CURRENT DEVELOPMENTS

DECISIONS OF INTERNATIONAL COURTS AND TRIBUNALS

Edited by J Craig Barker

I. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES TRIBUNAL, *SPYRIDON ROUSSALIS v ROMANIA*, DECISION OF 7 DECEMBER 2011

A. Introduction

International lawyers interested in international investment law and treaty interpretation issues should consider the international award recently delivered by an ICSID Tribunal in the case of *Spyridon Roussalis v Romania*.[1] The case arose out of the privatization of a Romanian warehouse company (SC Malimp SA). On 23 October 1998, another Romanian company (Continent SRL) entered into a share purchase agreement with the Romanian authority for state assets recovery (AVAS) to purchase 372,523 shares in SC Malimp SA, or the equivalent of a 70 per cent interest in the company. Following the acquisition of SC Malimp SA, the name of that company was changed to SC Continent Marine Enterprise SA (or 'Continent SA' for short).

The sole owner of Continent SRL was a Greek national, Mr Spyridon Roussalis. Mr Roussalis asserted that subsequent to his purchase of the 372,523 shares in SC Malimp SA, his investments in Romania were subjected to 'a series of malicious and unjustifiable acts' taken by various agencies of the Romanian Government:[2]

- In 1999 and 2000, Romanian tax authorities conducted numerous tax audits inquiring particularly into the financial transactions between Continent SRL and Continent SC. Charges were ultimately brought against Mr Roussalis and his company for tax evasion. In the course of the criminal proceedings later initiated, a Bucharest Criminal Court issued an order prohibiting Mr Roussalis from leaving Romania until the completion of investigations.
- In 2001, AVAS filed suit in the Bucharest Commercial Court claiming the commission by Continent SRL of a breach of contract. In concluding the share purchase agreement with AVAS, Continent SRL had committed to make a post-purchase investment in SA Continent of USD 1.4 million over a two-year period, including the completion of some outstanding construction and installation works. The investment was secured by a decision of the shareholders of Continent SA to increase the share capital of that company and to issue 1,418,648 new shares. AVAS disputed the true value of this investment. In particular, it accused Mr Roussalis of having fraudulently

[1] *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1, Award Dispatched on 7 December 2011. Available through the webpage of the International Centre for Settlement of Investment Disputes: <http://icsid.worldbank.org>.

[2] ibid para. 10.

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inflated the value of the claimed capital contribution concealing what in effect amounted to a breach of the 1998 share purchase agreement. AVAS requested the Bucharest Commercial Court to annul the share capital increase decision taken by the shareholders in Continent SA.

- In 2003, Romanian Tax Authorities once again audited Continent SA. This time they refused tax deductions for consulting fees, and pursuant to this decision, they held Continent SA liable for unpaid profit tax, VAT, interest and penalties.
- In 2005, Bucharest sanitary authorities suspended the refrigerated warehouse operation permits of Continent SA. By this decision, Continent SA was prohibited from carrying out reception, storage and delivery activities concerning all frozen and refrigerated products.

B. The Dispute

On 13 May 2004, ICSID received a request from Mr Roussalis for the institution of international arbitration proceedings under the ICSID Convention. On 10 January 2006, this request was later supplemented to allow also for the consideration of the 2005 decision of the Bucharest sanitary authorities. Mr Roussalis (the 'Claimant') alleged that the action taken by agents of the Romanian Government amounted to an indirect expropriation, or at least a substantial impairment, of his investments, in violation of the 1997 Agreement between the Government of Romania and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments (the '1997 BIT').[3] Furthermore, the Claimant maintained that the Romanian Government had acted in violation of the fair and equitable treatment, the full protection and security, and the non-impairment standards laid down in the 1997 BIT, as well as in violation of Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, and Article 1 of Additional Protocol No 1 to the European Convention. The Romanian Government (the 'Respondent'), for its part, filed a counterclaim against the Claimant and his companies reproducing essentially the claims pursued by AVAS in the Romanian courts.

