

The Viability and Potential of Corruption-Based Counterclaims in Treaty-Based ISDS Cases under ICSID Tribunals

An Assessment

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Abstract

In recent years, counterclaims by host States in investor-State dispute settlement (ISDS) are getting importance in the investment arbitration practice and academic literature. Many consider counterclaims as an effective tool in rebalancing the existing asymmetry in the ISDS system. This article examines the viability of a corruption-based counterclaim (CBC) in ISDS. It first explores how the concept and practice of counterclaim have been perceived in international law and adjudication so far. Subsequently, it analyses counterclaim-related investment arbitration cases to comprehend how counterclaim has been practised and interpreted in the treaty-based ISDS. Through critical analysis, it demonstrates the differences between a CBC and other types of counterclaims. The article finds that it would be difficult for the host States to resort and substantiate CBCs under the existing web of investment treaties and treaty-based ISDS practice. It concludes by suggesting ways to overcome the barriers for CBCs by the host States.

Keywords: corruption based counterclaim, counterclaim, ICSID arbitration, investor-State dispute settlement, rebalancing asymmetry in investment arbitration.

1 Introduction

Investor-State dispute settlement (ISDS) is criticised as it entertains only foreign investors' claims against host States but not the other way around,¹ i.e. host States

hold the 'perpetual respondent' position in this mechanism.² Commentators find this asymmetry problematic³ and some of them suggest bringing symmetry by allowing host States to make counterclaim against investors.⁴ In two recent ISDS cases under the International Centre for Settlement of Investment Disputes (ICSID) following the 2006 ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules 2006), host States succeeded in founding a counterclaim.⁵ This is a significant breakthrough. Before this success, one study referred to the practice of counterclaim in ISDS as '30 years of failure'.⁶ However, commentators now predict that counterclaims in ISDS will likely increase in the future as there is a global evolution in preserving States' interests.⁷

Until recently,⁸ investment treaties have typically created rights for foreign investors while imposing obligations on host States.⁹ Despite the fact that in a few cases

2 *Ibid.*, at 578.

3 K. Miles, 'Investor-State Dispute Settlement: Conflict, Convergence, and Future Directions' in M. Bungenberg, C. Herrmann, M. Krajewski and J. Terhechte (eds.), *European Yearbook of International Economic Law 2016* (2016) 273, at 279.

4 A. Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law', 17(2) *Lewis & Clark Law Review* 461 (2013); A. Nanteuil, 'Counterclaims in Investment Arbitration: Old Questions, New Answers?', 17 *The Law & Practice of International Courts and Tribunals* 377 (2018).

5 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims (7 February 2017); *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Award (27 September 2019).

6 A. Vohryzek-Griest, 'State Counterclaims in Investor-State Disputes: A History of 30 Years of Failure', 15 *International Law: Revista Colombiana de Derecho Internacional* 83-124 (2009).

7 Nanteuil, above n. 4, at 376-7.

8 Some new generation treaties begin explicitly mentioning investors' obligation. See, Brazil-India BIT, 'Investment Cooperation and Facilitation Treaty Between the Federative Republic of Brazil and The Republic of India', 25 January 2020; Belarus-India BIT, 'Treaty Between the Republic of Belarus and the Republic of India on Investments', 24 September 2018; Morocco-India BIT, 'Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria', 3 December 2016.

9 T. Gazzini, *Interpretation of International Investment Treaties* (2016), at 35; J. Rivas, 'ICSID Treaty Counterclaims: Case Law and Treaty Evolution', in

tribunals had allowed host States to bring counterclaims, which were then judged on merit, ultimately, until recently host States had failed to sufficiently convince tribunals that investors had obligations under the treaty and that those obligations had been violated.¹⁰ Holding investors liable for violating customary international law is also a grey area.¹¹ Some commentators believe if there is a breach of the international legal principle of good faith or international public policy, the investor might be liable even if the treaty does not refer to compliance with domestic or international law.¹² Investment treaties rarely explicitly contemplate counterclaims.¹³ For these reasons, it is challenging for host States to establish tribunals' jurisdiction over counterclaims.

Corruption has become a problem of international concern. Amongst multiple conventions adopted to address different forms of corruption,¹⁴ the United Nations Convention Against Corruption 2003 (UNCAC)¹⁵ is considered the most comprehensive.¹⁶ It recognises the presence of corruption in international trade and investment, and criminalised the active¹⁷ and passive¹⁸ bribery of foreign public officials.¹⁹

According to a commentary of the UNCAC, as soon as both the parties, i.e. bribe payer and receiver, enter into a criminal agreement of undue advantage, they commit the offence of corruption.²⁰ The UNCAC made active and passive corruption separate offences, meaning that the offence of corruption occurs when someone unilaterally offers or gives a bribe or undue advantage to a public official even if the person rejects the bribe or advantage.²¹ Similarly, when any public official explicitly or implicitly demands a bribe or any undue advantage from anyone, this constitutes an offence of corruption.²² However, while only offer without acceptance or demand without payment is sufficient for a crime of corruption to be made out, the gravity of the offence for these two forms of act varies when both parties mutual-

ly agree for an undue advantage to each other. Clearly, both incur criminal liability for the agreement of corruption in the latter case.

Investors²³ and host States frequently bring allegations of corruption before ISDS tribunals.²⁴ States mostly rely on corruption allegations as a jurisdictional defence to a claim. However, such a defence has succeeded in only a few cases,²⁵ resulting in tribunals' rejection in adjudicating the claim. Nevertheless, the consequence of a successful host State corruption defence is controversial because it imposes all the liabilities of corruption on a foreign investor and allows the host State to avoid the arbitration, although corruption could not have been committed without the State's participation.

Commentators have criticised the corruption defence on several grounds. It has been argued that the corruption defence incentivises host States to be corrupt,²⁶ imposes all the liability for corruption on investors,²⁷ is used by host States as a shield in arbitration,²⁸ and that governments victimise foreign investors for local political advantage.²⁹ Conversely, advocates support the corruption defence on the basis that it upholds the clean hands doctrine,³⁰ honour transnational public policy³¹ and holds investors accountable for violating host State law.

J. Kalicki and A. Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System* (2015) 779, at 820.

10 For example, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016).

11 K. Nowrot, 'Obligations of Investors', in M. Bungenberg, J. Griebel, S. Hobe and A. Reinisch (eds.), *International Investment Law: A Handbook* (2015) 1154, at 1170.

12 Rivas, above n. 9, at 822-5.

13 Bjorklund, above n. 4, at 467.

14 I. Carr, 'Fighting Corruption Through Regional and International Conventions: A Satisfactory Solution?', 15(2) *European Journal of Crime, Criminal Law and Criminal Justice*, at 129-30 (2007).

15 UNCAC, 31 October 2003.

16 C. Rose, M. Kubiciel and O. Landwehr (eds.), *The United Nations Convention Against Corruption: A Commentary* (2019), at 35.

17 *Ibid.*, at 170-1. It refers to the supply side of corruption by active bribery, i.e. bribe giver which covers from promising, offering, to give bribe.

18 Rose, Kubiciel and Landwer, above n. 16, at 170-1. It refers to the demand side of the corruption, i.e. the bribe-taker that covers soliciting and acceptance of bribe.

19 Art. 16 of UNCAC.

20 *Ibid.*

21 Rose, Kubiciel and Landwer, above n. 16, at 170.

22 *Ibid.*, at 171.

23 *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009); *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, (14 October 2010); K. Betz, *Proving Bribery, Fraud and Money Laundering in International Arbitration: On Applicable Criminal Law and Evidence* (2017), at 95.

24 B. Greenwald and J. Ivers, *Addressing Corruption Allegations in International Arbitration* (2019), at 9; I. Devendra, 'State Responsibility for Corruption in International Investment Arbitration', 10(2) *Journal of International Dispute Settlement* 248, at 286 (2019).

25 *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 October 2013); *Spentex Netherlands, B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, Award (27 December 2016).

26 B. Klaw, 'State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles and Opportunities', 33(1) *Berkeley Journal of International Law*, at 96 (2015); Z. Torres-Fowler, 'Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration', 52(4) *Virginia Journal of International Law*, at 1018 (2012); A. Llamzon, 'State Responsibility for Corruption: A Return to Regular Order', in M. Bungenberg, M. Krajewski, C. Tams, J. Terhechte and A. Ziegler (eds.), *European Yearbook of International Economic Law 2020* (2022) 107.

27 T. Meshel, 'Metal-Tech Ltd. v. Republic of Uzbekistan - Is Really No One Getting Punished?', *Kluwer Arbitration Blog* 3 January 2014, <http://arbitrationblog.kluwerarbitration.com/2014/01/03/metal-tech-ltd-v-republic-of-uzbekistan-is-really-no-one-getting-punished/> (last visited 7 March 2022). A. Pülle, 'Demand Side of Corruption and Foreign Investment Law', 4(1) *Journal of International and Comparative Law*, at 1-37 (2017). Available at https://ink.library.smu.edu.sg/sol_research/2789 (last visited 18 July 2022).

28 Torres-Fowler, above n. 26; C. Bowling, 'Corruption and FTAs: Does an Implicit Cause of Action Exist for Corruption Claims in ISDS?', 51(3) *New York University Journal of International Law And Politics* 921, at 931-2 (2019).

