that the customary international law governing the settlement of sovereign accounts in a non-litigious setting, as evidenced by the practice of States, does not mandate that counterclaims be related to the original claim.⁹ These international law rules governing counterclaims between States in non-litigious proceedings are fairly well

3. The classification of State acts into acts *jure imperii* and *jure gestiones*, for the benefit of American judicial proceedings involving a foreign Government, or agent or instrumentality thereof, was first made in a letter by Acting Legal Adviser to the State Department, Jack B. Tate, to Acting Attorney General Philip B. Perlman, on May 19, 1952. For the text of the "Tate Letter," see 26 DEPT. STATE BULL. 984 (1952). For an excellent discussion of the *jure imperii-jure gestiones* distinction, see *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied* 381 U.S. 934 (1965).

4. See generally 1 WHITEMAN, *supra* note 2.

5. See, e.g., H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 243, 244 (2d ed. 1976). *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* 206-210 (1965) (hereinafter cited as *RESTATEMENT*). See also Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT'L L. 389, 393-411 (1964). Exhaustion of local remedies is, for example, required by the recent series of Investment Guaranty Agreements between the Overseas Private Investment Corporation, a U.S. Government Agency, and foreign states. See, e.g., *Investment Guaranty Agreement Between the United States of America and Ecuador*, art. 6(b).

6. For an excellent account of the procedure for submission of claims for espousal by the United States government against a foreign government, see generally R. LILICH & CHRISTENSON, *INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION* (1962).

7. See, e.g., Bagge, *Intervention on the Ground of Damage Caused to Nationals, With Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders*, 34 BRIT. Y.B. INT'L L. 162, 162-65 (1958).

8. See, e.g., 1 WHITEMAN, *supra* note 2, at 248-84.

9. *Id.*

established and are quite liberal.¹⁰

There is also ample evidence demonstrating the existence of well-defined rules of international law regarding the procedural admissibility of counterclaims in State-to-State disputes before international courts and arbitral tribunals. The procedural rules governing international judicial and arbitral proceedings actually limit the jurisdiction of the forum to consideration of counterclaims related to the original claim. This limitation on unrelated counterclaims is not inherent in the international legal order; rather, it is founded on limitations to which States have consented, either directly or indirectly, by international conventions or bilateral arbitral agreements.

This article will discuss the sources and extent of general rules of international law¹¹ governing counterclaims in judicial and arbitral proceedings. Initially, the practice regarding counterclaims in the Permanent Court of International Justice and its successor, the International Court of Justice, is examined. The article then examines the permissibility of counterclaims before international arbitral tribunals in State-to-State disputes and disputes between private parties and States. The argument is made that regardless of the status of the party making or receiving the counterclaim, counterclaims must conform to two broad criteria. First, counterclaims must relate to the original claim. Thus, without a claim there can be no counterclaim. Second, the amount of the counterclaim cannot exceed the amount of the original claim. The article concludes with an analysis of the practice of Federal courts in the United States governing counterclaims. Counterclaims in cases involving the actual parties to a dispute have been allowed liberally in U.S. Federal courts. A far more restrictive view has been taken of counterclaims against third party assignees where the assignee is presenting the original claim. Particular emphasis is placed on the treatment of these counterclaims in federal courts as a possible source of analogy to international tribunals.¹²

II. COUNTERCLAIMS BEFORE INTERNATIONAL COURTS

Two bodies have qualified as "World Courts": the Permanent Court of International Justice (PCIJ), established under the Covenant of the League of Nations, and its successor, the International Court of Justice

10. *Id.*

11. There are four generally accepted sources of international law. See Statute of the International Court of Justice art. 38(1), which sets forth the sources of international law as conventions, the practice of States (custom), general principles of international law, and in a subsidiary capacity, the decisions of jurists (both municipal and international) and the opinion of scholars. *Id.* For a more detailed analysis of the sources of international law, see generally PARRY, *THE SOURCE AND EVIDENCES OF INTERNATIONAL LAW* (1965).

12. For a discussion of the role of analogy in international law and the importation of rules and principles of municipal law into international judicial and arbitral decisions, see H. LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW, WITH SPECIAL REFERENCES TO INTERNATIONAL ARBITRATION* (1927).

(ICJ). Both tribunals were established on a permanent basis to consider State-to-State disputes by the consent of States Party. The procedural rules of the Permanent Court of International Justice and its successor, the International Court of Justice, are illustrative of international limitations on counterclaims relating to the original claim.

A distinction must be drawn between what is purely a rule of counterclaim and that which might appear as one but which is, on closer inspection, a rule of procedure developed by the jurisprudence of the two World Courts and various arbitral tribunals relative to "joinder of separate causes," "introduction of new claims" and/or "amendment of pleadings." This commentary will not deal with these latter issues.¹³

A. *Practice of the Permanent Court of International Justice*

Article 14 of the Covenant of the League of Nations provided for the establishment of the Permanent Court of International Justice.¹⁴ Under the auspices of the League's Council and Assembly, a Protocol was opened for signature by Member States to establish the Statute of the Permanent Court of International Justice.¹⁵ This Statute entered into force in September 1921.¹⁶ Article 30 of the Statute empowered the Court to formulate its own rules of procedure.¹⁷ The original Rules of Court were adopted in March 1922.¹⁸ Article 40 of the Rules provided for the joining of counterclaims to the proceedings only "in so far as [they came] within the jurisdiction of the Court."¹⁹ Although this would appear to state a liberal rule concerning counterclaims, some judges took the position that counterclaims should not be allowed at all.²⁰

13. See generally, SIMPSON & FOX, *supra* note 1, at 179-183 (1959).

14. League of Nations Covenant art. 14. For a discussion of article 14, see M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE: 1920-1942*, 89-106 (1943) [hereinafter cited as HUDSON].

15. Protocol of Signature Relating to the Statute of the Permanent Court of International Justice Provided for by Article 14 of the Covenant of the League of Nations, signed December 16, 1920, 6 L.N.T.S. 380.

16. HUDSON, *supra* note 14, at 119.

17. P.C.I.J. Statute art. 30. For a discussion of article 30, see HUDSON, *supra* note 14, at 254. For a lucid critique of the Court's construction of its jurisdiction so as to also extend to the Polish counterclaim and a commentary about the reach of article 40 of the Rules of Court, see Anzilotti, *La Demande Reconventionnelle en Procedure Internationale*, 57 *JOURNAL DU DROIT INTERNATIONAL* 857, 867-877 (1930). Anzilotti states that the Court's jurisdiction must be interpreted so as to extend only to counterclaims related to the principal object of the claim. *Id.* at 876.

18. P.C.I.J. Ser. D, Acts and Documents concerning the organization of the Court, § 7, 66 (1926).

19. *Id.* § 7, at 75. Article 40 provided, *inter alia*, that "[c]ounter-cases shall contain: (1) the affirmation or contestation of the facts stated in the case; (2) a statement of additional facts, if any; (3) a statement of law; (4) conclusions based on the facts stated; these conclusions may include counterclaims, in so far as the latter come within the jurisdiction of the Court; (5) a list of the documents in support; these documents shall be attached to the counter-case."

20. See P.C.I.J. Ser. D, No. 2 (4th Add.) 261-63 (1936).

The first case interpreting article 40 was the *Chorzow Factory Case*²¹ involving German Government claims against Poland over the expropriation of a factory in Upper Silesia. The Court held that to be procedurally permissible, a counterclaim based upon article 40 must be "juridically connected with the principal claim."²² As the German claims met this "relatedness" criterion, they were allowed but then were ultimately dismissed on the merits.²³

In 1936 the Court promulgated a revised set of Rules²⁴ which narrowed and defined the scope of permissible counterclaims.²⁵ Article 63 allowed the presentation of a counterclaim provided that it was (1) presented in the submissions of the Counter-Memorial; (2) "directly connected with the subject of the application"; and, (3) "within the jurisdiction of the Court."²⁶ Article 63 also provided for the procedure to be followed for any claim which was not directly connected with the subject matter of the original application. Such a claim, really an offensive counterclaim or cross-action,²⁷ was to be put forward by means of a separate application, in which case it would "form the subject of distinct proceedings" or "be joined by the Court to the original proceedings."²⁸ The Court was thus to be the sole determinor of whether a claim not directly connected to the original application was to be allowed as a counterclaim related to the original claim.²⁹ Implicit in the Court's discretion, however, was the limitation that in allowing a counterclaim, the Court could not "assume a jurisdiction it would otherwise lack."³⁰

21. Case Concerning The Factory at Chorzow (Germany v. Poland), 1928 P.C.I.J. Ser. A, No. 17 (Judgment of Sept. 13, 1928).

22. *Id.* at 38.

23. *Id.* The Court refused to consider the applicant's motion to bar a submission for a setoff by the respondent. *Id.* at 60-63, 64.

24. P.C.I.J. Ser. D, No. 1, 9, 28 (3rd Add. 1936) [hereinafter cited as 1936 Rules of the Court].

25. I. SHIHATA, *THE POWER OF THE INTERNATIONAL COURT OF JUSTICE TO DETERMINE ITS OWN JURISDICTION* 262-63 (1965).

26. *Id.* at 49. Article 63 provides that:

When proceedings have been instituted by means of an application, a counterclaim may be presented in the submission of the Counter-Memorial, provided that such counterclaim is directly connected with the subject of the application and that it comes within the jurisdiction of the Court. Any claim which is not directly connected with the subject of the original application must be put forward by means of a separate application and may form the subject of distinct proceedings or be joined by the Court to the original proceedings.

Id.

27. HUDSON, *supra* note 14, at 322. See also P.C.I.J. Ser.D, No. 2, at 111 (3rd Add. 1936); and, Harvard Research in International Law, *Competence of Courts in Regard to Foreign States*, 26 AM. J. INT'L L. Supp. 453, 490 (1932) [hereinafter cited as Harvard Research].

28. See 1936 Rules of the Court, *supra* note 24, at 49.

29. *Id.*

30. I G. SCHWARZENBERGER, *INTERNATIONAL LAW* 364 (1945).

B. *Practice of the International Court of Justice*

Article 63's legacy survives and is codified in article 80 of the Rules of the International Court of Justice,³¹ which were adopted by the Court in 1978. Article 93(1) of the United Nations Charter provides that all Members of the U.N. are also parties to the Statute of the ICJ.³² Article 30 of the Court's Statute empowers the Court to establish its own procedural rules.³³ Exercising this prerogative, and based on the consent of states implied through the constitutional chain of the U.N.,³⁴ the Court promulgated article 80 of its Rules on counterclaims.

Article 80 permits the presentation of a counterclaim if it is (1) presented in the submission of the Counter-Memorial; (2) "directly connected with the subject matter of the claim of the other party;" and (3) "within the jurisdiction of the Court."³⁵ The remainder of article 80 deals with the procedural permissibility of a counterclaim whose connection with the subject matter of the application is in doubt. In such a case, article 80 provides that "[t]he Court shall, after hearing the parties, direct whether or not the question thus presented shall be joined to the original proceedings." As with article 63 of the PCIJ's rules, the Court reserves the right to determine whether a counterclaim unrelated to the original application should be joined to the proceeding.³⁶ If the Court finds against the permissibility of a State's counterclaim, the counterclaimant State may file a separate application.

The only case in which the Court appears to have interpreted article 80 (actually article 63 of the Rules of Court adopted in 1946) is in the

31. DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 256-57 (S. Rosenne ed. 1979) [hereinafter cited as Rosenne]. For the text of article 80, see *infra* note 35. The 1978 Rules of the Court are the third set issued by the I.C.J. The first Rules of the Court were issued in 1946. Article 63 of the 1946 Rules took verbatim the counterclaim provisions of article 63 of the P.C.I.J.'s 1936 Rules. For the text of article 63 of the 1946 Rules, see I.C.J. Ser. D, No. 1 Acts and Documents Concerning the Organization of the Court, Rules of Court 54, 74; Rosenne, 177. The 1972 Rules of the Court again used precisely the same language on counterclaims as in article 63. See *id.* For a comparative list of provisions of the three sets of Rules of the Court, see [1977-1978] I.C.J.Y.B. 113, 188 (1978).

32. U.N. CHARTER art. 93(1).

33. I.C.J. Statute art. 30.

34. *Id.*

35. Article 80 provides that:

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 doubts as to the connection between the question presented by way of counter-claim and the subject matter of the claim of the other party the Court shall, after hearing the parties, decide whether or not the question thus presented shall be joined to the original proceedings.

Id. See also Rosenne, *supra* note 31, at 256-57.