An Arbitration Tribunal was constituted, according to Article 37(2)(b) and Article 38 of the ICSID Convention. The Tribunal consisted of Dr Robert Briner, later replaced by Professor Bernard Hanotiau (acting as President), by Professor Andrea Giardina, and by Professor Michael Reisman (appointed by the Respondent). In the award dispatched on 7 December 2011, the Tribunal declared that it had jurisdiction over the dispute only in so far as it concerned alleged violations of the 1997 BIT, but not over the alleged violations of the European Convention and Additional Protocol No 1. Similarly, by a majority of two to one—Professor Reisman giving a short but forceful separate opinion—the Tribunal found that it lacked jurisdiction to arbitrate the Respondent's counterclaim. Having tried the merits of the Claimant's claims, the Tribunal held that they were all unfounded, and it dismissed them in their entirety.

This case note will look further into the *Spyridon Roussalis v Romania* Award. It will inquire specifically into the decision of the Tribunal that it lacked jurisdiction over the

[3] Agreement between the Government of Romania and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, Done at Athens, on 23 May 1997.

counterclaim made by the Respondent. ICSID jurisdiction over a Respondent State's counterclaim is an issue that has received little consideration in the international legal literature.[4] This will probably secure the *Spyridon Roussalis v Romania* Award a place in the history of international investment arbitration. However, the split of the Tribunal provokes further analysis. It is one of those cases where one can be sympathetic with the majority's line of reasoning as well as that of the dissenter. Both centre on the correct way to interpret the relevant treaty provisions: Article 46 of the ICSID Convention and Article 9 of the 1997 BIT. Regrettably, neither the majority nor the separate opinion provides any detailed description of how the claimed correct interpretation was attained in terms of the relevant international law. This note will elaborate and critically examine the possible reasons justifying the respective interpretations preferred. The note will arrive at the conclusion that indeed, the majority was correct, and it will reflect briefly on the proper future response to its decision.

C. The Reasoning of the Tribunal

As indicated earlier, the reasoning given by the Tribunal in deciding that it lacked jurisdiction over the Respondent's counterclaim is rather short.[5] The Tribunal first posited that as a matter of principle, the onus remained on the Respondent:

> Being the party asserting that the Tribunal has jurisdiction to hear and determine the counterclaims which it seeks to bring before the Tribunal, the Respondent carries the burden of establishing that jurisdiction exists.[6]

The Tribunal then turned to the relevant provision of the ICSID Convention, namely Article 46, which reads as follows:

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

For the purpose of the determination of whether in this case, the Claimant had consented to the arbitration of counterclaims or not, the Tribunal stressed the importance of the relevant dispute settlement clause in the 1997 BIT, Article 9. The articles provides in relevant parts:

1. Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way.
2. If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor concerned may submit the dispute either to the competent courts of the Contracting Party in the territory of which the investment has been made or to international arbitration. Each Contracting Party hereby consents to the submission of such dispute to international arbitration.

[4] See, however, P Lalive and L Halonen, 'On the Availability of Counterclaims in Investment Treaty Arbitration', (2011) 2 Czech Yearbook of International Law 141.

[5] See *Spyridon Roussalis v Romania* Award (n 1) paras 859–877.

[6] ibid para 860.

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According to the Tribunal, '[t]he investor's consent to the BIT's arbitration clause can only exist in relation to counterclaims if such counterclaims come within the consent of the host State as expressed in the BIT'.[7] The Tribunal noted the specific reference in Article 9(1) of the 1997 BIT to disputes concerning an obligation of a Contracting State. 'Pursuant to the interpretation rules of Article 31 of the Vienna Convention',[8] according to the Tribunal, this limited the jurisdiction to claims brought by investors about obligations of the host State. The Tribunal inferred that:

> . . . [a]ccordingly, the BIT does not provide for counterclaims to be introduced by the host state in relation to obligations of the investor. The meaning of the 'dispute' is the issue of compliance by the State with the BIT.[9]

The majority opinion can be contrasted with that of Professor Reisman. In his declaration of dissent, Professor Reisman expressed regret over the decision of the Tribunal to decline jurisdiction over the Respondent's counterclaim. He did so for two reasons. First, in his view:

> . . . when the States Parties to a BIT contingently consent, *inter alia*, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is *ipso facto* imported into any ICSID arbitration which an investor then elects to pursue.[10]

Second:

> . . . [i]n rejecting ICSID jurisdiction over counterclaims, a neutral tribunal . . . perforce directs the respondent State to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now constrained to become the defendant. (And if an adverse judgment ensues, that erstwhile defendant might well transform to claimant again, bringing another BIT claim.) Aside from duplication and inefficiency, the sorts of transaction costs which counter-claim and set-off procedures work to avoid, it is an ironic, if not absurd, outcome, at odds, in my view, with the objectives of international investment law.[11]