29 H. Raeschke-Kessler and D. Gottwald, 'Corruption in Foreign Investment-Contracts and Dispute Settlement between Investors, States, and Agents', 9(1) *The Journal of World Investment and Trade* 1, at 5, 8 (2008).

30 *Waguih Elie George Siag and Clorinda Vecci v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Dissenting Opinion (1 June 2009), para. 17.

31 E. Gaillard, 'The Emergence of Transnational Responses to Corruption in International Arbitration', 35(1) *Arbitration International* 1, at 13-14 (2019).

Although counterclaims have the potential to rebalance in the asymmetry of ISDS, they have their challenges. It is necessary to find an effective way to balance investor rights protection through ISDS on the one hand, and host States' relief against the alleged corruption on the other, without compromising with the evil of corruption. For these reasons, an enquiry into the potential of counterclaims in reconciling this problem is necessary. This article assesses the viability of corruption-based counterclaims (CBCs) in treaty-based ISDS under the ICSID Convention and its Arbitration Rules. In doing so, it first briefly explores the concept and practice of counterclaims in international law and adjudication (Section 2). The discussion highlights critical questions that have arisen before international courts and tribunals involving counterclaims. These are important to consider given ICSID tribunals frequently engage with decisions of other international courts and tribunals that deal with similar questions to those with which they grapple. Next, Section 3 shows how ICSID tribunals in treaty-based ISDS have decided on jurisdiction and admissibility-related questions involving counterclaims. Section 4 especially focuses on decisions of publicly available corruption-related counterclaim cases before ICSID. It critically examines the arguments and approaches of disputing parties along with the findings of a tribunal. Discussion and analysis in Sections 3 and 4 crystallise specific challenges that CBCs would face in addition to the usual challenges centring on host States' counterclaims. Section 5 then suggests ways to overcome those challenges, and Section 6 concludes.

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2 The Concept and Practice of Counterclaims in International Law and Adjudication

International law borrowed the concept of counterclaim from municipal law.³² It has long been practised in international adjudication.³³ So far, there exists no uniform definition of the counterclaim.³⁴ However, generally, it denotes a claim by the respondent against the claimant in an already instituted legal proceeding.³⁵

In their constituting instruments or rules of procedure, international forums prescribe elements of a statement of defence, including counterclaims.³⁶ Generally, they require submitting a counterclaim and statement of de-

fence together.³⁷ Therefore, some confusion arises as to whether a counterclaim and a defence are the same and serve a similar purpose. Antonopoulos's monograph shows that a counterclaim is 'completely different' from a defence on the merits.³⁸ It need not partake the character of a defence to be a counterclaim; rather, it is separate and independent, and premised on the autonomous cause of action.³⁹ Murphy has recently shown that when the International Court of Justice (ICJ) allows a counterclaim in international adjudication, this operates as an independent claim as it is neither a defence to nor dependent on the principal claim.⁴⁰ Therefore, the principal claim's failure or withdrawal does not affect the success of the counterclaim. However, this view is a contested issue in ISDS. Given the substantive and procedural advantages created for foreign investors by investment treaties, the consequence of a principal claim's failure or withdrawal impacts the counterclaim. Section 4 of this article has elaborately discussed it. Murphy also observes that a counterclaim must be based on and seek reparation for a violation of international law for which the other party to the dispute is responsible. Otherwise, it will not be regarded as a counterclaim.

Counterclaim provisions are in place in several international law instruments⁴¹ and rules of procedure of courts and tribunals.⁴² Some of these instruments explicitly mention preconditions for submitting a counterclaim, and some others merely validate the possibility of raising a counterclaim. Two preconditions that some instruments mention are counterclaims must fall within the jurisdiction of the Court or tribunal and should arise out of the subject matter of the initial claim. Besides, counterclaims are also part of the rules of procedure of different international forums.⁴³ Apart from these, many model Bilateral Investment Treaties (BITs) and model International Investment Agreements (IIAs) also have counterclaim provisions.⁴⁴ However, sometimes investment treaties exclude the possibility to counterclaim by

32 C. Antonopoulos, *The Concept of Counterclaims in International Litigation* (2011), at 7.

33 *Ibid.*, at 66.

34 Antonopoulos, above n. 32, at 50.

35 *Black's Law Dictionary* (2009), at 402. *Black's Law Dictionary* mentioned counterclaim as a claim for relief asserted against an opposing party after an original claim has been made.

36 Art. 49(2) of International Court of Justice Rules of the Court 1978 (Amended 2001); Rule 31(3) of ICSID Arbitration Rules, 2006.

37 For example, Rule 40(2) of ICSID Arbitration Rules, 2006, Art. 21(3) of UNCITRAL Rules of Arbitration 2010.

38 Antonopoulos, above n. 32, at 62.

39 *Ibid.*

40 S. Murphy, 'Counter-Claims at the International Court of Justice', *GWU Legal Studies Research Paper No. 2017-85 37*, available at https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2579&context=faculty_publications (last visited 18 July 2022).

41 For example, Art. 46 of the ICSID Convention; Art. II of the Declaration Constituting the Iran-US Claims Tribunal; Art. 28(9) of the Investment Agreement for COMESA Common Investment Area; Art. 9.19(2) of Comprehensive and Progressive Agreement on Transpacific Partnership.

42 Art. 80, Rules of Court (1978) of International Court of Justice; Rule 48, The ICSID Arbitration Rules, 2022; Rule 40, The ICSID Arbitration Rules, 2006.

43 For example, Art. 98 of International Tribunal for Law of the Sea Rules of the Tribunal; Arts. 2 and 21 of UNCITRAL Arbitration Rules (revised in 2010); Art. 40 of ICSID Arbitration Rules, 2006; Art. 80 of the International Court of Justice's Rules of Court (1978) (amended in 2001).

44 For example, Art. 28(7) of the US Model BIT 2012; Art. 14.11 of Indian Model BIT 2015; Art. 18(E) of IISD Model International Agreement on Investment for Sustainable Development 2005.

expressly limiting the scope of the dispute resolution clause to claims brought by the investor.⁴⁵

At the ICJ, in a few cases, it was necessary to clarify a counterclaim's essential nature and explain its application in the context of international law.⁴⁶ Thirlway identified four cases in the Permanent Court of International Justice and ICJ records that dealt with counterclaims prior to the *Bosnia and Herzegovina v. Yugoslavia (Genocide Convention Case)*⁴⁷ case in 1997.⁴⁸ In none of those cases did any major issue of interpretation of this concept arise.⁴⁹ In the present context, whether the problem that this article aims to investigate would benefit or not from the existing jurisprudence of international law on counterclaim needs to be enquired into, and the relevance and necessity of exploring counterclaim jurisprudence in the ICJ and other forums lies there.

In the *Bosnia and Herzegovina v. Yugoslavia* case, the issue was whether the counterclaim fulfilled the conditions provided for in Article 80 of the Rules of the Court, 1978. The ICJ dealt with two questions. Firstly, what did the requirement 'directly connected with the subject matter of the claim of the other party' mean. Secondly, what significance does the phrase 'that it comes within the jurisdiction of the Court' carry. The Court observed that the connection must be assessed both in fact and in law on the first question. With regard to the fact, it found that the counterclaim in question referred to the same fact from which the principal claim had arisen. Regarding the legal connection, it found that the counterclaim was based on the same international law through which the claimant had established the Court's jurisdiction to hear the claim.

On the second question, it was not clear whether any counterclaim other than the one directly connected to the claim would fall within the jurisdiction of the Court. The ICJ found that the then Rules of the Court not only referred to jurisdiction but also to the further requirement of a direct connection to the subject matter of the other party's claim. Therefore, it concluded that a counterclaim is restricted to only 'certain types of claims'. The majority of judges of the Court accepted jurisdiction over Yugoslavia's counterclaim. However, Judge Weera-

mantry dissented with the majority. He stated that the concept of counterclaim does not merely mean the connectedness to the principal claim and jurisdiction of the Court over the claim. Rather it must 'counter' the principal claim, and a 'claim that is autonomous and has no bearing on the determination of the initial claim does not thus qualify as a counterclaim'.⁵⁰ This view was rejected by the majority of judges in this case and did not influence subsequent cases.⁵¹

Upon claimant Iran's argument against the counterclaim, the Court in *Iran v. United States (Oil Platform Case)*⁵² enquired whether the counterclaim should be based on the violation of the same article of the treaty as the claimant had relied on to found its claim.⁵³ In this case, the Court first accepted jurisdiction over the principal claim on the basis of Article X paragraph 1 of the treaty.⁵⁴ It observed that although the respondent had invoked a violation of Article XXI of the treaty, the facts it described implied that its claim was based on a violation of paragraph 1 of Article X and paragraphs 2 to 5 of Article XXI. Therefore, the Court accepted jurisdiction over the respondent's counterclaim too. In a separate opinion, Judge Higgins stated that 'there is nothing in the Rules or practice of the Court to suggest that the very identical jurisdictional nexus must be established by a counterclaim'.⁵⁵ The ICJ cited the Genocide Convention Case and applied the same formula on the 'direct connection' requirement. It also emphasised the Court's discretion in examining the 'degree of connection' and 'both in fact and law'.⁵⁶ From the Court's perspective, both claim and counterclaim 'rest on facts of the same nature'⁵⁷ and 'the two parties pursue the same legal aim, namely the establishment of legal responsibility for violation of the 1955 treaty'.⁵⁸ Therefore, jurisdiction and admissibility had been established regarding the counterclaim.