36. Rosenne, *supra* note 31 at 257.

Asylum Case.³⁷ Colombia sought safe conduct from Peru for the Peruvian politician Haya de la Torre, to whom the Colombian ambassador in Lima had granted asylum in its embassy. Peru counterclaimed that notwithstanding its obligations, if any, to allow the safe conduct, the grant of asylum was in violation of Colombia's treaty obligations.³⁸ The Court, observing that "[t]he direct connexion being thus clearly established . . . ,"³⁹ permitted the counterclaim under article 63.

In both the PCIJ and the ICJ, the ultimate resolution of disputes originally arising between a private party claimant and a respondent State must clear two procedural hurdles. First, under article 34(1) of the ICJ's Statute, "[o]nly States may be parties in cases before the Court."⁴⁰ This procedural hurdle is surmountable by the private party only if the State of which it is a national chooses to espouse its national's claim and thereby elevate the dispute to the inter-state level.⁴¹ There is another hurdle to overcome, however, for the successful submission of a private party's claim to the Court: the exhaustion of local remedies.⁴²

C. *Exhaustion of Local Remedies*

The exhaustion of local remedies requirement is a basic principle of international law.⁴³ In the *Panevezys-Saldutiskis Railway Case*,⁴⁴ the Permanent Court of International Justice decided not to "entertain" the Estonian claim because the Esimene Juurdeveo Raudteede Selts Venemaal Company, the owners and concessionaires of the expropriated railroad, had not exhausted local remedies available to it in Lithuania.⁴⁵ A similar situation arose in *The Interhandel Case* when Switzerland made a claim for restitution of assets of one of its nationals,⁴⁶ which had been seized by the U. S. Government as enemy property during the Second World War. Rather than actively participate in the procedures available in the U. S. district courts, Switzerland took its claim to the ICJ.

37. *Asylum Case (Colombia v. Peru)*, 1950 I.C.J. 266 (Judgment).

38. *Id.* at 280.

39. *Id.* at 281.

40. I.C.J. Statute art. 34(1).

41. As Judge Moore states: "It is an elementary principle that, when a government officially intervenes on behalf of its citizens, it makes his claim its own. . ." *The Mavrommatis Palestine Concessions Case*, 1926 P.C.I.J. Ser. A, No. 2, at 63 (dissenting opinion of Judge Moore). See generally, STEINER & VAGTS, *supra* note 5, at 243-244; RESTATEMENT, *supra* note 5, at § 212; Bagge, *supra* note 7, at 162-65.

42. See Mummery, *supra* note 5, at 389-96; Bagge, *supra* note 7, at 165-66.

43. See, e.g., RESTATEMENT, *supra* note 5, at 206; *Finnish Shipowners (Finland v. Great Britain)*, 3 U.N.R.I.A.A. 1479 (1934); *Ambatielos Claim (Greece v. Great Britain)*, 12 U.N.R.I.A.A. 82 (1956), 23 I.L.R. 106-40 (Lauterpacht ed. 1960); *Interhandel Case (Switzerland v. United States)*, 1959 I.C.J. 6 (Objections).

44. *Panevezys Saldutiskis Railway Case (Estonia v. Lithuania)*, 1939 P.C.I.J. Ser. A/B, No. 76.

45. *Id.* at 19, 21.

46. *Interhandel Case*, 1959 I.C.J. 6. The facts of this case are conveniently summarized in 8 WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 794-801 (1967).

The ICJ refused to adjudicate the dispute because Interhandel, a Swiss corporation, had failed to exhaust local remedies available to it in the United States.⁴⁷

D. Summary

The Permanent Court of International Justice formulated a rather narrow interpretation of permissible counterclaims.⁴⁸ This interpretation was adopted by the International Court of Justice, reinforcing the international legal status of the rule. Although substantial discretion is left to the Court in deciding whether to join the counterclaim to the original application, the procedural rules contemplate the permissibility of counterclaims directly related to the original claim. There is no evidence that the Court has sought to enlarge this rather narrow rule.

III. AN HISTORICAL SKETCH OF COUNTERCLAIMS BEFORE THE INTERNATIONAL ARBITRAL TRIBUNALS

The history of modern international arbitration between States and private parties is less than a century and a half old.⁴⁹ As with counterclaims in international adjudication, the development of the procedural rule relative to counterclaims in international arbitration stems from conventions and international common law.

Early in this century, Jackson Ralston observed that: "Ordinarily at least, questions of set-off and counterclaim do not, and in the nature of things cannot, arise before an international tribunal."⁵⁰ This statement was no more wholly valid when made in 1926 than the assertion by Anzilotti four years later: "Il ne pouvait, évidemment, pas être question de demande reconventionnelle dans la procédure internationale, tant que la seule forme judiciaire de solution des litiges entre Etats a été l'arbitrage, au sens étroit du mot."⁵¹ In fact, prior to Ralston and Anzilotti, international arbitral tribunals had indeed considered the question of counterclaims as a matter of jurisprudential reasoning, independent of the provisions of the arbitral agreement (*compromis*).

47. Interhandel at 26-30.

48. See C. BISHOP, INTERNATIONAL ARBITRAL PROCEDURE 132 (1930).

49. See generally, T. BALCH, INTERNATIONAL COURTS OF ARBITRATION (1874), K. CARLSTON, THE PROCESS OF INTERNATIONAL ARBITRATION (1946), W. DARBY, INTERNATIONAL ARBITRATION (4th ed. 1904), D. MYERS, ARBITRATION IN THE AMERICAS (1932), J. RALSTON, INTERNATIONAL ARBITRAL LAW AND PROCEDURE (1910), and J. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO (1929).

50. J. RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS § 376, 211 (1926).

51. Anzilotti, *La Demande Reconventionnelle en Procédure Internationale*, 57 JOURNAL DU DROIT INTERNATIONAL 857 (1930) ("A counterclaim cannot be part of an international proceeding in the strict legal sense.")

A. *Earlier Cases*

One of the earliest cases considering counterclaims by an arbitral tribunal was in 1898 in *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*.⁵² The South African Republic brought suit to compel the appointment of a new trustee for certain funds deposited in England in connection with the building of a railroad for which the respondent Belgian corporation had a concession. The respondent counterclaimed, alleging various breaches by the Plaintiff-Government of the terms of the concession, the writing of a libelous letter by the plaintiff's agent, and the injustice and bad faith of the plaintiff in instituting proceedings in the Transvaal courts to avoid the concession. In rejecting the counterclaim, Justice North agreed with the decision by Lord Langdale, Master of the Rolls, in the early case of *Charles Duke of Brunswick v. The King of Hanover*⁵³ in holding that, although a counterclaim might be made if related to the subject matter of the suit, under the United Kingdom's interpretation of international law a counterclaim could not be made for matters "entirely outside of and independent of the subject matter of the present action."⁵⁴ The British interpretation of international law was that counterclaims were permissible only if they related to the subject matter of the plaintiff's claim.

B. *The Carthage and Manouba Cases*

The issue of counterclaims was also addressed in 1913 by a tribunal organized under the auspices of the Permanent Court of Arbitration⁵⁵ to arbitrate the *Carthage* and *Manouba* cases. This pair of cases stemmed from the seizure and detention of two French vessels by Italy in 1912 during the Turko-Italian war over Tripoli and Cyrenaica. In the *Carthage* case,⁵⁶ the Tribunal held that the Italian navy violated international law by capturing and temporarily detaining the French mail steamer "Carthage".⁵⁷ The Tribunal awarded France 160,000 francs for the loss and damage to private parties.⁵⁸ The Tribunal considered but ultimately dismissed the Italian counterclaim for 2,075.25 francs to cover the expense incurred by the seizure of the steamer.⁵⁹

52. *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord* [1898] L.R. Ch. 190.

53. *Charles Duke of Brunswick v. The King of Hanover*, 6 Bevan 1, 37, 38 [1844].

54. *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord* [1898] L.R. Ch. 190.

55. For a discussion of the Permanent Court of Arbitration see *infra* text accompanying notes 115-122, 132-141.

56. *The Carthage Case (France v. Italy)*, Permanent Court of Arbitration, Award of May 6, 1913, reprinted in J. B. SCOTT, *THE HAGUE COURT REPORTS* 330 (2d. ser. 1916).

57. *Id.* at 336.

58. *Id.*

59. *Id.*

In the *Manouba* case,⁶⁰ the Tribunal decided that the Italian navy violated international law by capturing the French steamer "Manouba" and directing its convoy to Cagliari.⁶¹ France was awarded 4,000 francs as compensation for the loss and damage sustained by its nationals.⁶² The Tribunal held, however, that once at Cagliari, the Italian navy could arrest twenty-nine Ottoman passengers on board.⁶³ The Tribunal, therefore, allowed the Italian counterclaim for the expenses incurred in guarding the "Manouba" at Cagliari,⁶⁴ and ordered that the amount of the counterclaim be deducted from the 4,000 francs awarded to France.⁶⁵ It is worth noting that the two *compromis* establishing the Tribunal were silent on the issue of counterclaims.⁶⁶

C. *Post-World War I Tribunals*

In spite of these precedents, Ralston chose to base his aforementioned observation, relative to the place of counterclaims in international arbitration, on the circumstances surrounding the *Del Rio Case*⁶⁷. In that case, when Mexico presented its claims against Venezuela to the Mexican-Venezuelan Claims Commission in 1903, an exchange of notes between the parties rather than a single private claim presented by Mexico was deemed necessary to authorize the Commission to take jurisdiction of any counterclaim which might be presented by Venezuela.⁶⁸

Most significantly, what may have contributed to the observations by Ralston and Anzilotti appears to have been the fact that the Rules of Procedure of three tribunals (the Belgo-German Mixed Arbitral Tribunals) established pursuant to article 304 of the Treaty of Versailles⁶⁹ between Germany and three of the Allied Powers (Britain, Belgium and Poland) explicitly prohibited the consideration of counterclaims (*demande reconventionnelle*) by the Tribunals.⁷⁰ Yet, in this context there were also

60. The *Manouba* Case (France v. Italy), Permanent Court of Arbitration, Award of May 6, 1912, reprinted in J. B. SCOTT, THE HAGUE COURT REPORTS 330 (2d. ser. 1916).

61. *Id.* at 350-51.

62. *Id.* at 351.

63. *Id.*

64. *Id.* at 345-46.

65. *Id.* at 351.

66. See *Compromis of Arbitration Relative to the Question Raised by the Capture and Temporary Detention of the French Mail Steamer "Carthage," signed in Paris, March 6, 1912 (France and Italy)*, in SCOTT, *supra* note 56, at 336-38; *Compromis of Arbitration relative to the Question raised by the Capture and Temporary Detention of the French Mail Steamer, "Manouba", signed in Paris, March 6, 1912 (France and Italy)*, in SCOTT, *id.*, at 351-53.

67. *Del Rio Case (Mexico v. Venezuela)*, Ven. Arb. of 1903, at 879 (1903).

68. RALSTON, *supra* note 50, at § 376, 211.

69. 3 REDMOND, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 3477 (1923).

70. For example, article 13 of the Anglo-German Mixed Tribunal Rules, 1 Trib. Arb. Mixtes 109 (1921-1922), at 111, provides: "Should the Respondent desire to make a claim against the Claimant, he must do so by a separate claim, and not by a counterclaim, but the

tribunals whose rules of procedure provided for admission of counterclaims.⁷¹ In other instances, the rules of procedure of a few tribunals were silent on the issue of counterclaims.⁷²

What has gone unmentioned by Ralston and Anzilotti is that despite the procedural rule prohibiting the admission of counterclaims, the Belgo-German Mixed Arbitral Tribunal succeeded, in effect, in admitting counterclaims under the procedurally permissible concept of *requete introductive d'instance* (i.e., request for separate cause application), which the Tribunal could join to the original proceedings.⁷³

Two cases illustrate this point. In *Installations maritimes de Bruges v. Hamburg Amerika Linie*,⁷⁴ the plaintiff sought 126,000 francs in damages arising out of the defendant's non-payment of sums owed to the plaintiff.⁷⁵ The defendant, in the person of its branch in Anvers, counterclaimed for more than 66,000 francs in damages arising out of a collision between two steamers and a seawall at the port of Zeebrugge, administered by the plaintiff.⁷⁶ Since the Rules of Procedure of the Tribunal did not permit counterclaims,⁷⁷ the defendant filed its twin counterclaims by way of *requete introductive d'instance*.⁷⁸ The Tribunal held that the two

Tribunal may, if it thinks fit, hear both claims at the same hearing." *Id.* Similarly, article 29 of the Belgo-German Mixed Arbitral Tribunal Rules, 1 Trib. Arb. Mixtes 33 (1921-1922), at 36-37, provides: "Les demandes reconventionnelles ne sont pas admises. Toute demande du defendeur contre le demandeur doit etre formee par une requete introductive d'instance. Le Tribunal purra adonner quel les causes soient jointes ou qu'elles soient plaidees dans la meme audience." *Id.* A similar wording appears in article 28 of the German-Polish Mixed Arbitral Tribunal Rules, 1 Trib. Arb. Mixtes 687, 691 (1921-1922).