As can be seen from the quoted passages, the explanation of the split of the Tribunal lies in the different interpretations maintained by the majority and the dissenter. The relevant provisions interpreted are Article 9 of the 1997 BIT, and Article 46 of the ICSID Convention. As for the law of interpretation applied, the majority opinion refers specifically to the 1969 Convention on the Law of Treaties (VCLT). In fact, however, only Greece, but not Romania, was a party to the Vienna Convention at the time, and consequently, that statement should be slightly modified. For the purpose of the interpretation of the two treaties at hand, arguably, Articles 31–33 of the VCLT were not applied, but the customary international law reflected in those same Articles.[12] This clarification is crucial for an assessment of the *Spyridon Roussalis v Romania* Award and the respective interpretations preferred by the Tribunal majority and the dissenter.

[7] ibid para 866. [8] ibid para 869. [9] ibid para 869.

[10] *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Separate Opinion by arbitrator Michael W Reisman, Dispatched on 7 December 2011. Available through the webpage of the International Centre for Settlement of Investment Disputes: <http://icsid.worldbank.org>.

[11] ibid.

[12] Today, international practice seems to accept as undisputable that customary international law is fully reflected in Articles 31–33 of the VCLT. See eg *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, International Court of Justice, Judgment of 26 February 2007, para 160; *La Grand Case (Germany v United States of America)*, International Court of Justice, Judgment of 27 June 2001, para 101. Both judgments are available through the webpage of the Court: <http://www.icj-cij.org>.

D. The Interpretation of Article 46 of the ICSID Convention

In order for an ICSID Tribunal to have jurisdiction over a counterclaim made by a Respondent State, according to Article 46 of the ICSID Convention, the counterclaim must be 'within the scope of consent of the parties'. According to Article 25 of the Convention, consent to ICSID proceedings has to be in writing. It is not a requirement of that Article that consent be express, however. According to a practice now well established, an investor may accept an offer to arbitrate contained in a BIT by the institution of ICSID proceedings.[13] In line with this practice, as correctly implied by the Respondent, where an investor requests arbitration under a BIT, the investor's consent to the arbitration of counterclaims may be inferred if that treaty allows for the arbitration of such claims exactly.[14] This explains why in the *Spyridon Roussalis v Romania* case, much attention focused on the interpretation of the 1997 BIT.

Now, obviously, the interpretation of the 1997 BIT is still conditioned by a particular understanding of Article 46 of the ICSID Convention, and that is why the finding of the Tribunal provokes an analysis of the interpretation of that Article, too. The majority would seem to have acted on the basis of the following two assumptions:

1. According to Article 46, the Claimant could only consent to the arbitration of counterclaims under the 1997 BIT if this possibility was already provided for in the 1997 BIT.
2. According to Article 46, it was incumbent upon the Respondent to show that the 1997 BIT did allow for the arbitration of a Respondent State's counterclaim; it was not incumbent upon the Claimant to show that it did not.[15]

It appears Professor Reisman, as well as the Respondent, may have interpreted Article 46 differently. According to them, a mere request for ICSID arbitration under a BIT should be construed to imply a consent to the arbitration of counterclaims under that treaty, *irrespective of whether the arbitration of counterclaims comes within the scope of application of the BIT or not*. This proposition is not only contrary to the former of the two assumptions held by the Tribunal majority. It also entails a denial of the latter assumption.

Arguably, the understanding of the majority is the sounder. If an investor like Roussalis has requested ICSID arbitration under a BIT, he is in fact exercising something like a delegated diplomatic protection. The parties to the BIT—in this case Romania and Greece—have agreed to treat investors of the nationality of the other party according to the standards laid down in their agreement. Each state has left investors of the other state a standing offer to settle disputes by international arbitration proceedings, but in the final analysis, when such proceedings are initiated, they will inevitably be tied to the rights and obligations contained in the BIT. According to this line of thinking, an investor cannot himself create a basis for jurisdiction. He may only consent to the arbitration of counterclaims under a BIT if this possibility is already provided for by the treaty parties. Certainly, if a BIT allows for the arbitration of a Respondent State's counterclaims, an investor may respond differently to this offer. He may decide to

[13] Cf R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP 2008) 243 and the several arbitral decisions cited in fn 126.

[14] See *Spyridon Roussalis v Romania* Award (n 1) para 759.