In *Croatia v. Serbia (Application of the Genocide Convention)*,⁵⁹ Croatia initially did not contend the admissibility of the respondent's counterclaim. At the merit stage, it raised the question of the factual link between claim and counterclaim. However, the Court observed that the claimant's arguments against the counterclaim were not acceptable. It found that a direct connection between claim and counterclaim exists by fact and law,⁶⁰ because the basis of Croatia's allegations in the claim, i.e. hostile-

45 Art. 29(1) of the ASEAN Comprehensive Investment Agreement 2009. This article provides that 'This Section shall apply to an investment dispute between a Member State and an investor of another Member State that has incurred loss or damage by reason of an alleged breach of any rights conferred by this Agreement with respect to the investment of that investor'. Art. 9(1) of the Greece-Romania BIT, 'Agreement between the Government of Romania and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments', 23 May 1997. This article provides that 'Dispute 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 parties in an amicable way'.

46 H. Thirlway, 'Counterclaims Before the International Court of Justice: The Genocide Convention and Oil Platforms Decisions', 12 *Leiden Journal of International Law*, at 198 (1999).

47 International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Counter-claims Order, 17 December 1997 ICJ Reports (1997) 243.

48 Thirlway, above n. 46, at 199.

49 *Ibid.*

50 *Ibid.*, Dissenting Opinion of Weeramantry; Sean D. Murphy, 'Counter-Claims at the International Court of Justice' *The George Washington University Law School, Legal Studies Research Paper No. 2012-36*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2037826 (last visited 18 July 2022).

51 Murphy, above n. 40, at 10.

52 International Court of Justice, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Counter-claim, 10 March 1998.

53 *Ibid.*, Separate Opinion of Judge Higgins.

54 *Ibid.*, para. 36.

55 *Ibid.*, Separate Opinion of Judge Higgins.

56 *Oil Platforms*, above n. 52, paras. 33 and 37.

57 *Ibid.*, para. 37.

58 *Ibid.*, para. 38.

59 International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Order, 4 February 2010.

60 *Ibid.*, Judgement of 3 February 2015 (paras. 120-23).

ities in Croatia in 1991-1992, was directly connected to incidents that occurred during and after Operation Storm in August 1995, for which Serbia brought counterclaim.⁶¹ The counterclaim brought was for the violation of the same provision, i.e. Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, on which the claim was based.⁶² In *Germany v. Italy (State's Jurisdictional Immunity Case)*,⁶³ Italy's counterclaim was rejected as it was outside the jurisdiction of the Court.⁶⁴ The Court came to this conclusion finding the fact and situation formed the basis of the counterclaim was barred by the temporal scope set under Article 27(a) of the European Convention.⁶⁵

The cases discussed above imply that counterclaim has rarely been used in international adjudication. International courts and tribunals applied vague provisions stipulated in treaties and procedural rules to allow the respondent State's counterclaim. Before judging counterclaims on merit, courts and tribunals judged the jurisdiction and admissibility of the counterclaim at the preliminary stage. Counterclaim-related cases show that parties objecting to counterclaims either objected to the jurisdiction, or the admissibility of the counterclaim, or both.⁶⁶ Tribunals usually adjudge their jurisdiction in response to the jurisdictional objection of the claimant to the counterclaim, or for proper adjudication by its own initiative.⁶⁷ The issue of a respondent's general right to raise a counterclaim in international adjudication was not discussed in any decisions in depth. However, it is apparent that the grounds for raising counterclaims are not open-ended. The jurisdictional and admissibility requirements must be satisfied to allow a counterclaim by the respondent. As far as a claim under international law is concerned, the distinction between jurisdiction and admissibility is well established.⁶⁸ In contrast, the jurisdictional and admissibility requirements for counterclaims are not as clear as they are for claims. The following section focuses on the practice of counterclaiming in treaty-based ISDS under the ICSID Convention.

3 Trends in Using Counterclaims in ISDS Under the ICSID Convention

The ICSID Convention and Arbitration Rules have had counterclaim provisions since they were first drafted. Unfortunately, the precise contours of these provisions remain to be fully developed.⁶⁹ In ISDS cases, two prevailing but less discussed grounds of challenging counterclaims are the tribunal's jurisdiction over the counterclaim (including the scope of parties' consent and within the jurisdiction of the Centre) and the admissibility of the counterclaim. Some cases have also discussed the ICSID tribunal's jurisdiction as provided under Article 25 of the ICSID Convention in the context of counterclaims by the host State.⁷⁰ The following subsections present relevant findings on counterclaims in those cases, mainly in chronological order. Cases in Section 3.1 are arranged and discussed under two themes. Within those themes, cases, where counterclaims were rejected, are presented in the beginning, and those which were accepted are presented later in chronological order of publication. However, a few cases with similar findings have been presented together for convenience.

3.1 Counterclaims in the Jurisdiction and Admissibility Stage: Procedural Challenges

3.1.1 Jurisdiction of the Tribunal: Question of Consent

Consent is an inherent feature and an essential requirement in arbitration.⁷¹ Parties' consent plays a decisive role in determining the tribunal's jurisdiction over the counterclaim. The respondent must satisfy this requirement first. Generally, the respondent submits the counterclaim as part of its counter-memorial, which stipulates the counterclaim's legal basis and cause.⁷² The claimant then contests or accepts the counterclaim to be adjudged at the merit stage. The tribunal *sua sponte* can also assess the counterclaim's jurisdictional and admissibility requirements.⁷³ However, tribunals have directly gone to decide counterclaim at the merit stage on some occasions.

In *Spyridon Roussalis v. Romania*,⁷⁴ the claimant challenged the parties' consent stating that the respondent can only bring a counterclaim with the claimant's con-

61 *Ibid.*, para. 123.

62 *Ibid.*

63 International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy)*, Counter-Claim, 6 July 2010.

64 *Ibid.*, paras. 30-31.

65 *Ibid.*, paras. 24 and 30.

66 Murphy, above n. 40, paras. 21-23.

67 ICSID Arbitration Rule 41(2). This rule provides that 'The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence'. L. Gouffes and M. Ordonez, 'Jurisdiction and Admissibility: Are We Any Closer to a Line in the Sand?', 31 *Arbitration International* 107, at 121 (2015).

68 Gouffes and Ordonez, above n. 67, at 110.

69 E. Brabandere, 'Human Rights Counterclaims in Investment Treaty Arbitration', *Grotius Centre Working Paper No 2018/078-IEL, Revue Belge de Droit International, Forthcoming, Leiden Law School Research Paper (October 8, 2018)*, available at <https://ssrn.com/abstract=3264167> (last visited 18 July 2022).

70 *Antoine Goetz and others v. Republic of Burundi (II)*, ICSID Case No. ARB/01/2, Award (10 February 2009).

71 H. Kjos, *Applicable Law in Investor-State Arbitration: The Interplay between National and International Law* (2013), at 20.

72 *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010), para. 352.

73 Art. 41(2) of ICSID Arbitration Rules, 2006; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 December 2011), para. 864.

74 *Roussalis*, above n. 73.

sent, which Roussalis did not give.⁷⁵ It argued that Article 9(1) of the Greece-Romania BIT 1997⁷⁶ limited the tribunal's jurisdiction to investor claims. While determining the parties' consent to arbitrate the counterclaims, the tribunal observed that consent to counterclaim is indispensable to exercising its jurisdiction.⁷⁷ It held that the BIT did not allow a counterclaim to be introduced⁷⁸ and concluded that parties did not consent to have counterclaims arbitrated; thus, the majority arbitrators declared the counterclaim beyond the tribunal's jurisdiction. However, Professor Reisman dissented with this decision. In his view, since both the parties agreed to settle the dispute under the ICSID arbitration mechanism, their consent to counterclaim should be construed from Article 46 of the ICSID Convention that allows counterclaims of disputing parties provided that some requirements are satisfied.⁷⁹

In *Karkey v. Pakistan*,⁸⁰ the basis for the counterclaim was Articles 46 and 25 of the ICSID Convention and Rule 40 of the 2006 ICSID Arbitration Rules.⁸¹ The respondent argued that express reference to counterclaims in the BIT is irrelevant.⁸² The governing Pakistan-Turkey BIT (1995)⁸³ was silent on the subject of counterclaims. The claimant argued that the respondent's consent to the principal claim was based on the BIT, and its consent to counterclaim must be based on the same.⁸⁴ The tribunal dismissed the counterclaim as it lacked the parties' consent. It rejected the *ipso facto* consent argument, noting that drawing consent on such a basis has not been a consistent practice in investment arbitration.⁸⁵

75 *Ibid.*, para. 821.

76 Art. 9(1) of Romania-Greece BIT 1997, 'Agreement between the Government of Romania and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments', 23 May 1997.