71. For example, article 27 of Anglo-Austrian Mixed Arbitral Tribunal Rules, 1 Trib. Arb. Mixtes 622, 626-627 (1921-1922) states: "Where the defendant raises a counterclaim it shall have the same effect as a separate claim and the Tribunal may pronounce a final judgment in the same cause both on the original and on the cross-claim. If, however, in the opinion of the Tribunal, such counterclaim cannot be conveniently disposed of with the claim, the Tribunal may order that no further proceedings thereon be allowed until its delivery as a separate claim in a new cause." *Id.* A similar language is contained in article 27 of Anglo-Bulgarian Mixed Arbitral Tribunal Rules, 1 Trib. Arb. Mixtes 639, 643 (1921-1922).

72. See, e.g., Greco-Austrian Mixed Arbitral Tribunal Rules, 1 Trib. Arb. Mixtes 672 (1921-1922); Austria-Kingdom of Serbs, Croats and Slovenes Mixed Arbitral Tribunal Rules, 1 Trib. Arb. Mixtes 698 (1921-1922).

73. See *supra* note 70.

74. *Installations maritimes de Bruges v. Hamburg-Amerika Linie* (Belgium v. Germany), 1 Trib. Arb. Mixtes 877 (1921-1922)

75. *Id.* at 877.

76. *Id.*

77. Article 29 of the Rules of the Belgo-German Arbitral Tribunal, 1 Trib. Arb. Mixtes 33, 36-37 (1921-1922) provides: "Les demandes reconventionnelles ne sont pas admises. Toute demande du defendeur contre le demandeur doit etre formee par une requete introductive d'instance. Le Tribunal pourra ordonner que les causes soient jointes ou qu'elles soient plaidees dans la meme audience." *Id.*

78. *Supra* note 74, at 877. There does not seem to be an adequate translation for the term "requete introductive d'instance." As it is used in article 2 of the rules of the Tribunal, *id.*, the term asks the defendant to bring its action against the plaintiff by way of requesting for the introduction of such an action at the start of the proceedings. In this respect the formulation of this part of article 2 resembles article 63 of the Rules of the Permanent

counterclaims "[arose] out of the same fact as the claim" and, therefore, it ordered the actions to be joined.⁷⁹

Similarly, in *Peeters, von Haute et Duyver v. Trommer et Gruber*,⁸⁰ the Belgo-German Tribunal was requested to admit a counterclaim which its rules prohibited it from admitting.⁸¹ The case involved the performance of a contract between the Belgian and German parties, whereby the Belgian plaintiff sold to the German defendant nine carpets, which the defendant lost while transporting them to Germany. Additionally, the defendant was to make lithographite stones for the plaintiff.⁸² The plaintiff demanded the purchase price of the carpets as yet unpaid by the defendant. The defendant counterclaimed in the amount of the cost of making the printing slabs.⁸³ The Tribunal admitted the counterclaim, stating that it was not a counterclaim (*demande reconventionnelle*) within the meaning of article 29, but rather it was a *demande de compensation* (set-off) based on one claim born from the same case.⁸⁴ Accordingly, the Tribunal deducted the amount of the counterclaim from the award made for the plaintiff.⁸⁵

The Anglo-German Tribunal has also admitted counterclaims in a number of cases, even though article 13 of the Rules of the Tribunal prohibited the respondent from making a claim against the claimant by way of a counterclaim.⁸⁶ In *The Empire Transport Co., Ltd. v. Bd. Blumenfeld*,⁸⁷ the Tribunal held in an interlocutory decision that a claim for unliquidated damages could be set up as a ground for the reduction of a debt if it arose out of the same transaction and its ascertainment was merely a matter of calculation.⁸⁸

An opposite result was reached in *Nitrogen Fertilizers Ltd. v. Verkaufe Vereinigung fuer Stickstoffsdunger G.m.b.H.*,⁸⁹ where the German debtors were not allowed to counterclaim against a British firm for certain legal expenses incurred when the debtors were sued by their German customers. The counterclaim was based on the allegation that the

Court of International Justice (*see supra* notes 24-28 and corresponding text), in which it is provided that an offensive counterclaim (or cross action) be put forward by means of a separate application, which, according to the decision of the Court, it could have joined to the original proceedings.

79. *Supra* note 74, at 877.

80. *Peeters, van Haute et Duyver v. Trommer et Gruber* (Belgium v. Germany), 2 Trib. Arb. Mixtes 384 (1922-1923).

81. *See supra* note 70.

82. *Supra* note 80, at 391-394.

83. *Id.*

84. *Id.* at 394.

85. *Id.* at 394-395.

86. *See supra* note 70.

87. *The Empire Transport Co., Ltd. v. Bd. Blumenfeld* (Great Britain v. Germany), 4 Trib. Arb. Mixtes 205 (1924-1925).

88. *Id.* at 207-208.

89. *Nitrogen Fertilizers Ltd. v. Verkaufe Vereinigung fuer Stickstoffsdunger G.m.b.H.* (Great Britain v. Germany), 5 Trib. Arb. Mixtes 648 (1926).

German debtors were not able to deliver the material for which they had made contracts when the British creditors failed to deliver lime nitrogen to the debtors. The Tribunal held that the debtors were not allowed to set-off their purchases of lime nitrogen from a Norwegian company belonging to the creditors which were made so that they could comply with their contracts with German purchasers.⁹⁰ Further, the debtors were not allowed to make a counterclaim for damages for breach of contract when the creditors failed to deliver the specified quantity of lime nitrogen during the war, since their obligation was extinguished by the outbreak of the War (under article 299 of the Treaty of Versailles) and did not arise out of the deliveries at issue in the creditor's claim.⁹¹ The debtors were allowed to counterclaim for the amount of a penalty incurred by the creditors as a result of a breach of the agreement before the outbreak of the war.⁹²

In *Ernest Epstein v. German Government*,⁹³ the Tribunal held in an interlocutory decision that the claimant was entitled to recover the proceeds of the sale of its pictures that had been sold by the compulsory administrator, together with the proceeds of pictures sold before the administrator was appointed, less certain deductions, including payments made by the administrator for taxes on the claimant's behalf and at its request, but not for debts of the firm of which the claimant was a partner.⁹⁴

In *The Vandyck Printers Ltd. v. Moderner Kunst-Belag G.m.b.H.*,⁹⁵ the Tribunal ruled that the debtor's claim for unliquidated damages, arising out of an entirely different transaction, could not form the basis of a counterclaim against a creditor's claim under article 296 of the Treaty of Versailles.⁹⁶ In *Morgan and Co. v. W.H. Chaplin and Co. Ltd.*,⁹⁷ the Tribunal reached a similar result and held that a counterclaim for unliquidated damages arising from a separate transaction could not be set up as a counterclaim under the Treaty of Versailles.⁹⁸

Finally, in *The Beeley Wood Steel Co., Ltd. v. Franz and Massmann*,⁹⁹ a British seller brought a claim against German buyers, Franz and Massmann, for the balance of the price of steel stipulated to the Ger-

90. *Id.* at 655.

91. *Id.* at 656.

92. *Id.* at 656-657.

93. *Ernest Epstein v. German Government (Great Britain v. Germany)*, 6 Trib. Arb. Mixtes 19 (1926-1927).

94. *Id.* at 20-21.

95. *The Vandyck Printers Ltd. v. Moderner Kunst-Belag G.m.b.H. (Great Britain v. Germany)*, 6 Trib. Arb. Mixtes 33 (1926-1927).

96. *Id.* at 33-34.

97. *Morgan & Co. v. W.H. Chaplin & Co. Ltd. (Great Britain v. Germany)*, 6 Trib. Arb. Mixtes 43 (1926-1927).

98. *Id.* at 43-44.

99. *The Beeley Wood Steel Co. Ltd. v. Franz and Massmann (Great Britain v. Germany)*, 8 Trib. Arb. Mixtes 289 (1928-1929).

man buyers during the years 1911-1913. The German buyers presented a counterclaim for damages due to imperfections in the steel. In an interim decision, the Tribunal held that a counterclaim, though not liquidated, could be set up against another claim if it arose out of the same contract or transaction. The set-off was allowed on the ground that "each of the orders formed part of a series which by their connection is for this purpose to be considered one transaction."¹⁰⁰

D. Recent Cases

The most recent decisions concerning the international legal status of counterclaims have come from the arbitral tribunal at The Hague which was established in 1981 to settle certain financial matters between the United States and Iran.¹⁰¹ The agreement establishing the Iran-United States Claims Tribunal sets forth the principle that claims can be made only by private parties against the foreign government, or an entity thereof, and that counterclaims may be brought only if they "arise . . . out of the same contract, transaction or occurrence that constitutes the subject matter of [the] claim."¹⁰² This principle was found to be dispositive in a recent decision of the Tribunal, *T.C.S.B., Inc. v. Islamic Republic of Iran*.¹⁰³

T.C.S.B., Inc., a Maryland corporation, was given a 51 month contract as a consulting engineer beginning in May 1975 to supervise construction of a large housing project to be built near Shiraz, Iran. T.C.S.B. brought four separate claims against Iran for breach of contract totalling

100. *Id.* at 291.

101. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, art. 2, signed and entered into force Jan. 19, 1981 (Algeria, Iran & United States), reprinted in 20 I.L.M. 230 (1981), 1 Iran-U.S. Claim Trib. Rep. 9 (1983) [hereinafter cited as Claims Settlement Declaration].

102. *Id.* art. 2(1). In the Case Concerning Jurisdiction of the Tribunal With Respect To Claims By The Islamic Republic of Iran Against Nationals of the United States of America, decision of Dec. 21, 1981, 1 IRAN-U.S. CLAIMS TRIB. REP. 101 (1983), the Full Tribunal held that "a right of counter claim is normal for a respondent, but it is admitted only in response to a claim and it does not mean, by analogy, that each State is allowed to submit claims against nationals of the other State. It means, a contrario, just the opposite." *Id.* at 103. In *Owens-Corning Fiberglass Corp. v. Government of Iran*, decision of May 13, 1983, 2 IRAN-U.S. CLAIMS TRIB. REP. 322 (Interlocutory Award) (1984), the tribunal observed that the Claims Settlement Declaration counterclaim provision in article 2(1), *supra* note 88, "suggests that 'contract,' 'transaction' and 'occurrence' are alternative" as they are "in the disjunctive." 2 IRAN-U.S. CLAIMS TRIB. REP. at 324. The Tribunal went on to note that "if a claim is based solely on a contract, a counterclaim must arise from the same contract to be within the jurisdiction of the Tribunal. Similarly, if a claim is for an occurrence, such as a taking of property, then a counterclaim would have to arise out of that same occurrence." *Id.* The Tribunal specifically reserved interpreting the latitude for counterclaims under the transactional provision. *Id.* In *American Bell International*, however, the tribunal enunciated a narrow transactional standard. See *infra* note 107 and accompanying text.

103. *T.C.S.B., Inc. v. Islamic Republic of Iran*, March 16, 1984, Case No. 140, Chamber 2, at 23-24.

nearly \$4.5 million. Iran filed several counterclaims, one of which alleged that, *inter alia*, T.C.S.B. failed to pay certain social security taxes. The Tribunal dismissed the counterclaims for lack of jurisdiction.¹⁰⁴ In a straight forward application of the rules of the *compromis*, the Tribunal observed that "a distinction must be made . . . between legal relationships arising out of the application of the law to a situation in which either party individually finds itself and the contractual relationship between the parties to the contract *inter se*."¹⁰⁵ T.C.S.B. was awarded slightly over \$1 million.¹⁰⁶

In *American Bell International v. Islamic Republic of Iran*,¹⁰⁷ the Tribunal considered the permissibility of a number of counterclaims. In May 1975, American Telephone & Telegraph (AT&T) was chosen by the Iranian Government to oversee the modernization of civilian and military communications throughout Iran. AT&T and Iran's Government entered into an initial three and one half month agreement to organize the project. In order to perform the project, AT&T created, with the consent of Iran, a wholly-owned subsidiary, American Bell International (ABI). Subsequently, ABI entered into two long-term contracts with the Government of Iran to provide consulting services. ABI brought a claim against Iran for \$63.8 million for its services, equipment and other expenses under these two contracts. Iran filed seven counterclaims exceeding \$285 million against ABI and its parent, AT&T, for a variety of alleged contractual breaches and violations of Iranian law. In an interlocutory award, the Tribunal held that Iran could not counterclaim against AT&T and was "barred from asserting any counterclaims against any person or entity other than [the] claimant itself . . ."¹⁰⁸ Iran asserted in the alternative that if it could not maintain a counterclaim against AT&T, it could nevertheless counterclaim against ABI under the original contract with AT&T. The Tribunal agreed with the Iranian position, finding "that the linkage between all three contracts must be considered sufficiently strong so as to make them form one single 'transaction' . . ."¹⁰⁹ The Tribunal observed that ABI was the successor to AT&T under the original contract and, as such, was liable for a breach of the contract.¹¹⁰

104. *Id.* at 24.