[15] ibid paras 866 and 860, respectively.

consent to the arbitration of counterclaims, or he may not. This power given to the investor explains the language used for Article 46 of the ICSID Convention. Although counterclaims may be 'within the scope of consent of the parties', Article 46 has to allow for the possibility of other solutions, and hence the introducing passage: 'Except as the parties otherwise agree'. The alternative reading suggested by Professor Reisman and the Respondent deprives the former passage of all practical meaning. This is a reason to reject it. According to customary international law, for the interpretation of a treaty in accordance with the ordinary meaning of its terms and in the light of its object and purpose,[16] it is a legitimate assumption that parties to that treaty intended all parts of their agreement to have at least some effect, rather than none.[17]

E. The Interpretation of Article 9(2) of the 1997 BIT: The Ordinary Meaning

To secure a firm basis for further inquiries into the correct interpretation of Article 9 of the 1997 BIT, first of all, the ordinary meaning of that provision should be clarified. Once again, the relevant paragraphs read as follows:

> 1. *Disputes* between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way.
> 2. If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor concerned may submit *the dispute* either to the competent courts of the Contracting Party in the territory of which the investment has been made or to international arbitration. Each Contracting Party hereby consents to the submission of such dispute to international arbitration.[18]

Obviously, the provision most relevant for the determination of the jurisdiction of the ICSID Tribunal is paragraph 2. The majority opinion of the Tribunal emphasizes the references made in the text of Article 9(1) to disputes concerning an obligation of a Contracting Party.[19] In so doing, it implicitly recognizes the close relationship between 'the dispute' in paragraph 2 and '[d]isputes' in paragraph 1. Admittedly, paragraph 2 does not say explicitly that 'the dispute' must concern an obligation of a host state. However, drawing on the relationship between 'the dispute' in paragraph 2 and '[d]isputes' in paragraph 1, the Tribunal majority correctly inferred that the meaning of 'the dispute' in paragraph 2 is the same as the meaning of '[d]isputes' in paragraph 1. While the disputes referred to in paragraph 1 concern only obligations of a host state, then consequently, 'the dispute' in paragraph 2 must be given a similar interpretation.

The important point is that this interpretation can be justified by reference to the ordinary meaning of Article 9. According to customary international law, a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty.[20] This is another way of saying that a treaty shall be interpreted in accordance

[16] Cf art 31(1) of the VCLT.

[17] See eg U Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007) 217–27 and the further references cited there.

[18] Emphasis added.

[19] See *Spyridon Roussalis v Romania* Award (n 1) paras 868–869.

[20] Cf art 31(1) VCLT.

with conventional language.[21] Obviously, the conventions of the English language relevant to the interpretation of a text like the 1997 BIT include a lexicon and a set of grammatical rules. More importantly in this context, they include rules of pragmatics.[22] In the English language, certain terms encode or grammaticalize features of the context or situation of utterance. Obvious examples are the first and second person singular pronouns. Where used in a text or a discourse, the word *I* will typically encode reference to the utterer; the word *you* will refer to the addressee.[23] If Jane, addressing John, announces 'I will pick you up at five', then obviously, 'I' will be understood as Jane and 'you' as John. Linguists refer to this phenomenon as *deixis*.[24] Further examples of deixis include temporal expressions such as 'now', 'last Thursday', and 'tomorrow', which will typically encode reference to the time of utterance.[25]

Similarly, the English language presents utterers with the possibility of using terms to encode reference to the meaning of prior expressions. In linguistics, such indirect references are termed *anaphora*.[26] Imagine the following sentence being expressed in a daily newspaper: 'The team made a gloomy appearance, and the players wore black armbands'. Typically, 'the players' would be interpreted to refer back to whatever 'The team' stands for in the utterance. The interpretation would be justified by a rule reading something along the following lines: typically, when a writer of a text uses the unqualified definite noun, this word will encode reference to a referent explicitly (or implicitly) picked out earlier in the same text.[27] This same rule would explain why, in Article 9(2) of the 1997 BIT, 'the dispute' must concern obligations of a host state, although this is not explicitly stated in this same paragraph.