77 Roussalis, above n. 73, para. 865.

78 *Ibid.*, para. 869.

79 Roussalis, above n. 73, Declaration by W. Michael Reisman (28 November 2011). According to the declaration '... decision which rejects jurisdiction over counterclaims "arising directly out of the subject-matter of the dispute," the first time it has been so rejected on the ground of absence of consent ... in my 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. ... such counterclaim jurisdiction is not only a concession to the State Party: Article 46 works to the benefit of both respondent state and investor. In rejecting ICSID jurisdiction over counterclaims, ... 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 counterclaim 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.'

80 *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award (22 August 2017).

81 *Ibid.*, paras. 1003-1006.

82 *Ibid.*, para. 1007.

83 Pakistan-Turkey BIT, 'The Agreement Between the Islamic Republic of Pakistan and the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments', 16 March 1995.

84 *Karkey*, above n. 80, para. 1010.

85 *Ibid.*, para. 1015.

In *Gavazzi v. Romania*,⁸⁶ the respondent argued that the Italy-Romania BIT (1990)⁸⁷ did not expressly exclude counterclaims, so its right to counterclaim must be presumed,⁸⁸ and the procedural framework regulating arbitration proceedings, i.e. Article 46 of the ICSID Convention and Rule 40 of the 2006 ICSID Arbitration Rules, allows counterclaim.⁸⁹ However, the tribunal found that Article 8(2) of the BIT only granted an investor the right to claim against the host State. It also found that a free-standing counterclaim cannot be presumed if the BIT did not expressly exclude the counterclaim.⁹⁰ Moreover, the BIT wording provided no jurisdiction in relation to the counterclaim, and no jurisdiction can be inferred merely from the spirit of the BIT.⁹¹ Thus, the tribunal rejected jurisdiction over the counterclaim.

In *Goetz v. Burundi*,⁹² the claimant argued that Belgium-Luxembourg and Burundi Investment Treaty (1989) (BLBIT)⁹³ did not allow the right to bring a counterclaim.⁹⁴ It further submitted that it was not a treaty party; therefore, its obligation cannot be considered as a treaty obligation. The tribunal analysed the consent requirement, considering Article 25 of the ICSID, the definition of investment under Article 1(2) and the dispute resolution provision Article 8(1) (b) of the BLBIT.⁹⁵ It found that the counterclaim satisfied the consent requirement.⁹⁶ Regarding the treaty language, the tribunal noted that BLBIT's clauses were not worded in the same fashion as the Greece-Romania BIT (1997).⁹⁷ Therefore, it had broad competence in deciding any kind of dispute. In response to the counterclaim in *Urbaser v. Argentina*,⁹⁸ the claimant stated that its scope of acceptance of Argentina's offer to arbitrate was limited to the disputes arising from damage caused to the investment and not

86 *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability (21 April 2015).

87 Italy-Romania BIT, 'Agreement between the Government of the Italian Republic and the Government of Romania on the Mutual Promotion and Protection of Investments', 6 December 1990.

88 *Gavazzi*, above n. 86, para. 150.

89 *Ibid.*, para. 149.

90 *Ibid.*, para. 154.

91 *Ibid.*

92 *Goetz*, above n. 70.

93 Belgium-Luxembourg and Burundi Treaty, 'Convention Between the Belgium-Luxembourg Economic Union and the Republic of Burundi Concerning the Reciprocal Promotion and Protection of Investment', 13 April 1989.

94 *Goetz*, above n. 70, para. 269 (Unpublished award. Para number collected from secondary source).

95 *Ibid.*, para. 276; A. Steingruber, 'Antoine Goetz and others v Republic of Burundi: Consent and Arbitral Tribunal Competence to Hear Counterclaims in Treaty-based ICSID Arbitrations', 28(2) *ICSID Review - Foreign Investment Law Journal* 293 (2013); Art. 8(1)(b) Belgium-Luxembourg and Burundi Investment Treaty 1989 (BLBIT) provides that '[f]or the purpose of this article, a dispute relating to an investment is defined as a dispute concerning ... (b) the interpretation or application of any investment authorization granted by the authorities of the State where the investment is made in respect of foreign investments.'

96 *Goetz*, above n. 70, para. 278.

97 *Ibid.*, para. 276; Art. 8(1) (b) of Belgium-Luxembourg and Burundi Treaty, above n. 93; Art. 9 (1) of Greek-Romania 1997 BIT provides that [d]isputes between an investor of a contracting party and the other contracting party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way.

98 *Urbaser*, above n. 10.

to the potential losses of Argentina.⁹⁹ The tribunal accepted jurisdiction over the counterclaim on the grounds that Articles 25 and 46 of the ICSID Convention and Article X of the Spain-Argentina BIT (1991)¹⁰⁰ allowed both parties to bring the claim to which contracting parties to investment agreement agreed and by accepting the host State's offer to arbitrate the claimant also accepted the scope of the counterclaim.¹⁰¹

The *Hamester v. Ghana*¹⁰² award indicates nothing about whether the counterclaim was challenged on jurisdiction. The tribunal found that the respondent's arguments did not support the relief it sought, and it had not specified the basis of the tribunal's jurisdiction over the counterclaim.¹⁰³ Nevertheless, the tribunal went on to determine its jurisdiction over the counterclaim according to Article 46 of the ICSID Convention.¹⁰⁴ It observed that, in theory, the respondent State could have the right to file a counterclaim.¹⁰⁵ The tribunal found that Article 12(1) of the governing Germany-Ghana BIT (1995) only allowed disputes concerning obligations of one Contracting Party to the national or company of the other Contracting Party, and that under Article 12(3) and 12(4), the State party may be 'aggrieved' and 'shall have the right to refer the dispute to' arbitration.¹⁰⁶ The tribunal could not analyse the parties' consent to the counterclaim issue in this case because of the respondent's non-submission on the counterclaim's nature¹⁰⁷ and rejected its jurisdiction on the ground that the counterclaim was based on the loss suffered by a non-party to the dispute.¹⁰⁸

In *Inmaris v. Ukraine*,¹⁰⁹ the counterclaim concerned the respondent's maintenance cost of the claimant's vessel. The tribunal found that the language of Article 11 of the Ukraine-Germany BIT (1993)¹¹⁰ provided that parties had consented to bring before the tribunal 'disputes "with regard to investments between either Contracting Party and a national or company of the other Contracting Party"'.¹¹¹ The award's excerpts did not mention whether the tribunal's jurisdiction over counterclaims had been challenged on consent.

Burlington v. Ecuador is an exceptional case on environmental counterclaim because in this case, the claimant

in an agreement decided not to contest jurisdiction over the counterclaim, which is unusual in ISDS practice.¹¹² The *Perenco v. Ecuador* case shares the same facts as *Burlington*; however, it was brought under the France-Ecuador BIT (1994)¹¹³ and before a separate tribunal. *Perenco's* procedural history was slightly different from other cases. In this case, the tribunal accepted jurisdiction over the claim and provided an interim decision on the respondent's counterclaim in 2015. Interestingly, the claimant never challenged the counterclaim on jurisdiction and admissibility grounds until the tribunal's interim decision.¹¹⁴ Later, when the claimant raised an admissibility question, the tribunal rejected it.¹¹⁵ The interim decision reflects that the counterclaim was based on the violation of Ecuador's domestic environmental law, which incorporated settled international law principles protecting the environment and the claimant's obligations under Participation Contracts (*Burlington* and *Perenco's Consortium*).

3.1.2 Admissibility of the Counterclaim: Question of Direct Connection to the Claim

A counterclaim's admissibility usually faces the challenge of having no direct connection with the claim. Whether the connection refers to either a factual or a legal link or both is not clear from the ICSID Convention provision and Arbitration Rules. Further, what is meant by 'arising directly out of the subject matter and arising directly out of the investment' is also ambiguous.

In *Spyridon Roussalis v. Romania*, the respondent argued that the counterclaim and principal claim were connected. However, the tribunal did not attempt to find the connection as it found that the counterclaim lacked its jurisdiction.¹¹⁶ Similarly, in *Karkey v. Pakistan*,¹¹⁷ the tribunal finding counterclaim lacked the consent requirement did not enquire into the direct connection requirement.¹¹⁸

In *Goetz v. Burundi*, the counterclaim passed the connectedness requirement. The tribunal analysed this condition on its own initiative¹¹⁹ and observed that the Article 46 requirement of the ICSID Convention is one of admissibility (*recevabilité*) of counterclaims and should be distinguished from the Article 25 requirement that is 'arising directly out of an investment'.¹²⁰ In *Inmaris v. Ukraine*,¹²¹ the tribunal did not comment directly on connection requirement; however, it found that

99 *Ibid.*, para. 1123.

100 Argentina-Spain BIT, 'Agreement for the Promotion and Reciprocal Protection of Investments Between the Republic of Argentina and the Kingdom of Spain', 3 October 1991.

101 *Ibid.*, paras. 1143 and 1155.

102 *Hamester*, above n. 72.

103 *Ibid.*, paras. 352 and 355.

104 *Ibid.*, para. 353.