105. *Id.*

106. *Id.*

107. *American Bell International, Inc. v. Islamic Republic of Iran*, June 11, 1984, Case No. 48, Chamber 3, IRAN-U.S. CLAIMS TRIB. REP. (1984).

108. *Id.* at 15.

109. *Id.* at 17.

110. *Id.* However, in *Owens-Corning Fiberglass Corp. v. Government of Iran*, decision of May 13, 1983, 2 IRAN-U.S. CLAIMS TRIB. REP. 322 (Interlocutory Award 1984), the tribunal rejected an Iranian contention that it could counterclaim against Owens-Corning for alleged actions by the French Government-owned company Saint Gobain Pont a Mousson and its licensing subsidiary, Sodefiv. Owens-Corning and Saint Gorbain had entered into a cross-licensing agreement with Glass Wool Co. of Iran. When Owens-Corning filed a claim for royalties, Glass Wool counterclaimed for acts and omissions by Saint Gorbain on the theory that Owens-Corning was the French guarantor or, alternatively, that Saint Gorbain

E. Summary

This brief historical sketch illustrates the significant role which international arbitral tribunals, particularly those established in the aftermath of World War I between the Allied Powers (not including the United States) and Germany, have played in the development and refinement of the concept of counterclaims in international law. The rules relative to counterclaims in international arbitration—which had gone unnoticed by Ralston and Anzilotti in the nascent stage of its emergence some five and a half decades ago—have advanced to such a degree that the state of the law is no longer confined to the broad rule allowing admission of counterclaims so long as they are related to the original claim.¹¹¹ The progressive development and refinement by international tribunals of the rules governing counterclaims has been such that it now permits distinctions between a counterclaim (*demande reconventionnelle*) and set-off (*demande de compensation*),¹¹² a distinction which until 1923 had been confined to municipal systems based on Roman Law.¹¹³ Equally remarkable is the increased incorporation into international law of a refinement of the concept of counterclaims beyond those arising merely out of and relating to the original claim to include “counterclaims arising out of the same contract, transaction or occurrence.”¹¹⁴

IV. PERMISSIBILITY OF COUNTERCLAIMS AS CODIFIED BY INTERNATIONAL ARBITRAL CONVENTIONS, RULES, AND INSTITUTIONS

In the preceding sections, it was shown that international courts and arbitral tribunals, by their decisions and in accordance with their rules of procedure, have contributed to the emergence and development of international law rules governing counterclaims. Attempts at the codification of counterclaim rules by international arbitral conventions, model rules, and institutions have also played a role in the evolution of the rules governing counterclaims. This section is divided into two parts. First, it will

was Owens-Corning's agent. 2 IRAN-U.S. CLAIMS TRIB. REP. at 323-24. The Tribunal held that Owens-Corning had entered into separate, albeit related, contracts with Glass Wool. *Id.* at 325-26.

111. See also, 1 L. OPPENHEIM, INTERNATIONAL LAW 240, n. 1 (H. Lauterpacht 8th ed. 1955).

112. See, e.g., Article 19 of Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) [issued at the ninth session of the Commission's work on 12 April-7 May 1976, Doc. No. A/31/17]. Article 19(3) states: “the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.” *Id.* Presently, Article 19 as well as the remainder of UNCITRAL rules, some modified and some in whole, form the Arbitration Rules governing the Iran-United States Claims Tribunal. Iran-United States Claims Tribunal, Final Tribunal Rules of Procedure, May 3, 1983, in 2 IRAN-U.S. CLAIMS TRIB. REP. 405, 423-424 (1983).

113. SIMPSON & FOX, *supra* note 1, at 178.

114. This enumeration is contained in Article 2(1) of the Claims Settlement Declaration, *supra* note 102, which established the Iran-U.S. claims Tribunal.

examine the codification of counterclaim rules by international arbitral conventions, model rules and institutions for the *exclusive* purpose of applying them to arbitral proceedings involving states (*i.e.*, codification of counterclaim rules in public international arbitral codes). This section will then discuss codification of counterclaim rules by international arbitral conventions, model rules and institutions for the *exclusive and/or primary* purpose of applying them to arbitral proceedings in which at least one of the parties is a private actor (*i.e.*, codification of counterclaim rules in private international arbitral codes).

A. Counterclaims in Public International Arbitral Codes

1. The Permanent Court of International Arbitration

One year after the decision in the *South African Republic* case,¹¹⁵ the cause of international arbitration in general was furthered by the conclusion of the Hague Convention on Pacific Settlement of International Disputes (the 1899 Hague Convention).¹¹⁶ This convention established the Permanent Court of International Arbitration.¹¹⁷ In 1907, the Second Hague Convention on Pacific Settlement of International Disputes (the 1907 Hague Convention)¹¹⁸ extended the life of the Permanent Court of International Arbitration and adopted a revised and expanded set of procedural rules for the court.¹¹⁹ This, as well as the earlier set of procedural rules, made no mention of counterclaims. This omission appears to have stemmed from the fact that the Permanent Court of International Arbitration was intended to be neither permanent nor a court.¹²⁰ It was, rather, to be an administrative organ to which States could resort to create an arbitral tribunal whose composition, procedure, and jurisdiction were to be defined and set out by the disputant States in an arbitral agreement or *compromis*.¹²¹ It was therefore natural that the 1899 and 1907 rules made no mention of counterclaims; the issue was intended to be left to the *compromis* or the jurisprudence of the duly constituted tribunal on a case-by-case, tribunal-by-tribunal basis. The very first instance in which a tribunal organized under the auspices of the Permanent Court of International Arbitration addressed a counterclaims issue was in

115. *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord* [1898] L.R. Ch. 190. Discussed *supra* in text accompanying notes 52-54.

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

117. *Id.* art. 20.

118. 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. SUPP. 43 (1908) [hereinafter cited as the 1907 Hague Convention].

119. *Id.* art. 14.

120. See HUDSON, *supra* note 14, at 1-7.

121. See articles 24, 31-32 of the 1899 Hague Convention, *supra* note 117, and articles 52-53, 73 of the 1907 Hague Convention, *supra* note 119. See also HUDSON, *supra* note 14, at 1-7.

the *Carthage* and *Manouba* cases, for which the *compromis* were silent on the issue of counterclaims.¹²²

2. *International Central American Tribunal (1923)*

In 1923, a decade after the decisions in the *Carthage* and *Manouba* cases, five Central American countries entered into a convention (the Central American Convention) for the establishment of the International Central American Tribunal.¹²³ This Convention adopted, in very large measure, the terms of the 1907 Hague Convention,¹²⁴ which had extended the life of the Permanent Court of Arbitration. Unlike the 1907 Hague Convention, however, the Central American Convention cannot be said to have been silent on the matter of counterclaims. The Convention appears to have addressed the issue of counterclaims when it provided that in an action by one Government against another, "[c]laims or disputes which do not necessarily follow from the principal action, or which do not involve a dispute over the rights of third parties . . . shall not be accepted as incidental questions."¹²⁵ The Central American Convention thus contemplated a rather narrow approach to counterclaims between States.

3. *The United Nations International Law Commission Model Rules on Arbitral Procedure (1958)*

In 1958, the United Nations International Law Commission published its Model Rules on Arbitral Procedure.¹²⁶ Article 19 of the Rules provided that "[i]n 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."¹²⁷ According to the preamble of the Model Rules, this article as well as the rest of the provisions apply to disputes between States.¹²⁸ The preamble also indicates that the Model Rules do not apply to a particular arbitration unless they are accepted by the parties to the arbitration.¹²⁹ The application of article 19 relative to counterclaims therefore seems to

122. See *supra* notes 55-66 and accompanying text.

123. Convention for the Establishment of an International Central American Tribunal, Feb. 7, 1923 (Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica), reprinted in 17 AM. J. INT'L. L. SUPP. 83 (1923) [hereinafter cited as Central American Convention].

124. *Id.* art. XIX(1). Article XIX, "Rules of Arbitral Procedure," provides by virtue of its paragraph 1 for the incorporation of articles 63-84 of the 1907 Hague Convention, *supra* note 118.

125. Central American Convention, *supra* note 123, at Annex B. The Rules of Procedure referred to in paragraph 2 of Article XIX of the Convention for the Establishment of an International Central American Tribunal, art. XIX, *Id.* at 98.

126. *Model Rules on Arbitral Procedure*, 2 Y.B. INT'L L. COMM'N 83 (1958) [hereinafter cited as U.N.M.R.A.P.].

127. *Id.* at 85.

128. Paragraph 1, Preamble to U.N.M.R.A.P. *Id.* at 83.

129. *Id.*

be dependent in the first instance on agreement between the parties to accept the Model Rules as governing the arbitral proceedings. Even then, when the Parties have agreed to the application of the Model Rules as a whole, the applicability of article 19 may still be denied by virtue of a special agreement between the Parties. Such a special agreement can be implied or made explicit in and by the *compromis*.¹³⁰ However, should the Parties be silent as to the applicability of article 19, the Tribunal is empowered to consider counterclaims.¹³¹

B. *Counterclaims in Private International Arbitral Codes*

Credit for the progressive development of rules pertaining to counterclaims in international arbitration must go to international arbitral codes whose purview is not restricted to disputes arising solely between States. These instruments are ones under which at least one Party is a non-State actor.

1. *Permanent Court of International Arbitration's Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One is a State (1962)*

Until 1935, the Permanent Court of International Arbitration (PCIA) continued to lend its good offices for the settlement of disputes between States, a role explicitly delegated to it by article 15 of the 1899 Hague Convention and repeated in article 37 of the 1907 Hague Convention.¹³² The Permanent Court of International Arbitration broke with this tradition in 1935. During an arbitration between the Chinese Government and the Radio Corporation of America, the umpire, Professor von Hamel, asked the Administrative Council of the Permanent Court of International Arbitration to make available to the Tribunal the services of the staff of the Permanent Court.¹³³ In circumventing the apparent intent of article 15 of the 1899 Hague Convention and article 37 of the 1907 Hague Convention, the Council and the International Bureau of the Permanent Court accepted the umpire's request. They interpreted the provisions of articles 26 and 47 of the 1899 and 1907 Conventions as authorizing the Bureau to place its premises and staff at the disposal of the Contracting

130. Article 19 of the U.N.M.R.A.P. provides: "*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.*" See U.N.M.R.A.P., *supra* note 126, at 85 (emphasis added).

131. *Id.*

132. See art. 15 of the 1899 Hague Convention, *supra* note 116; art. 37 of the 1907 Hague Convention, *supra* note 117, at 57 stipulates: "L'arbitrage international a pour objet le reglement de litiges entre les Etats par les Juges de leur choix et sur la base du respect du droit."

133. Permanent Court of Arbitration, Circular Note of the Secretary-General, March 3, 1960, *reprinted in* 54 AM. J. INT'L L. 933, 937 (1960) [hereinafter cited as P.C.A. Circular Note].

Powers for the use of any special arbitral board,¹³⁴ without stipulating expressly that such services be rendered only in cases involving an arbitration between States.¹³⁵ While contrary to the apparent intent of the 1899 and 1907 Conventions, the decision must be applauded as an attempt by the PCIA to keep pace with the nature and increasing number of commercial arbitrations.

Several years later, the Permanent Court's International Bureau announced its readiness to place its premises and staff at the disposal of a Contracting Power for the pacific settlement of international disputes, even if one Party was not a State.¹³⁶ In 1960, the PCIA took yet another step forward in offering itself as a forum to which disputes between "a private person or a foreign commercial corporation" and a sovereign State may be referred without necessitating the espousal of the private party's claim by its own State.¹³⁷ The Secretary General of the Administrative Council accordingly circulated a letter for consideration by the Contracting Powers to the 1899 and 1907 Hague Conventions, stating the Permanent Court's readiness to serve as a forum for the settlement of disputes between a private party and a foreign State.¹³⁸

Subsequently, in February 1962, the Permanent Court's International Bureau published a set of Rules of Arbitration for the settlement of international disputes between a private party and a foreign State.¹³⁹ Article 11 of the Rules relating to counterclaims stated that "[t]he respondent may introduce a counterclaim against the claimant, provided that this counterclaim 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 counterclaim."¹⁴⁰ The application of this provision is dependent in the first instance on the agreement (*compromis*) of the Parties to accept the Rules as governing the arbitral pro-

134. Article 47 of the 1907 Hague Convention, *supra* note 118, at 67 (corresponding to article 26 of the 1899 Hague Convention) provided, *inter alia*: "Le Bureau est autorisé a mettre ses locaux et son organisation a la disposition des Puissances Contractantes pour le fonctionnement de toute juridiction speciale d'arbitrage."