F. The Interpretation of Article 9(2) of the 1997 BIT: The Context and the Object and Purpose

Once it is established that according to the ordinary meaning of Article 9(2) of the 1997 BIT, the ICSID Tribunal lacks jurisdiction over the Respondent's counterclaims, this will severely limit the possibility of successfully arguing any different interpretation. The Respondent argued that the umbrella clause laid down in Article 2(6) of the 1997 BIT could be seen to confirm its position. The Tribunal rejected this argument stressing that Article 2(6) does not impose obligations on an investor, but only on a host state.[28] Article 2(6) provides:

> Each Contracting Party shall observe any other obligation it may have entered into with regard to investments of investors of the Contracting Party.

This reasoning seems correct, but the Tribunal could have added that since the ordinary meaning of Article 9(2) is perfectly clear, and not ambiguous, regardless of the provision laid down in Article 2(6), the Respondent's argument will inevitably fail.

[21] See eg Linderfalk (n 17) 62–73.

[22] This proposition is argued more fully in U Linderfalk, 'Who are "the parties"? Article 31 § 3(c) of the 1969 Vienna Convention, and the "Principle of Systemic Integration" Revisited' (2008) 55 *Netherlands International Law Review* 346–51.

[23] See eg S Levinson, *Pragmatics* (CUP 1983) 62, 68–73.

[24] Further on deixis, see ibid 55–96.

[25] ibid 62, 73–9.

[26] See eg J Saeed, *Semantics* (Blackwell 1997) 188.

[27] ibid.

[28] See *Spyridon Roussalis v Romania* Award (n 1) para 875.

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Certainly, for the purpose of the interpretation of Article 9(2), Article 2(6) forms part of the context.[29] However, by the interpretation of the terms of a treaty in their context, according to customary international law, interpreters cannot justify a result, which is not compatible with the ordinary meaning of those terms. The role of context is to determine which one of two possible ordinary meanings is correct and which one is not.[30] Hence, any use of context inevitably presupposes that the ordinary meaning is ambiguous, and this is not the case with the ordinary meaning of Article 9(2).

The clear and unambiguous ordinary meaning of Article 9(2) would also be relevant for the assessment of any argument based on the object and purpose of the 1997 BIT. Professor Reisman argued that in rejecting jurisdiction over counterclaims, the Award of the ICSID Tribunal would work to cause duplication and inefficiency, and unnecessary costs.[31] Furthermore, the Award would be contrary to one of the very basic ideas of international investment arbitration: to promote the settlement of investment disputes in a neutral and depoliticized setting.[32] As far as the relevant causalities are concerned, there can be few objections to such arguments. The problem remains, however, that any argument based on the object and purpose of the 1997 BIT would also have to accord with the hierarchical structure of the relevant international law on the interpretation of treaties. To the extent that the argument of Professor Reisman implies an interpretation of Article 9(2) 'in accordance with the ordinary meaning to be given to the terms of the treaty . . . in the light of its object and purpose' (Article 31, paragraph 1 of the VCLT), it cannot be used to circumvent the unambiguous ordinary meaning of that provision. The role of the object and purpose, like the context, is to determine which one of two possible ordinary meanings is correct and which one is not.[33]

Now, it should be added, there is another way the object and purpose of the 1997 BIT may be used to sustain the interpretation suggested by Professor Reisman. The object and purpose of the 1997 BIT may help build an argument based on the so-called *rule of necessary implication*.[34] In *Bosnia Genocide Case* (Merits), this rule was applied by the International Court of Justice to justify the conclusion that according to Article 1 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[35] Serbia-Montenegro was not only under an obligation to prevent individuals from committing acts of genocide. It was also under an obligation to itself abstain from the commission of such acts, because 'the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide'.[36] Article 1 of the Genocide Convention reads as follows:

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

[29] Cf art 31(2) VCLT.

[30] '[T]he ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose'. (Draft Articles on the Law of Treaties with Commentaries, adopted by the International Law Commission in 1966, Report to the UNGA on the work of the second part of the seventeenth session and the eighteenth session of the ILC, *ILC Yearbook*, 1966: 2, 221.)

[31] Separate Opinion by arbitrator Michael W Reisman (n 10).

[32] ibid.

[33] See n 30.

[34] See eg Linderfalk (n 17) 287–94.

[35] 78 UNTS 277.

[36] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 12) para 166.