105 *Ibid.*

106 Art. 12(1), Art. 12(3), Art. 12(4) of Germany-Ghana BIT, 'Agreement between the Federal Republic of Germany and the Republic of Ghana on the Promotion and Mutual Protection of Capital Investments', 24 February 1995; *Hamester*, above n. 72, paras. 353 and 354.

107 *Hamester*, above n. 72, para. 355.

108 *Ibid.*, para. 356.

109 *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Award (1 March 2012).

110 Netherland-Ukraine BIT, 'Vertrag zwischen der Bundesrepublik Deutschland und der Ukraine über die Förderung und den gegenseitigen Schutz von Kapitalanlagen', 15 February 1993.

111 *Ibid.*, para. 432.

112 J. Hepburn, 'Successful Counterclaim in *Burlington v. Ecuador* Breaks New Ground, as Tribunal Has to Evaluate Quantum of Environmental Damage', *IAReporter*, 13 February 2017, available at www.iareporter.com/articles/analysis-successful-counterclaim-in-burlington-v-ecuador-breaks-new-ground/ (last visited 5 September 2021).

113 France-Ecuador BIT, 'Agreement on the Reciprocal Promotion and Protection of Investments', 7 September 1994.

114 *Perenco*, above n. 5, Decision on *Perenco's Application for Dismissal of Ecuador's Counterclaims* (18 August 2017), paras. 35 and 44.

115 *Ibid.*, para. 53.

116 *Roussalis*, above n. 73, paras. 859-77.

117 *Karkey*, above n. 80.

118 *Ibid.*, paras. 1011-1016.

119 *Steingruber*, above n. 95, at 300.

120 *Goetz*, above n. 70, para. 283; *Steingruber*, above n. 95, at 299.

121 *Inmaris*, above n. 109.

the counterclaim for maintenance costs was a component of the larger claim submitted by Inmaris. The tribunal in the *Urbaser v. Argentina* case observed that the factual link between the two claims was manifest.¹²² It arrived at this finding as it found that the principal claim and counterclaim were brought based on the same investment in relation to the same concession.¹²³ It also found a legal connection between the two claims because the counterclaim was brought based on domestic law and the BIT.

3.2 Fate of Counterclaims in the Merits Stage

The counterclaim in the *Goetz v. Burundi* case sought compensation for the claimant's failure to respect the terms of a local operating (free-zone) certificate.¹²⁴ The tribunal dismissed the counterclaim, finding no causal link between the bank's violation of obligations and the alleged damage suffered by Burundi in the disruption of financial markets and loss of tax receipts.¹²⁵ On the other hand, the tribunal in *Inmaris v. Ukraine* dismissed the counterclaim finding the respondent was responsible for maintenance costs.¹²⁶

In *Urbaser v. Argentina*, the counterclaim was based on the violation of human rights obligations. In its defence, the claimant argued that it had not violated any obligation under the BIT, that compliance with host State domestic law did not create an obligation, and only States have obligations to protect human rights, not corporations. Considering the BIT and the investor's human rights obligations, the tribunal observed that the treaty language did not restrict the dispute to being raised only by the claimant. As the BIT referred to international law, the tribunal held that it would be wrong to assume that other rules of international law external to the BIT would be inapplicable. However, it did not find any obligation of the investor derived from the human right to water under international law on the facts of the case.¹²⁷

In *Burlington v. Ecuador*,¹²⁸ the respondent substantiated the counterclaim and obtained an award. Ecuador argued that the investor's activities violated Ecuadorian tort law. Pursuant to Article 42(1) and 42(2) of the ICSID Convention, a tribunal shall decide the dispute 'in accordance with such rules of law as may be agreed by the parties' and in the absence of this 'the tribunal shall apply the law of the host State...and such rules of international law as may be applicable'. There was no agreed applicable law in this case, but the claimant did not op-

pose the application of Ecuadorian tort law sought by the respondent. In determining the applicable law, the tribunal applied rule 42(1)¹²⁹ and justified the same stating that 'according to prevailing case law, it is left to the Tribunal's discretion to apply either municipal or international law depending on the type of issue to be resolved'.¹³⁰ Put differently, if the applicable law imposes an obligation on investors not to violate the host State's environmental law, and if the host State can prove such a violation, then they would be liable as per the counterclaim. Ultimately, the tribunal found the investor in breach and upheld the counterclaim.

The counterclaim in *Perenco v. Ecuador* was based on the violation of Perenco's constitutional and environmental obligations under Ecuadorian law as it had been agreed in the Participation Contracts.¹³¹ The tribunal's interim and final decision on the counterclaim together demonstrate that the claimant's obligation under Ecuadorian law was uncontested. The claimant argued that: strict liability for environmental damages under the 2008 Constitution of Ecuador was inapplicable;¹³² it had acted responsibly in managing the oil blocks;¹³³ it could not be liable for any environmental damage that occurred when Petroamazon took over the control of the sites;¹³⁴ and the *res judicata* principle barred Ecuador from getting compensation in this case as Ecuador was already compensated by Consortium's partner Burlington in the *Burlington v. Ecuador* case for the same incident.¹³⁵ However, the tribunal found the claimant liable. It determined that from the beginning of its operations in 2002 to the adoption of Ecuador's new constitution in 2008, the claimant incurred fault-based liability, and for the post-constitution period until 16 July 2009, it incurred strict liability for environmental damage. Finally, it determined and declared the damages to be paid to the respondent.

The case analysis above shows that under a broad interpretation of investment treaties, the ICSID Convention and its Arbitration Rules, an ICSID tribunal has a mandatory obligation to allow counterclaims as part of the arbitration procedure if the parties did not agree otherwise. In contrast, under a restrictive interpretation of the same instruments, a tribunal should be reluctant to allow counterclaims as a procedure until and unless the investment treaty expressly allows it.¹³⁶ Some tribunals have rejected the argument that BIT's silence on counterclaims should be read as parties' consent to a coun-

122 *Urbaser*, above n. 10, para. 1151.

123 *Ibid.*

124 *Goetz*, above n. 70, para. 267; L. Peterson, 'ICSID Tribunal Admits Counter-Claim in BIT Dispute; Outcome is a Setback for Counsel that had Recently Sat as Arbitrator in Case Where Counter-Claims Were Excluded', *IAReporter*, 03 July 2012, available at www.iareporter.com/articles/icsid-tribunal-admits-counter-claim-in-bit-dispute-outcome-is-a-setback-for-counsel-that-had-recently-sat-as-arbitrator-in-case-where-counter-claims-were-excluded/ (last visited 22 September 2021).

125 Peterson, above n. 124.

126 *Inmaris*, above n. 109, paras. 270 and 432.

127 *Ibid.*, para. 1208.

128 *Burlington*, above n. 5, Decision on Counterclaim (2017).

129 *Ibid.*, para. 74.

130 *Ibid.*

131 *Perenco*, above n. 5, Interim Decision on the Environmental Counterclaim (2015), para. 109.

132 *Ibid.*, para. 44.

133 *Ibid.*, para. 43.

134 *Ibid.*, para. 47.

135 *Perenco*, above n. 5, Award (2019), paras. 447-48.

136 D. Atanasova, A. Benoit and J. Ostřanský, 'The Legal Framework for Counterclaims in Investment Treaty Arbitration', 31(3) *Journal of International Arbitration*, at 357 (2014); M. Waibel and J. Rylatt, 'Counterclaims in International Law', *University of Cambridge Faculty of Law Research Paper No. 66/2014* (1 December 2014), at 300, available at <https://ssrn.com/abstract=2511847> (last visited 18 July 2022).

terclaim. As far as disputing parties' procedural rights are concerned, parties to an investment treaty dispute have a right to defend the claim.¹³⁷ However, whether they can equally ask for a counterclaim is vague and remains an unsettled issue. In this regard, one commentator says that the right to advance a counterclaim is a default position unless the parties agree otherwise.¹³⁸ One commentary on the ICSID Convention stated that the

[t]ribunal may not, on its own initiative, include ... counterclaims in its deliberations or decision. To do so might lead to an award *ultra petita* which would be subject to annulment ... Arbitration Rule 40(1) rephrases Article 46 making it clear that the Tribunal's duty ("shall determine") is matched by a corresponding right of the parties ("may present")¹³⁹

In *Sempra v. Argentina*, the tribunal recognises counterclaims as the respondent's procedural right.¹⁴⁰ Jurisprudence developed by international courts and tribunals has been used by the disputing parties and cited in at least four ISDS awards discussed above.¹⁴¹ However, in none of the ISDS cases analysed under this section, tribunals considered it appropriate to explicitly refer to or analyse the decisions discussed under Section 2 concerning the issues of the counterclaim. As investment treaty arbitration tribunals have no compulsion to refer to decisions of the other forums or be bound by the precedence of the same forum in decision-making, it is hard to comment on why tribunals have avoided engaging with decisions on counterclaim-related issues by other forums. However, as ICJ and other tribunals got few opportunities to analyse different issues involving counterclaims in detail, ISDS tribunals might have found those decisions unhelpful or inadequate to address counterclaim-related issues that ICSID ISDS cases encountered. Considering the above-mentioned issues, this article will now analyse corruption-related counterclaim cases before ICSID tribunals.