135. See P.C.A. Circular Note, *supra* note 133, at 937.

136. In 1937, for example, the International Bureau of the Permanent Court of Arbitration formally authorized the American Arbitration Association to publish the fact that the Bureau was ready to place its premises and its staff at the disposal of the Contracting Power for the pacific settlement of international disputes, even if one Party was not a State. In turn, the American Arbitration Association informed its membership of the Bureau's decision and recommended to the membership the text of an arbitral clause adopting this approach, approved by the Bureau, to be inserted in the future in contracts with foreign States. *Id.* at 937-38.

137. *Id.* at 937.

138. *Id.*

139. Rules of Arbitration and Conciliation for Settlement of International Disputes between Two Parties of which only One is a State (Bureau International de la Cour Permanente d'Arbitrage, February 1962), *reprinted* in 57 AM. J. INT'L L. 500 (1963) [hereinafter cited as P.C.A./RAC].

140. *Id.* at 503.

ceedings. Even then, however, the parties are allowed to exempt the proceedings from the application of the rule relative to counterclaims. Article 10 of the Permanent Court's Rules clearly provides that any procedural rule, including article 11 on counterclaims, applies only when there is an absence of agreement of the parties to the contrary.¹⁴¹ At any rate, under the heading "procedure", article 11 of the Permanent Court's Rules represents the first attempt at the "codification" of an international law rule of counterclaims in cases involving a private party and a foreign State.

2. *Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965)*¹⁴²

Article 46 of this Convention provides for the treatment of counterclaims and states:

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine only incidental or additional claims as 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 [International Center for the Settlement of Investment Disputes].¹⁴³

This provision was applied in *Benvenuti et Bonfant S.R.L. v. Peoples Republic of the Congo*,¹⁴⁴ where a panel of arbitrators under the auspices of the International Center for the Settlement of Investment Disputes found that the Government of the Congo presented permissible counterclaims. The claimant had entered into a joint venture agreement with the Congolese Government in 1973 for the manufacture of plastic bottles and the construction and operation of a mineral water bottling plant. The equity shares were 40% and 60%, respectively. The claimant later invoked the arbitration provision of its investment agreement, claiming that the respondent Government had promulgated laws rendering the continued operation of the joint venture uneconomic and amounting, in effect, to "creeping" expropriation. The respondent Government counterclaimed, alleging (1) non-payment of import duties, (2) reporting inflated raw materials costs, (3) defects in the construction of the manufacturing facility, (4) design faults in the facility and (5) "moral damages."¹⁴⁵ The tribunal held "that the counterclaim[s] relate[d] directly to

141. Article 10 of the P.C.A./RAC provides: "Unless agreed upon to the contrary by the parties, the rules of procedure contained in the following articles shall be applicable." See P.C.A./RAC, *supra* note 139, at 502.

142. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *entered into force* October 14, 1966, 575 U.N.T.S. No. 159 [hereinafter cited as ICSID Convention].

143. *Id.* at 188.

144. *Benvenuti et Bonfant S.R.L. v. People's Republic of the Congo*, International Center for the Settlement of Investment Disputes Arbitration Tribunal, Award of Aug. 8, 1980, *reprinted in* 21 I.L.M. 740 (1982).

145. *Id.* at paragraph 4.101, at 762-63.

the subject matter of the dispute" and that they therefore were properly within the jurisdiction of the panel.¹⁴⁶

3. *UNCITRAL Arbitration Rules (1976)*

Issued in 1976, the United Nations Commission on International Trade Law Arbitration Rules¹⁴⁷ codifies the procedural permissibility of counterclaims in international arbitrations. Article 19(3) provides:

In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same for the purpose of a set-off.¹⁴⁸

Again, however, it should be observed that the counterclaim or set-off contemplated is a rather narrow one.

4. *Other International Arbitral Codes*

In addition to the instruments enumerated above, it should also be noted that there are a large number of conventions and codes that have been promulgated by various international bodies concerned with the furtherance of international commercial arbitrations. It is not the focus of this commentary to offer a survey of counterclaim rules set out in such instruments,¹⁴⁹ and therefore we refer to just two such instruments as examples. Article 5 of the Rules for the International Chamber of Commerce Court of Arbitration (1975) permits the defendant to make a counterclaim.¹⁵⁰ Similarly, article 26 of the Uniform Rules of Procedure in the Arbitration Courts at the Chamber of Commerce of the Council of Mutual Economic Assistance Countries¹⁵¹ provides for the submission of counterclaims by the respondent.¹⁵²

C. *Summary*

It can be seen that based on both treaty and the practice of interna-

146. *Id.* at paragraph 4.101, p. 763.

147. Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) [issued at the 9th session of the Commission's work on 12 April-7 May, 1976, Doc. No. A/31/17], reprinted in *INTERNATIONAL COMMERCIAL ARBITRATION*, (C. Schmitthoff ed. 1975).

148. *Id.*

149. For an excellent anthology of documents pertaining to international arbitrations, see *INTERNATIONAL COMMERCIAL ARBITRATION*, *supra* note 147. This source is periodically updated to reflect developments in the field.

150. Rules for the International Chamber of Commerce Court of Arbitration, *in force* as of June 1, 1975. Reprinted in *id.*, part IV, D8.

151. *Id.*

152. The Uniform Rules of Procedure in the Arbitration Courts at the Chambers of Commerce of the Council of Mutual Economic Assistance Countries, *done in* Moscow, Feb. 26, 1974. Reprinted in *INTERNATIONAL COMMERCIAL ARBITRATION*, *supra* note 147 at 250.

tional arbitral tribunals (and acquiesced in by States), counterclaims, where not prohibited, are permissible. Where counterclaims are left unmentioned in arbitral agreements, they are allowed by tribunals as a matter of general international jurisprudence.

V. SUBSTANCE OF COUNTERCLAIM RULES

In the previous sections of this commentary, the emergence, progressive development and ultimate acceptance under international law of counterclaims in international arbitration was outlined. While these preceding sections dealt primarily with the procedural admissibility of counterclaims, the present discussion will focus on the substantive rules governing counterclaims in international arbitration. Specifically, three areas will be explored: (1) the development of the "relatedness" criterion; (2) the fate of counterclaims in the event of dismissal, procedurally or on the merits, of a claim; and (3) the rule governing counterclaims in excess of the original claim itself.

A. *The Relatedness Criterion*

Several general principles of international law relating to counterclaims emerge from the conventions, rules of procedure and decisions of international courts and arbitral tribunals. First, in the realm of international adjudication between States, counterclaims are permitted insofar as they relate to the subject of the original claim or come within the jurisdiction of the Court. This conclusion is based on both international conventions¹⁵³ and case law, as acquiesced in by States.¹⁵⁴

Second, in the area of international arbitration, in disputes between States or a State and a private party, tribunals permit counterclaims related to the original claim, unless the parties agree to the contrary in the *compromis*. This is illustrated by the model rules for international arbitration,¹⁵⁵ various conventions,¹⁵⁶ the *compromis*¹⁵⁷ and the discretionary practice of international arbitral tribunals.¹⁵⁸

153. See, e.g., art. 296 of the Treaty of Versailles, *supra* note 69, which the tribunal found dispositive in the case of counterclaims unrelated to the original claim in *The Vandyck Printers Ltd. v. Modeaner Kunst-Belag G.m.b.H. (Great Britain v. Germany)*, 6 Trib. Arb. Mixtes 33 (1926-1927). See also art. 63 of the 1936 Rules of the Permanent Court of International Justice, *supra* note 24, and art. 63 of the Rules of the International Court of Justice, set forth in *supra* note 26.

154. See, e.g., *Chorzow Factory Case, (Germany v. Poland)*, 1928 P.C.I.J. Ser. A, No. 17 at 38 (Judgment of Sept. 13, 1928).

155. See, e.g., article 19, U.N.M.R.A.P., *supra* note 126.

156. See, e.g., art. 11, P.C.A./RAC, *supra* note 139; art. 46, ICSID Convention, *supra* note 142; Claims Settlement Declaration, *supra* note 101.

157. See, e.g., art. 2(1), Claims Settlement Declaration, *supra* note 102.

158. See, e.g., *South African Republican v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1898] L. R. Ch. 190; *The Carthage Case, (France v. Italy)*, Permanent Court of Arbitration, Award of May 6, 1913, reprinted in J. B. SCOTT, *THE HAGUE COURT REPORTS* 330 (2d. Ser. 1916); *The Manouba Case, (France v. Italy)*, Permanent Court of Arbitration,

Third, despite the various contexts in which counterclaim provisions have been formulated, arbitral tribunals have interpreted the related-to-the-original-claim criterion with remarkable unanimity, basing their position invariably on the *compromis* which established each tribunal.¹⁵⁹

Finally, in international arbitration, a procedurally correct counterclaim, that is, one which is deemed by the tribunal to be related to the original claim or which comes within its jurisdiction, is permitted regardless of the status of the party originating the counterclaim. The counterclaim may originate from (1) a private party counter-claimant against a private party claimant;¹⁶⁰ (2) a private party counter-claimant against a claimant State;¹⁶¹ (3) a counter-claimant State against a private party claimant;¹⁶² or (4) a counter-claimant State against a claimant State.¹⁶³ This symmetry relating to the limits placed upon the counterclaim arises from the presumption that the parties are considered by the tribunal to be equal before it and the law,¹⁶⁴ and that injustice would result if counterclaims were not to be considered as potentially admissible.

Thus, there exist general rules of international law governing counterclaims in international judicial and arbitral proceedings. These rules provide that a counterclaim is permissible only when it arises out of the same subject matter as that involved in the principal claim.

Award of May 6, 1912, reprinted in J. B. SCOTT, *THE HAGUE COURT REPORTS* 330 (2d. Ser. 1916); *The Empire Transport Co., Ltd. v. Bd. Blumenfeld* (Great Britain v. Germany), 4 Trib. Arb. Mixtes 205 (1924-1925); *The Beeley Wood Steel Co., Ltd. v. Franz & Massmann* (Great Britain v. Germany), 8 Trib. Arb. Mixtes 289 (1928-1929).

159. See cases cited in *supra* note 158.

160. See, e.g., *The Empire Transport Co., Ltd. v. Bd. Blumenfeld* (Great Britain v. Germany), 4 Trib. Arb. Mixtes 205 (1924-1925); *Nitrogen Fertilizers Ltd. v. Verkaufe Vereinigung fuer Stickstoffsdunger G.m.b.H.* (Great Britain v. Germany), 5 Trib. Arb. Mixtes 648 (1926); *The Beeley Wood Steel Co. Ltd. v. Franz & Massmann* (Great Britain v. Germany), 8 Trib. Arb. Mixtes 289 (1928-1929) *Morgan & Co. v. W.H. Chaplin & Co. Ltd.* (Great Britain v. Germany), 6 Trib. Arb. Mixtes 43 (1926-1927). See also, *T.C.S.B., Inc. v. Islamic Republic of Iran*, March 16, 1984, Case No. 140, Chamber 2, at 23-24.

161. See, e.g., *The Empire Transport Co., Ltd.*, 4 Trib. Arb. Mixtes 205; *Nitrogen Fertilizers Ltd.*, 5 Trib. Arb. Mixtes 648; *Morgan & Co.*, 6 Trib. Arb. Mixtes 43; *The Beeley Wood Steel Co. Ltd.*; 8 Trib. Arb. Mixtes 289.

162. See, e.g., *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, *supra* note 52.

163. See, e.g., *Ernest Epstein v. German Government* (Great Britain v. Germany), 6 Trib. Arb. Mixtes 19 (1926-1927); *Benvenuti et Bonfant v. People's Republic of the Congo*, International Center for the Settlement of Investment Disputes Arbitration Tribunal, Award of Aug. 8, 1980, reprinted in 21 I.L.M. 740 (1982); *T.C.S.B., Inc. v. Islamic Republic of Iran*, March 16, 1984, Case No. 140, Chamber 2, at 23-24; *American Bell International, Inc. v. Islamic Republic of Iran*, June 11, 1984, Case No. 48, Chamber 3, *IRAN-U.S. CLAIMS TRIB. REP.* (1984).

164 See, e.g., *Charles Duke of Brunswick v. The King of Hanover*, 6 Bevan 1, 37, 38 [1844]; *The Carthage Case* (France v. Italy), Permanent Court of Arbitration, Award of May 6, 1913, reprinted in J. B. SCOTT, *THE HAGUE COURT REPORTS* 330 (2d. ser. 1916); *The Manouba Case* (France v. Italy), Permanent Court of Arbitration, Award of May 6, 1912, reprinted in J. B. SCOTT, *THE HAGUE COURT REPORTS* 330 (2d. ser. 1916).