In order for the rule of necessary implication to sustain the interpretation suggested by Professor Reisman, first of all, the language of Article 9(2) of the 1997 BIT would have to allow the implication that counterclaims come within the scope of this provision. Second, this same implication must be absolutely essential to ensure that the application of the treaty does not defeat a fundamental *telos* of the treaty.[37] Third, since the application of the rule of necessary implication inevitably leads to a result, which is incompatible with the unambiguous ordinary meaning of Article 9(2), according to the relevant international law, the ordinary meaning of the provision must be 'manifestly absurd or unreasonable' (Article 32 of the VCLT). Arguably, neither requirement is met. Most conspicuously, as previously observed, Article 9(2) refers specifically to disputes concerning an obligation of a Contracting State.[38] This would seem to exclude any argument that the provision implicitly refers also to disputes concerning an obligation of an investor.[39] To that extent, Article 9(2) of the 1997 BIT is fundamental different from Article 1 of the Genocide Convention.

G. Conclusions: The Limits of Treaty Interpretation

The *Spyridon Roussalis v Romania* Award provides good illustration of the limits inherent in the modern international law on the interpretation of treaties. When the ordinary meaning to be given to the terms of a treaty is clear and unambiguous, this meaning cannot easily be circumvented. To argue the adoption of a different (non-ordinary) meaning, resort would have to be made to supplementary means or rules of interpretation, such as for example the preparatory work of the treaty, or the rule of necessary implication. According to the law reflected in Article 32 of the VCLT, this in turn requires that the ordinary meaning can be shown to be 'manifestly absurd or unreasonable'. This places quite a heavy burden on interpreters.

In the *Spyridon Roussalis v Romania* case, circumstances did not allow the ICSID Tribunal to negate the clear and unambiguous ordinary meaning of Article 9(2) of the 1997 BIT. Hence, the Tribunal could only conclude that it lacked jurisdiction over the Respondent's counterclaim. This should send a clear signal to those responsible for drafting and revising international investment treaties. However much an international Tribunal may sympathize with concerns like those expressed by Professor Michael Reisman, in the interpretation of a treaty, it has to defer to the relevant international law, whether this is the law laid down in Articles 31–33 of the VCLT, or the customary rules reflected in those same articles. Acting in any other way, the Tribunal would be amending, not interpreting, the treaty, and treaty amendment remains an exclusive task of the treaty parties. Naturally, if states believe that international investment arbitration is an appropriate remedy for the settlement of respondent states' counterclaims, they should ensure that international investment treaties are drafted accordingly. In *Saluka*

[37] 'Under international law, the Organization (i.e. the United Nations] must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.' (*Reparations for Injuries Suffered in the Service of the United Nations*, International Court of Justice, Advisor Opinion of 11 April 1949, ICJ Reports, 1949, 174, at 182.)

[38] See section E.

[39] The oft-used maxim *expressio unius est exclusio alterius* may be seen to confirm this proposition.

Investment BV v The Czech Republic,[40] an ad hoc arbitral tribunal established under the rules of the UNICTRAL found that the jurisdiction conferred upon it by Article 8 of the 1991 Czech-Netherlands BIT was 'in principle wide enough to encompass counter-claims'.[41] Article 8 reads in relevant parts:

1. All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall, if possible, be settled amicably.
2. Each Contracting Party consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within [a stated] period.[42]

A comparison of the language of this provision with the language of the 1997 BIT between Romania and Greece might give an indication of the kind of language required.

ULF LINDERFALK*

II. GRAND CHAMBER OF THE EUROPEAN COURT OF HUMAN RIGHTS, *A, B & C v IRELAND*, DECISION OF 17 DECEMBER 2010

A. Introduction

The use of 'European consensus' as a decision-making mechanism of the European Court of Human Rights has been condemned and praised in almost equal measure.[1] On the one hand, some scholars argue that the way in which so-called 'consensus' is

[40] *Saluka Investments BV v The Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim, Decision of 7 May 2004, available through the webpage of the Permanent Court of Arbitration: <http://www.pca-cpa.org>.

[41] ibid, para 39.

[42] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, Done on 29 April 1991, 2242 UNTS 205. The Agreement was acceded to by the Czech Republic on 1 January 1993, upon the dissolution of the Czech and Slovak Federal Republic.

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[1] See eg G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2009) 120–31; G Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 EJIL 279; JL Murray, 'Consensus: Concordance, or Hegemony of Majority' in *Dialogues between Judges* (Council of Europe 2008); E Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 JILP 843; A McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 MLR 671; JA Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004) 11 CJEL 113; F de Londras, 'International Human Rights Law and Constitutional Rights: In Favour of Synergy' (2009) 9 International Review of Constitutionalism 307; K Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human

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