4 CBC in ISDS Under ICSID: Mapping Arguments of Disputing Parties and Approach of the Tribunal

Investment treaties usually limit the option for bringing a claim to investors.¹⁴² Most treaties are silent on counterclaims. Few treaties that mention counterclaims rarely elaborate on their scope. While allowing investors to bring a claim, some treaties mention that parties cannot bring counterclaims on certain issues.¹⁴³ Like the claimant's claim, the respondent's counterclaim also seeks relief. In counterclaims under ISDS, the respondent host State seeks relief for damage caused by the investor. The investor in the principal claim seeks relief for the host State's violation of an investment treaty obligation. Similarly, counterclaims require the respondent to substantiate a breach of the investor's treaty obligations owed to the host State.¹⁴⁴ Thus some commentators say that a counterclaim is, in effect, a claim.¹⁴⁵

The general principle of the burden of proof is that those who assert something must prove that which is asserted. The respondent's role is to disprove the claimant's claim in its defence.¹⁴⁶ In international investment arbitration, whereas the investor claimant claims that there has been a violation of the host State's obligation under an investment treaty, the host State in its defence may justify its alleged acts as lawful and not in violation of the applicable treaty law. In a CBC, the respondent may attempt to prove the investor's involvement in corruption either in obtaining the foreign investment approval or contract, or in continuing the investment in the host State. This may be a violation of the investor's treaty obligation, i.e. if the investment must be made in accordance with the laws of the host State, and the corruption resulted in damage or loss to the respondent. In response, the investor tries to disprove its involvement in corruption. It may challenge the validity of the respondent host State's counterclaim in procedure and substance. In other words, the counterclaim temporarily reverses disputants' position as the claimant turns into the respondent.¹⁴⁷

CBC is one of the less explored variants of counterclaim in ISDS. Although UNCAC and other anti-corruption conventions allow States to institute civil claims and recover damages for the harm caused by corruption,¹⁴⁸ in ISDS, this practice is in its infancy. Through CBC, the host State could attempt to recover damages for the

137 F. Marisi, *Environmental Interests in Investment Arbitration* (2020), at 237-254.

138 T. Kendra, 'State Counterclaims in Investment Arbitration: A New Lease of Life', 29(4) *Arbitration International*, at 577 (2012).

139 C. Schreuer, L. Malintoppi, A. Reinisch and A. Sinclair, *The ICSID Convention: A Commentary* (2009), at 734-5.

140 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007), para. 289.

141 *Karkey*, above n. 80, para. 551; *Spyridon*, above n. 73, para. 322; *Hamester*, above n. 72, para. 154; *Urbaser*, above n. 10, para. 1070.

142 For example, Romania-Greece BIT 1997, above n. 76; 'Energy Charter Treaty', 17 December 1994; United Kingdom Model BIT 2008.

143 Arts. 15 and 26 of Energy Charter Treaty.

144 Waibel and Rylatt, above n. 136, at 295.

145 Bjorklund, above n. 4, at 468.

146 C. Lim, J. Ho and M. Paparrinskis, *International Investment Law and Arbitration: Commentary, Awards and Other Materials* (2018), at 166.

147 Nanteuil, above n. 4, at 375.

148 Art. 53 of UNCAC; Rose, Kubiciel and Landwer, above n. 16, at 543.

harm caused by foreign investors through corrupt acts. While the environmental and human rights-based counterclaim in ISDS is making an impact in ensuring environment and human rights-sensitive foreign investment, the practice of CBC could develop accountability awareness and fear of compensation to foreign investors as a consequence of corruption.

In the absence of an anti-corruption clause in the treaty, CBC is mainly grounded on the clause that an investment must be made in accordance with the laws of the host State. In the literature, this clause is identified as a 'legality clause'.¹⁴⁹ The controversy surrounding the interpretation of this clause is whether it covers all laws of the host State or only laws relating to foreign investment.¹⁵⁰ Besides, should this clause be considered in establishing or continuing the investment?¹⁵¹ Moreover, another debate surrounding this clause is whether the respondent is barred by estoppel from resorting to this clause.¹⁵²

The corruption issue came before ISDS tribunals under ICSID in many cases. However, the only known CBC case is *Metal-tech Ltd. v. Republic of Uzbekistan*.¹⁵³ According to some secondary sources, Uzbekistan also successfully used the corruption defence and sought to counterclaim in a recent case.¹⁵⁴ However, as the award is publicly unavailable, it is not confirmed whether Uzbekistan sought to counterclaim on the basis of corruption in that case.¹⁵⁵

4.1 *Metal-tech Ltd. v. Republic of Uzbekistan: Facts*

The *Metal-tech* case was based on the Israel-Uzbekistan BIT (1994).¹⁵⁶ The facts of this case were that as a foreign

investor, *Metal-tech* entered into a joint venture with two State-owned companies named Uzbek Refractory and Resistant Metals Integrated Plant (UzKTJM) and Al-malik Mining Metallurgy Combine (AGMK) and formed Uzmetal Technology to build and operate a molybdenum product plant.¹⁵⁷ While in operation, Uzmetal's general director faced criminal proceedings in 2006, and its right to purchase raw materials was abrogated by the Uzbek Government.¹⁵⁸ Later, it also faced domestic court proceedings initiated by the UzKTJM and AGMK to terminate the contract and pay dividends.¹⁵⁹ At one point, the domestic court declared Uzmetal bankrupt and Uzmetal's assets were transferred to State-owned AGMK and UzKTJM.¹⁶⁰ The investor's claim before the ICSID Tribunal was on the grounds that Uzbekistan's action had breached its treaty obligation as a host State, which amounts to expropriation.¹⁶¹ Therefore, Uzbekistan is liable for compensation. In its reply and counter-memorial, Uzbekistan defended its actions and alleged that *Metal-tech* was involved in corruption in obtaining the approval for its investment and continuing thereafter.¹⁶² It stated that *Metal-tech* had adopted sham consultancy agreements with persons, including retired government officials who were incompetent to provide such service but had a close connection to the government.¹⁶³ *Metal-tech* paid an unusually high (USD 4.4 million) amount in the name of consultancy fees to utilise those persons' influence and connection over the government in obtaining and continuing their investment.¹⁶⁴ According to Uzbek Criminal Code, such acts were corrupt acts. Articles 210-212 of the Criminal Code prohibited giving or taking bribes, directly or through an intermediary, in exchange for the performance or non-performance of an action.¹⁶⁵ In its counterclaim plea, respondent Uzbekistan asserted that it was part of UzKTJM and AGMK, and the claimant's unlawful acts caused damage to it.¹⁶⁶

The basis of the respondent's counterclaim was an unlawful act of the investor claimant, which resulted in damage to the host State. As per the wording of the tribunal, the respondent sought to counterclaim because

as a result of the claimant's unlawful actions [violation of host State's law on corruption] and because the State has an ownership interest in AGMK and UzKTJM, the Respondent has suffered damages due to the claimant's misrepresentations.¹⁶⁷

ty and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.'

157 *Metal-Tech*, above n. 25, para. 7.

158 *Ibid.*, para. 37.

159 *Ibid.*, paras. 40 and 43.

160 *Ibid.*, paras. 46-53.

161 *Ibid.*, para. 107.

162 *Ibid.*, para. 110.

163 *Metal-Tech*, above n. 25, paras. 225 and 226.

164 *Ibid.*, para. 229.

165 *Ibid.*, para. 279.

166 *Ibid.*, paras. 110 and 393.

167 *Ibid.*, para. 393.

149 S. Schill, 'Illegal Investments in Investment Treaty Arbitration', 11(2) *The Law and Practice of International Courts and Tribunals* 281 (2012); J. Hepburn, 'In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration', 5(3) *Journal of International Dispute Settlement* 531, at 532 (2014).

150 L.E.S.I. S.p.A. and ASTALDI S.p.A. v. *République Algérienne Démocratique et Populaire* (2006), Decision on Jurisdiction, ICSID Case No. ARB/05/3, para. 83; *Desert Line Projects LLC v. The Republic of Yemen* (2008), ICSID Case No. ARB/05/17, paras. 104-105; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (2008), ICSID Case No. ARB/05/16, para. 319.

151 *Saba Fakes v. Turkey* (14 July 2010), ICSID Case No. ARB/07/20, para. 119.

152 *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines* (16 August 2007), ICSID Case No. ARB/03/25, para. 346.

153 *Metal-Tech*, above n. 25.

154 *Spentex*, above n. 25; Betz, above n. 23; V. Djanic, 'In Newly Unearthed Uzbekistan Ruling, Exorbitant Fees Promised to Consultants on Eve of Tender Process are Viewed by Tribunal as Evidence of Corruption, Leading to Dismissal of All Claims Under Dutch BIT', *IAReporter*, 22 June 2017, available at www.iareporter.com/articles/in-newly-unearthed-uzbekistan-ruling-exorbitant-fees-promised-to-consultants-on-eve-of-tender-process-are-viewed-by-tribunal-as-evidence-of-corruption-leading-to-dismissal-of-all-claims-under-dutch/ (last visited 5 September 2021).

155 *Spentex*, above n. 25; Betz, above n. 23; Djanic, above n. 154.