B. *Dismissed Claims and Counterclaims*

The basic question raised here is: What procedure, if any, is available to the counterclaiming party to pursue a counterclaim which has been disallowed by the arbitral tribunal on the ground of not relating to the original claim or not coming within the jurisdiction of the tribunal? Insofar as the procedure of the World Court is concerned, the prosecution of a dismissed counterclaim in international adjudication is straightforward, and is effected by means of an application to the Court for a new action. Article 63 of the 1936 Rules of the PCIJ¹⁶⁵ and articles 63 of the 1946 and 80 of the 1978 Rules of the International Court of Justice¹⁶⁶ provide that a State's dismissed counterclaim may form the subject-matter of a separate application (claim). In both cases, the Court reserved the right to treat the counterclaim separately or to join it to the original proceedings.¹⁶⁷ Although procedurally permissible, no case before the World Court has been discovered where a respondent State has undertaken to institute a separate application containing the subject matter of an already dismissed counterclaim.

In the realm of international arbitration, however, the rules governing counterclaims are silent as to the future of a dismissed or impermissible counterclaim.¹⁶⁸ An interesting permutation arose in *T.C.S.B.*,¹⁶⁹ where the plaintiff's fourth claim against the Government of Iran was dismissed. Iran nevertheless pressed a related counterclaim. The *compromis* was silent on the issue of whether a counterclaim may exist independently of the original claim. The Tribunal held that since it had dismissed the claim, the counterclaim "must also be dismissed for lack of jurisdiction."¹⁷⁰

The *T.C.S.B.* panel did not indicate which rule of international law it applied in dismissing the counterclaim related to the original claim. It appears that the panel construed its own jurisdiction and power to determine what the pertinent rule of international law is or should be. The rule "no claim, therefore no counterclaim" is one which may prove to be an invaluable tactical weapon in the hands of a claimant faced with the prospects of a troublesome counterclaim.

165. See *supra* note 24.

166. See *supra* notes 26, 30.

167. *Id.* See *supra* notes 24, 26, 30.

168. See, e.g., U.N.M.R.A.P., *supra* note 126; P.C.A./RAC, *supra* note 139; ICSID Convention, *supra* note 142.

169. *T.C.S.B., Inc. v. Islamic Republic of Iran*, March 16, 1984, Case No. 140, Chamber 2, at 23-24.

170. *Id.* at 24. The Tribunal stated: "The [respondent] has . . . counterclaimed for damages arising from TCSB's alleged failure to perform its contractual obligations under the . . . contract. Since the Full Tribunal has dismissed the claimant's claim based on the . . . contract . . . , the counterclaim . . . must also be dismissed for lack of jurisdiction." *Id.* Accord *Reliance Group Inc. v. National Iranian Oil Co., Iran-U.S. Claims Trib.*, decision of Dec. 9, 1982, Case No. 90, Chamber 2, 1 IRAN-U.S. CLAIMS TRIB. REP. 284, 285 (Award) (1983).

The Iran-U.S. Claims Tribunal recently was presented with a request by Continental Illinois National Bank to withdraw its claim against Iran, thereby depriving the Tribunal of jurisdiction to entertain Iran's counterclaims, which had not as yet been filed by the defendant.¹⁷¹ As of the time of this writing, the Tribunal had not rendered a decision with respect to the plaintiff's request and the fate of Iran's counterclaims.

C. Counterclaims in Excess of the Original Claim

One difficult problem in the international law governing counterclaims is whether an otherwise permissible counterclaim may exceed the amount of the original claim. There is no doubt that a counterclaim may be less than or equal to the amount awarded for the original claim,¹⁷² barring any provision of the *compromis* to the contrary. However, the situation where the counterclaim exceeds the original claim is analogous to the case where the original claim is dismissed or withdrawn;¹⁷³ that is, the original claim is legally "wiped out" by virtue of the award for the counterclaim and the excess of the counterclaim has an independent legal existence. There is a paucity of cases and literature on this issue.¹⁷⁴ There appears to be no international judicial or arbitral case where the forum has granted an award for a counterclaim exceeding the claim itself. The issue was raised recently, however, in *American Bell International*.¹⁷⁵

As discussed above, American Bell brought a \$63.8 million claim before the Iran-U.S. Claims Tribunal for its services, equipment and other expenses arising out of the performance of two contracts in Iran. Iran filed seven counterclaims exceeding \$285 million against the plaintiff and its parent, American Telephone & Telegraph, for a variety of alleged contractual breaches and violations of Iranian law. The Tribunal held in an interlocutory award that Iran could not counterclaim against AT&T but that it could counterclaim against ABI, AT&T's successor in interest,

171. *Continental Illinois National Bank and Trust Co. v. Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Case No. 252, Chamber 3, Order of Oct. 21, 1982, 1 IRAN-U.S. CLAIMS TRIB. REP. 232 (1983). For a discussion of the international rules governing the withdrawal of a claim where a counterclaim has not been filed. See *id.* (dissenting opinion of Judge Mosk, at 232-233).

172. See Dickinson, *Waiver of State Immunity*, 19 AM. J. INT'L L. SUPP. 555, 556 (1925) and sources cited therein.

173. This is not a settled area of international law. For instance, in *Gould Marketing, Inc. v. Ministry of National Defense of Iran*, decision of July 27, 1983, Case No. 49, Chamber 2, 3 IRAN-U.S. CLAIMS TRIB. REP. 147 (interlocutory award) (1984), the claimant objected to the Ministry of Defense's \$40 million counterclaim, which was far in excess of its \$5 million original claim, as an affirmative award against it, in violation of the Claims Settlement Declaration *supra* note 101. 3 IRAN-U.S. CLAIMS TRIB. REP. at 151. The Tribunal rejected this theory stating that there is "no support for [the claimant's contention that the jurisdictional bar on direct claims comprehends a bar on affirmative counterclaims." *Id.* at 152. For a discussion of this case, see *infra* notes 177-185 and accompanying text.

174. See *supra* note 172 and accompanying text.

175. *American Bell International v. Islamic Republic of Iran*, June 11, 1984, Case No. 48, Chamber 3, 3 IRAN-U.S. CLAIMS TRIB. REP. (1984).

for breach of contract.¹⁷⁶ No decision has yet been made on the merits of Iran's counterclaims or on the procedural admissibility of the \$221.1 million excess between the original claim and the counterclaim.

Similarly, in *Gould Marketing, Inc. v. Ministry of National Defense*,¹⁷⁷ a claim was filed for \$5 million relating to various alleged breaches of contract for the delivery and maintenance of radio equipment. The Defense Ministry filed a counterclaim for over \$40 million.¹⁷⁸ The claimant objected "to the Tribunal's jurisdiction over the counterclaim to the extent it sought relief in excess of the amount claimed on the theory that the Tribunal lacks power to issue affirmative awards against United States nationals."¹⁷⁹ The Tribunal rejected the claimant's objection to subject matter jurisdiction in an interlocutory award as the claim fell "within the requirements" of article 2(1) of the Declaration of Algiers, "even if it exceeds the amount of the claim."¹⁸⁰

In the final award, the Tribunal dismissed the counterclaims on the merits.¹⁸¹ In an unexpected move, however, the Tribunal ordered the claimant to pay \$3.6 million to the Defense Ministry. The award was for repayment of sums paid in advance under the contracts but never performed by the claimant. The Tribunal applied California law (as specified in the contracts) "to equitably allocate" the costs of the contract as far as it was performed.¹⁸² The Tribunal applied equitable principles as a matter of American municipal law to make an affirmative award in favor of Iran while dismissing counterclaims which amounted to separate claims. Thus, the award did not involve the issue of counterclaims in excess of the original claim.

This holding at first seems to cast doubt on the proposition that arbitral tribunals do not grant awards on counterclaims in excess of the original claim. There are two distinctions, however, which may serve to explain the Tribunal's actions. First, the claimant may have made a tactical error by characterizing the amount of the counterclaim in excess of the original claim as an "affirmative award . . . against United States nationals"¹⁸³ and, therefore, outside of the Tribunal's jurisdiction.¹⁸⁴ The Tribu-

176. *Id.* at 17.

177. *Gould Marketing, Inc. v. Ministry of National Defense*, Case No. 49, Chamber 2, 3 IRAN-U.S. CLAIMS TRIB. REP. 147.

178. *Id.* at 151-52.

179. *Id.* at 151. Under the construction given to art. 2(1) of the Claims Settlement Declaration in the Case Concerning the Jurisdiction of the Tribunal with Respect to Claims by the Islamic Republic of Iran Against Nationals of the United States of America, *supra* note 102, the Tribunal held that it has "no jurisdiction over claims" filed by the Government of Iran against nationals of the United States. IRAN-U.S. CLAIMS TRIB. REP. at 101. Thus, Iran may appear only as a respondent before the Tribunal.

180. 3 IRAN-U.S. CLAIMS TRIB. REP. at 151.

181. *Id.* at 151.

182. *Id.*

183. *See supra* note 173.

184. 3 IRAN-U.S. CLAIMS TRIB. REP. at 152.

nal correctly observed in response that its jurisdiction rests on article 2(1) of the Declaration of Algiers, as the "counterclaims arise directly out of the contract which constitutes the subject matter of [the] claim."¹⁸⁵ Perhaps the better approach would have been to focus on the claim and to argue that the original claim ceases to exist under international law once the counterclaim exceeds the original claim. Thus, under the reasoning of the Tribunal's holding in *T.C.S.B.*,¹⁸⁶ without a claim there can be no counterclaim.

The second alternative is for the Tribunal to consider the merits of the counterclaim, but to restrict any award on the counterclaim to the actual award, if any, made on the original claim. This would be a practical approach and yet one which adheres to the principle of no counterclaim in excess of the original claim. Because of the unsettled nature of the issue, however, analogy to municipal legal principles may be helpful.

VI. U.S. LAW AS A POSSIBLE SOURCE OF ANALOGY

Limited discussion of the legal status of counterclaims which exceed the amount of the original claim can be found in United States municipal law.¹⁸⁷ However, international tribunals may be able to draw the necessary legal principles from municipal law which can be applied by analogy in the international context. It is not uncommon for international tribunals to look to municipal law for a legal principle which might be incorporated into the proceedings of an international dispute. For instance, in *The Island of Palmas Case*,¹⁸⁸ between the United States and The Netherlands, the sole arbitrator referred to the decisions of the Supreme Court of the United States to sustain the view that prescription founded on length of time constitutes a valid and incontestable title to territory.¹⁸⁹

The analogy to municipal law, however, should be undertaken with some care. In the *Case of the S.S. "Lotus"*,¹⁹⁰ the Permanent Court of International Justice observed that "the courts of many countries"¹⁹¹ allowed limited extraterritorial application of municipal criminal law. In

185. *Id.*

186. See *T.C.S.B., Inc. v. Islamic Republic of Iran*, March 16, 1984, Case No. 140, Chamber 2, at 23-24.

187. In American judicial practice the issue of counterclaims in excess of the original claim repeatedly has been held to limit the amount of the counterclaim up to the amount of the original claim. See *infra* notes 247-258 and accompanying text.

188. *The Island of Palmas Case (U.S. v. The Netherlands)*, Permanent Court of Arbitration, Award of April 4, 1928, 2 U.N.R.I.A.A. 831.

189. *Id.* at 840. The arbitrator observed: It may suffice to quote among several non-dissimilar decisions of the Supreme Court of the United States of America that in the case of *the State of Indiana v. State of Kentucky*, 136 U.S. 479 (1890), where the precedent of the case of *Rhode Island v. Massachusetts*, 45 U.S. [4 How.] 591, 639 (1846), is supported by quotations from Vattel and Wheaton, who both admitted prescriptions founded on length of time as a valid and incontestable title. *Id.*

190. [1927] P.C.I.J. Ser. A/B, No. 9/10 (*France v. Turkey*).

191. *Id.* at 23.

that case, both France and Turkey cited numerous municipal court decisions to support conflicting legal principles on the extraterritorial extension of municipal criminal law. The Court concluded that "[w]ithout pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law, it will suffice to observe that the decisions quoted sometimes support one view and sometimes the other."¹⁹² Thus, reference by an international court or arbitral tribunal to a municipal law analogy should be in an area where there is general agreement.

This would seem to have been the case in the *Trail Smelter Arbitration*,¹⁹³ between the United States and Canada, that involved large amounts of pollutants crossing the border between Canada and the United States and despoiling certain farms in the state of Washington. The arbitrators referred, *inter alia*, to the decision of the United States Supreme Court on the issue of interstate riparian pollution in order to ascertain a general principle of law applicable by analogy to cases involving international air pollution.¹⁹⁴

A. *The Relatedness Criterion*

The rule in the United States federal courts and in most states within the United States¹⁹⁵ is that a defendant may assert a counterclaim if it arises out of the same contract from which the plaintiff's rights flow.¹⁹⁶ This approach was adopted in section 9-318 of the Uniform Commercial Code (UCC) and has received wide acceptance in the U.S.¹⁹⁷ The UCC provides that the plaintiff's rights are subject to a counterclaim if the subject matter of the counterclaim arises from the original claim between the plaintiff and defendant.¹⁹⁸ The UCC bars counterclaims ex-

192. *Id.* at 28.

193. *Trail Smelter Arbitration (U.S. v. Can.)*, Canada-United State Trail Smelter Arb. Trib., decision of 1941, *reprinted in* 3 U.N.R.I.A.A. 1938.

194. *Id.* at 1963-65. Among the cases cited with approval by the Tribunal were *Kansas v. Colorado*, 185 U.S. 125 (1902); *Missouri v. Illinois*, 200 U.S. 496 (1906); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1906); *Georgia v. Tennessee Copper Co. and Ducktown Sulphur, Cooper and Iron Co., Ltd.*, 237 U.S. 474 (1915); *New York v. New Jersey and Paaic Valley Sewerage Commissioners*, 256 U.S. 296 (1921).

195. The right to counterclaim is based on statute and varies by jurisdiction. S. WILLISTON & G. THOMPSON, *SELECTIONS FROM WILLISTON'S TREATISES ON THE LAW OF CONTRACTS* § 432 (Rev. ed. 1938) [hereinafter cited as WILLISTON].

196. 4 CORBIN, *supra* note 1, at 896. *Cf.* Rule 13 of the Federal Rules of Civil Procedure (permitting liberal joinder of counterclaims).

197. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* 18-19 (2d ed. 1977) [hereinafter cited as CALAMARI & PERILLO].

198. *See* Uniform Commercial Code § 9-318. *See also*, *RESTATEMENT OF CONTRACTS*, which provides:

§ 336. Defenses Against an Assignee.

(1) By an assignment the assignee acquired a right against the obligor only to the extent that the obligor is under a duty to the assignor;

(2) The right of an assignee is subject to any defense or claim of the obligor which accrues before the obligor receives notification of the assignment, but

ceeding the damages awarded in the original claim.¹⁹⁹ With regard to claims involving a foreign sovereign,²⁰⁰ U.S. federal case law allows a plaintiff to press a claim on its merits while barring a foreign respondent Government from maintaining a counterclaim unrelated to the applicant's claim, and barring an American defendant from raising counterclaims unrelated to the applicant-Government's claim.²⁰¹

The modern American municipal position can be traced to three British cases which established the principle that only counterclaims stemming from the "same transaction" may be asserted against a foreign sovereign plaintiff.²⁰² In *High Commissioner for India v. Gosh*,²⁰³ the Indian High Commissioner and the Indian Government brought suit to collect a debt. The defendant counterclaimed for damages stemming from an alleged slander. The British court held that by bringing the suit on the debt the plaintiffs had submitted to the court's jurisdiction *only* on this action, including any reasonable counterclaim connected to the claim. It dismissed the counterclaim²⁰⁴ on the ground that it was unrelated to the

not to defenses or claims which accrue thereafter.

RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 336 (1981).

199. CALAMARI & PERILLO, *supra* note 197, at 17-18. Further, the award for counterclaims may not exceed the judgment granted for the original claim. *See, e.g.*, *Republic of China v. Pang-Tsu Mow*, 105 F. Supp. 411 (D.D.C. 1952); *Hungarian People's Republic v. Cecil Associates, Inc.*, 118 F. Supp. 954 (S.D.N.Y. 1953) (discussed *infra* at notes 252-253).

200. The issue of sovereign immunity and the act of state doctrine have become hopelessly intertwined with the American municipal law rules governing counterclaims. *See generally* Looper, *Counterclaims Against a Foreign Sovereign Plaintiff*, 50 AM. J. INT'L L. 647 (1956). This was evident in *National City Bank v. Republic of China*, 348 U.S. 356, 361 (1955), *discussed infra* at notes 213-216, where the Court stated:

The short of the matter is that we are not dealing with an attempt to bring a recognized foreign government into one of our courts as a defendant and subject it to the rule of law to which a non-governmental obligor must bow. We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. . . . It becomes vital, therefore, to examine the extent to which considerations which led this court to bar a suit against a sovereign in *The Schooner Exchange* are applicable here to foreclose a court from determining. . . whether the Republic of China's claim against the National City Bank would be unjustly enforced by disregarding legitimate claims against the Republic of China.

Id. at 361-62. This rule was recently restated in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 459 U.S. 942, 103 S. Ct. 253, 74 L.Ed.2d 198 (1983). *See also* RESTATEMENT, *supra* note 5, at 70.

201. *See, e.g.*, Looper, *supra* note 200.

202. *See generally* *Strousberg v. Republic of Costa Rica*, 44 L.T.R. (N.S.) 199 (C.A. 1881); *South African Republic v. La Compagnie Franco-Belge de Chemin de Fer du Nord*, [1898] 1 Ch. 190, *discussed supra* at notes 37-39; *Union of Soviet Socialist Republics v. Belaiew*, 42 T.L.R. 21 (K.B. Div. 1925). *See also* *Duke of Brunswick v. King of Hanover*, 6 Beav. 68, *discussed supra* at notes 54-55. For an early American formulation of the rule regarding counterclaims, see Justice Washington's circuit opinion in *King of Spain v. Oliver*, 14 F. Cas. 572 (C.C.D. Pa. 1816) (No. 78130).

203. [1959] 3 All. E.R. 659; 3 W.L.R. 811.

204. *Id.*

original claim.²⁰⁵

It appears that the reciprocal rule, that a foreign State respondent may bring a counterclaim relating to the original claim or transaction against a private party plaintiff, seems to have emerged as a matter of equity.²⁰⁶ The rule governing counterclaims against a foreign sovereign claimant was expressed in article 5 of the Harvard Research on the Competence of Courts in Regard to Foreign States,²⁰⁷ which provides that: "[a] complainant State, by instituting a proceeding in a court of another State, submits to the jurisdiction of that court in respect of a direct counterclaim . . . arising out of the facts or transactions upon which a complainant's claim is based."²⁰⁸

The trend in U.S. municipal courts has been to broaden slightly the "same transaction" rule of the older British cases into the modern "same claim" rule.²⁰⁹ This change appears to have resulted from the growing complexity of international business transactions and a recognition that equity would not be served by narrowly interpreting permissible counterclaims. This trend towards liberalization was evident in *United States v. National City Bank of New York*,²¹⁰ in which the federal Government, as assignee of the Soviet Government under the Litvinov Assignment, brought suit for funds held by National City Bank.²¹¹ The respondent bank counterclaimed for delinquent Russian Government treasury notes. The Second Circuit found for the bank, stating that the same transaction could include an ongoing course of dealings related to the subject matter of the claim.²¹²

This trend in the federal courts peaked in 1955 with the Supreme Court's decision in *National City Bank of New York v. Republic of China*.²¹³ This case involved a claim for \$200,000 held on account in New York for the Shanghai-Nanking Railway Administration, an agency of the

205. *Id.*

206. This appears to be the practice in federal courts, despite the permissiveness of Federal Rule of Civil Procedure 13(b).

207. Harvard Research, *supra* note 27, at 451.

208. *Id.* at 508.

209. Looper, *supra* note 200, at 649; *see also* the cases cited in *supra* note 202.

210. 83 F. 2d 236, 237 (2d Cir. 1936).

211. The funds, amounting to \$115,000, were deposited in December 1917 with Bankers Trust Co. of New York. A dispute arose as to the proper payee of the funds. To protect itself, Bankers Trust deposited the funds with National City Bank. The Russian Government brought suit in 1925 to compel the release of the funds then held by National City Bank. National City Bank counterclaimed for certain defaulted Russian treasury notes. The district court allowed the counterclaim and the bank prevailed. The Russian Government appealed but, before the case was decided, the United States Government became the assignee of the claim on November 16, 1933 under the Litvinov Assignment. The federal government then brought suit against National City Bank. *Id.* at 237.

212. The court stated that "[c]laims arising out of the same transaction may be set-off against the sovereign. The same transaction does not necessarily mean occurring at the same time." 83 F.2d at 239.

213. 108 F. Supp. 766 (S.D.N.Y. 1952).

Chinese Government. National City Bank counterclaimed for \$1.6 million on the claimant's defaulted treasury notes. The district court, applying the "same transaction" standard, dismissed the counterclaims because they were not based on the subject matter of the suit.²¹⁴ The Second Circuit affirmed,²¹⁵ although the bank indicated its willingness to use the counterclaims only to the extent of the judgment awarded to the respondent and to not seek affirmative relief. The Supreme Court reversed, holding that "the limitation of 'based on the subject matter' is too indeterminate, indeed too capricious, to mark the bounds of the limitations."²¹⁶

Similarly, the *Banco Nacional de Cuba v. The First National City Bank of New York* case²¹⁷ may be said to have broadened the criterion as to what constitutes a counterclaim related to the original claim. Initially, an action was brought by Banco Nacional de Cuba, the financial agency of the Cuban Government, to recover funds held by the First National City Bank of New York (Citibank), comprising \$1,810,880.51. This sum represented the excess realized on the sale of certain collateral held by Citibank as security for a loan to a corporation owned by the Cuban Government. Also involved was \$33,812.93 in accounts maintained by Cuban banks at Citibank. The defendant filed a counterclaim to set-off against the proceeds an amount up to the value of its Cuban properties expropriated by the Cuban Government.

The plaintiff sought to bar the defendant's counterclaim by invoking the doctrines of sovereign immunity and act of state. The district court dismissed the plaintiff's defense against the counterclaim. Judge Bryan reasoned that Citibank was entitled to set-off against the plaintiff's claim and to recover the excess funds as compensation for the seized Citibank branches in Cuba.²¹⁸

The Second Circuit reversed,²¹⁹ with Chief Judge Lumbard observing that by its counterclaim, Citibank was seeking in effect "something more"

214. *Id.* at 767.

215. *Republic of China et.al. v. National City Bank of New York*, 208 F.2d 627 (2d Cir. 1953).

216. *National City Bank of New York v. Republic of China*, 348 U.S. at 364. The Court continued:

There is great diversity among courts on what is and what is not a claim "based on the subject matter of the suit" or "growing out of the same transaction." No doubt the present counterclaims cannot fairly be deemed to be related to the Railway Agency's deposit of funds except insofar as the transactions between the Republic of China and the petitioner may be regarded as aspects of a continuous business relationship. The point is that the ultimate thrust of the consideration of fair dealing which allows a setoff or counterclaim based on the same subject matter reaches the present situation.

Id. at 364-65.

217. 270 F. Supp. 1004 (S.D.N.Y. 1967)

218. *Id.*

219. *Banco Nacional de Cuba v. The First National City Bank of New York*, 431 F.2d 394 (2d. Cir. 1970).

than just a dollar-for-dollar relief on the loan transaction.²²⁰ The court held that Citibank should not have been allowed to recover on its counterclaim for its expropriated Cuban properties.²²¹ On appeal, the Supreme Court remanded the case without opinion for consideration in light of a brief filed by the Department of State.²²² On remand, the Second Circuit affirmed its original decision.²²³

The State Department intervention, known as the Stevenson letter, stated *inter alia* that (1) the act of state doctrine need not be applied when it is raised to bar adjudication of a counterclaim or set-off, and (2) the amount of relief sought is limited to the amount of the foreign State's claim.²²⁴ Nevertheless, the Second Circuit declined to find in Citibank's favor by allowing it to set-off Banco Nacional's claim against its confiscated Cuban properties.²²⁵

Citibank again appealed and this time the Supreme Court reversed the Second Circuit.²²⁶ Justice Douglas' concurring opinion illustrates the liberal interpretation accorded the "same transaction" rule. He observed that:

[i]t would also offend our sensibilities if Cuba could collect the amount owed on liquidation of the collateral for the loan and not be required to account for any setoff. To allow recovery without more would permit Cuba to have her cake and eat it too. Fair dealing requires allowance of the setoff to the amount of the claim on which this suit is brought.²²⁷

Some commentators have lauded *Republic of China*²²⁸ as sounding the death knell for a narrow interpretation of the "same transaction" rule and signaling the shift to a broader "same claim" standard.²²⁹ Looper argues that *Republic of China* eliminated the principle that counterclaims in federal courts must be tied to the original claim.²³⁰ In one of the *Cuban Cigar* cases,²³¹ the Second Circuit observed that, "[t]he counterclaim

220. 431 F.2d 394, 404 (2d. Cir. 1970).