156 Art. 8(1) of Israel-Uzbekistan BIT, 'Agreement between the Government of the State of Israel and the Government of the Republic of Uzbekistan for the Reciprocal Promotion and Protection of Investments', 4 July 1994. This article provides that 'Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter: the 'Centre') for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Par-

Uzbekistan suffered damages due to the claimant's corrupt acts as stated: loss of revenue from AGMK, Uzmet-al's production and export, UzKTJM's bankruptcy, and direct damage arising from loss of tax, custom revenue and foreign exchange.¹⁶⁸

In other words, corruption was the basis of the defence¹⁶⁹ as well as the counterclaim of the respondent. The tribunal rejected the claim, being satisfied with other grounds of defence that the claimant was involved in corruption, violating investment conditions.¹⁷⁰ Therefore, the investment could not get legal protection from the governing investment treaty.

After deciding that it had jurisdiction over the claim, the tribunal decided on the respondent's counterclaim. The *Metal-tech* tribunal determined that to entertain a counterclaim, two conditions need to be satisfied. Firstly, the counterclaim must be within the jurisdiction of the Centre, which includes the consent of parties, and secondly, the counterclaim must arise directly out of the subject matter of the dispute.¹⁷¹ The tribunal found that Article 8(1), the applicable treaty provision to the dispute, is not restricted to disputes initiated by an investor against a host State.¹⁷² It covers any dispute about an investment.¹⁷³ However, it further found that it lacked jurisdiction over the counterclaim, as the counterclaim failed to satisfy the first requirement (jurisdiction including consent) stipulated under Article 46 of the ICSID Convention.¹⁷⁴ According to the tribunal,

the first requirement set in Article 46 of the ICSID Convention which relates to jurisdiction, including consent, is not met. As a consequence of its having no jurisdiction over the claims, this tribunal has no jurisdiction over the counterclaims.¹⁷⁵

In other words, the second sentence quoted above implies that the existence of jurisdiction over the counterclaim depends on the existence of the tribunal's jurisdiction over the claim. If a tribunal concludes that it lacks jurisdiction over the claim, it will inevitably conclude that it has no jurisdiction over the counterclaim. To conclude that the first requirement, i.e. jurisdiction including consent, set in Article 46 of the ICSID Convention had not been met, the tribunal used Article 8(1) of the Israel-Uzbekistan BIT. The said provision of the BIT provides that

[e]ach Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes ... *any legal dispute* arising between that Contracting Party and a national or com-

pany of other Contracting Party *concerning an investment of the latter in the territory of the former*.¹⁷⁶

In other words, the *Metal-tech* tribunal has construed from Article 8(1) that contracting parties have given consent to submit any dispute concerning an investment. The contracting parties did not give any consent to submit any dispute to the ICSID, which is concerning a non-investment matter.¹⁷⁷ Moreover, consent to submit any dispute must mean that any dispute which comes subsequent to the institution of a dispute in the form of a claim by the investor. Otherwise, this would contradict Article 8(3), which states that the investor affected may institute an arbitration proceeding, i.e. the BIT limited the consent to bring a dispute in the form of a claim against the host State only by the investor. Since in this case no legal investment exists, the host State's counterclaim fails to satisfy the tribunal's jurisdiction, including the consent requirement required to adjudicate the counterclaim.¹⁷⁸

The *Metal-tech* tribunal could have provided more clarification regarding the viability of a CBC if it had utilised the opportunity to entertain the question of admissibility of the counterclaim. However, as host States are using both counterclaims and corruption-based defences with increasing frequency,¹⁷⁹ it is not unrealistic to assume that the number of CBCs may also increase in future. Therefore, an assessment of arguments advanced by the parties in the *Metal-tech* case on counterclaims can help understand the contours and guide the future application of CBC.

4.2 Analysis of Uzbekistan's Arguments for the Counterclaim

In advancing its arguments on the tribunal's jurisdiction over the counterclaim, Uzbekistan stated that Article 8(1) of the governing treaty's dispute resolution clause allows the respondent to bring a counterclaim.¹⁸⁰ The phrase that the respondent referred to from the BIT article was '*any legal dispute*'.¹⁸¹ According to the respondent, this particular phrase used in this provision is wide enough to cover counterclaims, as they arise directly out of the investment at issue rather than non-compliance with the general law of Uzbekistan.¹⁸² The

176 Art. 8(1) of Israel-Uzbekistan BIT, above n. 156.

177 *Metal-Tech*, above n. 25, para. 411. According to para. 411 'The next question then is whether the counterclaims "concern an investment". The definition of the term investment is found in Article 1(1) of the BIT. It includes a legality requirement. As the Tribunal has concluded above, the Claimant's "investment" does not meet the legality requirement and thus does not constitute an investment in the meaning of the BIT. In other words, the State's offer to arbitrate did not extend to this "non-investment" and the investor's acceptance included this limitation.'

178 *Metal-Tech*, above n. 25, para. 411.

179 Y. Lahlou, R. Willard, M. Craven and C. Lindsey, 'The Rise of Environmental Counterclaims in Mining Arbitration', *Global Arbitration Review*, 18 June 2019, available at <https://globalarbitrationreview.com/chapter/1194145/the-rise-of-environmental-counterclaims-in-mining-arbitration> (last visited 12 September 2021).

180 *Metal-Tech*, above n. 25, para. 392.

181 Art. 8(1) of Israel-Uzbekistan BIT, above n. 156.

182 *Metal-Tech*, above n. 25, para. 395.

168 *Ibid.*

169 *Ibid.*, paras. 278-80.

170 *Ibid.*, paras. 327, 352, 372-4 and 389-90.

171 *Ibid.*, para. 407.

172 *Ibid.*, para. 410.

173 *Ibid.*

174 *Ibid.*, para. 413.

175 *Ibid.*

decision in *Saluka v. Czech Republic*'s¹⁸³ decision also referred to supporting the meaning of *all disputes* mentioned in Article 8(1). Supporting the argument on the tribunal's jurisdiction, the respondent also mentioned Article 46 of the ICSID Convention and Article 40(1) of the ICSID Convention Rules. To establish admissibility, it stated that the counterclaim arises out of the investment at issue.¹⁸⁴ On the same issue, it further stated that the counterclaim has been brought for the breach of investment obligations and fraudulent misconduct. As stated in the award, 'it [host State] is seeking to recover for injuries directly sustained by it [host State] on account of the claimant's breach of the investment obligations and fraudulent misconduct'.¹⁸⁵ In this regard, the respondent mentioned *Amco Asia*'s decision. In other words, it has referred to the governing treaty of the dispute. Overall, Uzbekistan's approach was mostly indifferent to respondents seeking counterclaims in other ISDS cases, as seen in Section 3 of this article.

4.3 Analysis of Metal-tech's Arguments Contesting Uzbekistan's Counterclaim

The claimant's response to the counterclaim was that firstly, Uzbekistan, under Rule 40(2), inadequately pleaded the counterclaim. Secondly, Uzbekistan lacked standing because the two companies are not organs of Uzbekistan. Finally, the legal basis for a counterclaim was a violation of Uzbek law, not directly concerned with the claimant's investment. On the first point of contention, the claimant stated that Rule 40(2) of the 2006 ICSID Arbitration Rules incorporates a standard of specificity adequate to give the opposing party a fair opportunity to respond. But the respondent in articulating the merits of seven assorted theories lacks the requirement of the rules.¹⁸⁶ On the second point, *Metal-tech* added that AGMK and UzKTJM are not parties to the arbitration. Besides, it also argued that Uzbekistan's assertion is wrong that it brought counterclaims on its behalf for the loss it suffered as a shareholder in AGMK and UzKTJM.¹⁸⁷ On the final point of defence, the claimant argued that counterclaims relating to the loss of tax, customs revenue and foreign exchange fall under the violation of domestic law and, therefore, outside the ambit of the jurisdiction of the tribunal. These counterclaims are neither directly connected to the claimant's investment nor directly concerned with the claimant's investment and also lack consent under the dispute settlement clause of the applicable BIT.¹⁸⁸

The award shows that the claimant's contention has not emphasised the point of the parties' consent to the counterclaim. It merely mentioned that the counterclaim lacks consent under Article 8(1) of the BIT as it is not sufficiently broad to include Uzbekistan's consent to

arbitrate counterclaims.¹⁸⁹ Usually, in cases involving counterclaims, the claimant investor advocates strong opposition on the point of consent requirement (see Section 3.1.1). Such a tendency was absent in this case. It is unclear whether it was because of the influence of the earlier decision in *Goetz v. Burundi*. The claimant's overemphasis on the inadequate pleading of the respondent is rare in practice. Rule 40(2) of Arbitration Rules of ICSID does not imply that it required the counterclaims to be formulated in a particular fashion. The claimant's second point of contention, which mentioned that the respondent's counterclaims are based on the violation of domestic law and not concerning violation of the treaty, is controversial. Apparently, the respondent treated investing in accordance with the host State law as a treaty obligation over the investor. The treaty did not indicate which law of the host State would be considered as a violation and which would not. The violation of this obligation linked to or resulted in loss and damages to Uzbekistan. However, the appropriate answer to this would have been possible if the tribunal did not avoid entertaining the counterclaim, concluding that it has no jurisdiction over the claim; therefore, there is no jurisdiction over the counterclaim.