221. *Id.*

222. 400 U.S. at 1019.

223. 442 F.2d 530 (2d Cir. 1971).

224. *Id.* at 536. The "Stevenson Letter" stipulated, *inter alia*, that "the act of state doctrine need not be applied when it is raised to bar adjudication of a counter claim or set-off," and that the amount of relief to be granted is limited to the amount of the foreign state's claim." For the full text of the "Stevenson Letter," see 10 I.L.M. 89 (1971).

225. *Id.* at 533-34.

226. *First National City Bank of New York v. Banco Nacional de Cuba*, 406 U.S. 759 (1971).

227. *Id.* at 772.

228. 348 U.S. 356.

229. See, e.g., Looper, *supra* note 200.

230. *Id.* at 650-51.

231. On September 15th, 1960 the Cuban Government expropriated the business and assets of the five leading manufacturers of high grade Havana cigars and placed interventors in charge of these enterprises. The interventors, acting on behalf of the Cuban Government, continued to manufacture and export the cigars to the U.S. under trademarks belonging to the confiscated firms. The three importers (Faber, Coe, & Gregg; Alfred Dunhill of London;

here, unlike that in *First National City Bank*, arises out of a course of dealing with respect to the same parties or their successors. Indeed, the equities here balance much more heavily in favor of the importers than in the *First National City Bank* case where the counterclaim arose out of a wholly unrelated factual context."²³² It is thus evident that federal courts may abandon the "same transaction" rule in favor of a somewhat broader "same claim" standard when equity is perceived as requiring it. Looper's criticism, however, cannot stand in the light of this interpretation. *Republic of China* and its progeny stand for nothing more than a recognition that international business transactions are complicated (both by their nature and the politics which are inevitably involved), and that equity requires that federal courts examine the context in which claims and counterclaims arise.²³³ This was recently demonstrated by the Second Circuit in *Banco Nacional de Cuba v. Chase Manhattan Bank*.²³⁴ Banco Nacional brought suit to recover \$9,794,000 from Chase Manhattan for funds on deposit with Chase as collateral at the time of the Cuban revolution.²³⁵ Chase Manhattan did not dispute the validity of Banco Nacional's claims. Rather, Chase asserted two sets of counterclaims: first, in its own right, the bank sought damages for the expropriation of its four Cuban branches and, second, as trustee for certain U.S. railroad interests, whose leased equipment was nationalized.²³⁶ The court held that Chase could maintain its first set of counterclaims because they were closely enough

and Saks & Co.) accepted and retained the cigars shipped by the intervenors but did not pay the intervenors for most of the cigars received after September 15th. The majority of shareholders of the five firms had fled to the United States. They initiated nine actions in the U.S. district court against the various importers seeking (1) to enjoin the defendants from infringing plaintiffs' U.S. trademarks or paying anyone for products so marked; (2) to obtain an accounting, damages and any money found to be owing to plaintiffs; and (3) to recover the purchase price of cigars bearing trademarks shipped from their factories in Cuba. Upon commencement of the actions, the intervenors brought an action to enjoin prosecution of the actions and to substitute the intervenors' counsel for the original plaintiffs' counsel. Thus began a prolonged three-way battle between the owners, intervenors and importers. Among the many issues raised in the Cuban Cigar Cases was the question of counterclaims and set-offs relative to monies paid by the parties for pre- and post-intervention shipments. See *F. Palacio y Compania, S.A. v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966); *Menendez v. Faber, Coe & Gregg, Inc.*, 345 F. Supp. 527 (S.D.N.Y. 1972); *Menendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 96 S.Ct. (1976).

232. *Menendez v. Saks & Co.*, 485 F.2d 1373-74.

233. See *supra* note 216.

234. *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981).

235. *Id.* at 879.

236. Banco Nacional argued that the act of state doctrine barred the court from adjudicating the counterclaim. The district court held that under *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1971), the act of state doctrine did not bar the counterclaim. See also *National City Bank v. Republic of China*, 348 U.S. 356, where the Court ruled that when a foreign sovereign asserts a claim in a U.S. court, "the consideration of fair dealing" bars the state from asserting a defense of sovereign immunity to defeat a setoff or counterclaim. *Id.* at 365. This was recently reaffirmed in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

related to the plaintiff's original claim in that they arose out of Chase's course of dealings with Banco Nacional. Chase was barred from asserting the second set of counterclaims as trustee. The court noted that "a defendant may counterclaim only in the capacity in which he has been sued."²³⁷ Since the counterclaims on behalf of the railroad interests were presented by the bank as trustee, they rightfully were rejected as independent claims.²³⁸

A similar result was reached in *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*²³⁹ Banco Nacional brought suit to recover certain sums it had deposited with Chemical Bank in New York. Banco Nacional also sought to recover sums deposited by private Cuban banks with the Chemical Bank, Manufacturers Hanover Trust Co. and Irving Trust Co.; Banco Nacional claimed to be the successor in interest to the private banks, which were nationalized by the Cuban Government.

The defendant banks counterclaimed on the ground that the Cuban Electric Company, a Florida corporation nationalized by the Cuban Government in 1960, owed them sums in excess of Banco Nacional's claims and for which it stood liable as the Cuban Government's alter ego.

The Second Circuit remanded the case for a determination of the justiciability of the counterclaims. It indicated, however, that it would bar the counterclaims against Banco Nacional for the sum deposited with Chemical Bank in its own name as Banco Nacional was shown not to have played a role in the nationalization of Cuban Electric.²⁴⁰ The court found, however, that since Banco Nacional represented the Cuban Government, which owned the funds on deposit from the now-nationalized Cuban banks, the counterclaims would be allowed.²⁴¹

The rule emerging from the practice of federal courts with respect to assignees is that counterclaims will be allowed only if they relate to the original claim. The equitable shift away from the "same transaction" standard to a broader "same claim" rule should not be overly emphasized. The "same transaction" standard has withstood the test of time, while the "same claim" rule is invoked only when equity knocks at the court's door.

237. 658 F.2d at 886.

238. *Id.* The Court also took the opportunity to formulate a "phenomenological rule" to determine whether claims should be barred by the act of state doctrine:

[W]here (1) the Executive Branch has provided a Bernstein letter advising the courts that it believe [sic] act of state doctrine need not be applied, (2) there is no showing that an adjudication of the claim will interfere with delicate foreign relations, and (3) the claim against the foreign sovereign is asserted by way of counterclaim and does not exceed the value of the sovereign's claim, adjudication of the counterclaim for expropriation of the defendant's property is not barred by the act of state doctrine.

Id. at 884. Thus, Chase was permitted to maintain its first set of counterclaims.

239. 658 F.2d 903 (2d Cir. 1981).

240. *Id.* at 910.

241. *Id.* at 910-11.

B. Counterclaims Without an Original Claim

As noted in the discussion above of *T.C.S.B.*, the Iran-U.S. Claims Tribunal dismissed Iran's related counterclaim for want of jurisdiction because the panel had dismissed the plaintiff's original claim.²⁴² This position is in accord with federal law, which holds that without a claim there can be no counterclaim.²⁴³ In *First National Bank of Boston (International) v. Banco Nacional de Cuba*,²⁴⁴ the Second Circuit allowed the respondent Banco Nacional to maintain a counterclaim against an assignee based on a right of action against the assignor. Boston's wholly-owned subsidiary, BBI, was Boston's assignee and successor in interest.²⁴⁵ On appeal, BBI's claims were dismissed; nevertheless, Banco Nacional attempted to pursue its counterclaim. The court held that since no claims were allowed, the counterclaims must be dismissed.²⁴⁶

C. Counterclaims in Excess of the Original Claim

As discussed earlier in *American Bell International*,²⁴⁷ the U.S.-Iran Claims Tribunal was confronted with seven counterclaims by Iran which exceeded by some \$122 million the amount of the original claim. An interlocutory award has been made in the case;²⁴⁸ however, no decision has been reached as to the permissibility of the counterclaims, including the issue of whether a counterclaim in excess of the original claim would be allowed. The rule in federal courts is that the amount of the counterclaim against a State by a private party may not exceed the original claim or the judgment awarded on the original claim.²⁴⁹ If the Iran-U.S. Claims Tribunal follows precedent based on U.S. law, it should refuse to permit Iran's counterclaim insofar as it exceeds ABI's original claim.

In *Republic of China v. Pang-Tsu Mow*,²⁵⁰ the respondent filed counterclaims in excess of the Chinese Government's original claim. The district court held that the plaintiff was subject to counterclaims "to the extent that it affords recoupment against . . . [the plaintiff], but not beyond the point where affirmative relief is to be granted."²⁵¹ Similarly, in *Hungarian People's Republic v. Cecil Associates, Inc.*,²⁵² a federal district

242. *T.C.S.B., Inc. v. Islamic Republic of Iran*, March 16, 1984, Case No. 140, Chamber 2, IRAN-U.S. CLAIMS TRIB. REP. (1984).

243. See *supra* note 170.

244. See, e.g., *First National Bank of Boston (International) v. Banco Nacional de Cuba*, 685 F.2d 895 (2d Cir. 1981).

245. *Id.*

246. *Id.*

247. *American Bell International v. Islamic Republic of Iran*, June 11, 1984, Case No. 48, Chamber 3, IRAN-U.S. CLAIMS TRIB. REP. (1984).

248. *Id.* at 15.

249. See, e.g., *United States v. National City Bank of New York*, 83 F.2d at 237; *Looper*, *supra* note 200, at 652.

250. 105 F. Supp. 411 (D.D.C. 1952).

251. *Id.* at 412.

252. 118 F. Supp. 954 (S.D.N.Y. 1953).

court held that a counterclaim for damages in excess of the plaintiff Government's claim for return of a \$9,000 security deposit was not permissible. The court held that the respondent's counterclaim was limited to the extent of the award to the plaintiff and thus was purely defensive.²⁵³

This federal rule governing the extent of the award on a counterclaim was recently applied to a foreign State counterclaimant. In *First National Bank of Boston*,²⁵⁴ the Second Circuit allowed Banco Nacional to counterclaim against Boston's assignee, BBI, but "limited to the amount of the assignee's recovery."²⁵⁵ In *Menendez v. Saks & Co.*,²⁵⁶ involving Cuba's expropriation of five leading manufacturers of Havana cigars, the Second Circuit interpreted *First National City Bank* as holding that counterclaims could be asserted against claimant-interventors up to the amount of the original claim,²⁵⁷ but reversed the district court's award in excess of the original claim.²⁵⁸

D. Summary

Should an international tribunal, especially one to which the United States is a Party, seek an analogy to principles of American municipal law in cases involving counterclaims between a private party and a foreign sovereign, it will find that (1) the defendant's counterclaim must relate to the original claim; (2) without a claim there can be no counterclaim; and, (3) the counterclaim may not exceed in amount the original claim or the judgment awarded.

VII. CONCLUSION

This article has demonstrated that the international law rules regarding counterclaims are generally rather narrow and require that a counterclaim be related in some direct and tangible way to the original claim. This is certainly true in the international judicial arena, where the rules and decisions of the Permanent Court of International Justice and the International Court of Justice require a direct connection between a counterclaim and the original claim. Similarly, in international arbitration between States and between a State and a private party, the conventions establishing the arbitral tribunals universally provide for a narrow interpretation of permissible counterclaims.

On a substantive level, the following principles may be seen as governing counterclaims in international arbitrations involving States or a State and a foreign private party. First, a counterclaim is permitted only if it relates to the original claim, contract or transaction. Second, a coun-

253. *Id.* at 958.

254. 658 F.2d 895.

255. *Id.* at 902.

256. 485 F.2d 1355.

257. *Id.* at 1374.

258. *Id.*

terclaim cannot exist independently of the original claim and therefore should the latter be disallowed (procedurally) or dismissed on the merits (substantively), the counterclaim also must be rendered inadmissible (procedurally) or non-justiciable (on the merits), for want of jurisdiction of the tribunal. The same reasoning applies to counterclaims should the claim be withdrawn before a counterclaim is filed. Third, a counterclaim in excess of the original claim, although admissible, cannot be awarded, for it will be, in the amount of the excess, tantamount to an affirmative award.

Similarly, the rules and decisions of the tribunals, where the convention or *compromis* is silent, have generally admitted counterclaims where there is a direct link between the counterclaim and claim. Finally, it was shown that in U.S. federal courts, especially in cases involving third party assignees as successors in interest to a claim against a foreign sovereign, only counterclaims directly related to the original claim are allowed. The only exception to the "same transaction" rule developed by the federal courts is the "same claim" standard applied in cases involving an action between a foreign sovereign and private parties. This latter standard stems from equitable considerations and is invoked when an unduly narrow interpretation of permissible counterclaims would appear unjust.