4.4 Understanding the Approach of the Metal-tech Tribunal

The *Metal-tech* tribunal has taken a straightforward approach to the counterclaim. Its decision on counterclaim recognises the uncertain status of counterclaims under international investment law. In other words, howsoever meaningful and strong a counterclaim the respondent host State presents before the tribunal, its existence depends on the existence of the main claim, at least so long as the case is at the jurisdictional stage. If the tribunal finds sufficient reason to deny the jurisdiction of the main claim, it will not proceed with the counterclaim that the respondent submitted as part of the counter-memorial. In other words, a counterclaim cannot exist by itself at the jurisdictional stage. What can be read from this approach of the tribunal is that where there is no legal investment, there exists no legal claim on that investment. Further, where the claim is legally nonexistent, there exists no question of a counterclaim. In other words, the fate of the counterclaim is dependent on the fate of the tribunal's jurisdiction over the claim, but the fate of the jurisdiction over the claim is independent of the outcome of the jurisdiction over the counterclaim. Finding the nonexistence of a principal claim affects the counterclaim, but finding the nonexistence of the counterclaim does not affect the main claim.

In *Metal-tech*, Article 8 was the relevant dispute settlement clause of the Israel-Uzbekistan BIT. Article 8(1) provides that parties in a dispute between a Contracting Party and a foreign investor can bring 'any legal dispute' to the tribunal, which is 'concerning an investment'. In other words, the precondition required to be filled to be

183 *Saluka Investments B.V. v. The Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim (7 May 2004).

184 *Ibid.*, para. 396.

185 *Ibid.*, para. 397.

186 *Ibid.*, para. 401.

187 *Ibid.*, para. 402.

188 *Ibid.*, para. 403.

189 *Metal-Tech*, above n. 25, para. 404.

come a valid legal dispute that could be brought before the tribunal was that the dispute should concern an investment. Consequently, the tribunal had first to recognise that the claimant investor brought an investment claim within the meaning of the governing investment treaty and that also satisfied Article 25 of the ICSID Convention's jurisdictional requirements. The tribunal considering parties' memorial and counter-memorial, evidence and oral arguments, found that *Metal-tech's* claim falls short of being considered an investment claim under the Israel-Uzbekistan BIT due to the investor's involvement in corruption in obtaining the investment approval.

If the finding on the claimant investor's claim would have been different, i.e. if the tribunal would have found the claim to be a valid investment claim, then Article 8(1) of the Israel-Uzbekistan BIT could not be used by the tribunal in denying jurisdiction over the counterclaim. The rationale behind that is that while Article 8(1) states that 'Each contracting party hereby consents to submit ... any legal dispute ... concerning an investment of the latter [foreign investor's] in the territory of the former [host State]', it did not narrow the limit of the dispute, stating that only violation of the obligation of the host State could be considered a dispute before the tribunal.

However, Article 8(3) of the BIT states that '*if any such dispute should arise and cannot be resolved, amicably or otherwise ... then the investor affected may institute conciliation or arbitration proceedings*' (emphasis added).¹⁹⁰ In its decision on the counterclaim, the tribunal did not refer to this sub-clause. Therefore, the award does not indicate whether Article 8(1) should be read together with Article 8(3) in determining the consent requirement for the counterclaim. The tribunal's observation on the scope of Article 8(1) was that the 'BIT is *not restricted to disputes initiated by an investor* against a Contracting Party. It *covers any dispute* about an investment (emphasis added).'¹⁹¹ The textual interpretation of Article 8(3) implies that only the investor, whose treaty rights were affected, may institute an arbitration proceeding for any dispute. In other words, in the BIT, the consent to arbitration is restricted to any dispute raised by the investor. In many treaties, the same limitation appears in different wordings focusing on the dispute concerning the State's obligations rather than the investor's rights. The point to be noted here is that this clause apparently is about a claim and not about a counterclaim. It provides that '*investor ... may institute arbitration proceedings*' (emphasis added). Thus, following the basic understanding of counterclaims, this clause has little significance. It deals with the initiation of proceedings and not about a procedure that could be resorted to in an already instituted proceeding. Therefore, relying on this provision on the question of consent to counterclaim would have been incorrect. This suggests that such a counterclaim then would fully fall within the

scope of Article 8(1) and consent to counterclaim has to be construed from the interpretation of the phrase 'any legal dispute'.

Nevertheless, the tribunal's approach to counterclaims challenges the view that counterclaims could play a role in rebalancing the positions of claimant and respondent in ISDS. It clearly shows the nonequivalence between claim and counterclaim. Therefore, at least in the preliminary stage, when the claim's jurisdiction and admissibility are decided, there claim and counterclaim do not have the same force. This means that counterclaims cannot operate to balance out the blanket advantage of instituting a claim that has been historically provided to foreign investors in investment treaties. It appears from the *Metal-tech* decision that if the respondent wants to obtain reparations through a counterclaim regarding the investor's alleged corruption, then at least in some cases, it consider refraining from challenging the principal claim at the jurisdiction stage in the dispute or even if challenged that has to be rejected by the tribunal. Will the host State take such a risk? Probably, if the host State is confident enough that the investor cannot establish the host State's violation of a treaty obligation on the merits, and at the same time thinks that it can prove the counterclaim, then the host State might opt for this strategy.

A visible difference of other types of counterclaim cases to the CBC in *Metal-tech* is that in environmental and human rights-related counterclaims, host States frame their counterclaims based on investors' violation of obligations in the post-investment period. In *Metal-tech*, the violation occurred in obtaining the approval of the investment, which has affected the legality of the investment. Therefore, the tribunal dismissed the claim finding it lacks jurisdiction as there exist no legal investment of the claimant. The decision not to entertain the question of jurisdiction over counterclaim was based on the decision on the claim.

The asymmetric nature of investment treaties and investor-State arbitration was exposed again through the *Metal-tech* decision. In this case, the claimant's acceptance apparently did not complete by bringing a claim before the ICSID tribunal. Rather, the investor's acceptance would be completed if the tribunal would have found that it has jurisdiction over the investor's claim and the claimant investor's consent to the respondent host State's counterclaim would be construed therefrom. This shows that the constituting instruments of international investment law, and the interpretation of those investments in investment arbitration, is weighted in favour of foreign investors. If merely instituting a claim would have been sufficient for the investor's acceptance of the host State's offer to arbitrate, then rejection of the investor's claim would not affect the counterclaim of the host State. Hence it can be argued that instituting a claim does not solidify the investor's acceptance of the offer to arbitrate. For that reason, rejection of a claim by the tribunal at the jurisdictional stage inexorably rejects all other issues, including counterclaims that the host State brings believing that by insti-

190 Art. 8(3) of Israel-Uzbekistan BIT, above n. 156.

191 *Metal-Tech*, above n. 25, para. 410.

tuting the claim investor consented to arbitrate the counterclaim as well. The analysis above indicates that at present, CBCs by host States face multiple challenges. In the following section, the author suggests some ways through which effective CBC could be brought before ICISID ISDS tribunals.

5 Actions Required for Effective CBC in ISDS

5.1 Including Anti-Corruption Obligations and Allowing Host State CBCs in New IIAs

In new IIAs, an anti-corruption provision can be added to create an explicit obligation on the foreign investor to comply with national or international anti-corruption norms. This practice has already started, and could benefit both investors and host States.¹⁹² For investors, their responsibility would be clear; therefore, they would be more alert before engaging in these activities and consider the adverse consequences. For host States, such provisions would help in the development of robust arguments based on the investor's obligations not to engage in corruption.

Corruption is a globally condemned act, and some of its core forms are already outlawed by nearly all countries. However, considering the object and purpose of IIL, it is difficult to determine what could be an appropriate and effective remedy in case of findings of corruption in foreign investment. As corruption in foreign investment means the involvement of public officials of the host State,¹⁹³ it is evident that a question of State responsibility will arise. In *Metal-tech*, the tribunal indicated the host State's responsibility for corruption.¹⁹⁴ It stated that

[t]he law is clear – and rightly so – that in such a situation the investor is deprived of protection and, consequently, the host State avoids any potential liability. That does not mean, however, that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this participation, which is implicit in the very nature of corruption, it appears fair that the parties share in the costs.¹⁹⁵

In *Spentex v. Uzbekistan*, the tribunal went a step ahead. It rejected jurisdiction over the claim that alleged the investor's corruption, but it directed the host State to donate USD 8 million to the United Nations Anti-cor-

ruption Agency,¹⁹⁶ or to face adverse cost awards.¹⁹⁷ This indicates that corruption is not an act of investors alone. Commentators have raised concern about the State's avoidance of responsibility for corruption by invoking the corruption defence.¹⁹⁸ Depriving an investor of ICISID arbitration for treaty claims at the jurisdictional stage on the basis of the investor's alleged corruption means overlooking the host State's responsibility for participation in alleged corruption too. This approach is questionable. It could encourage the host State to be corrupt or tolerate corruption, rather than abstain from it.¹⁹⁹ Therefore, a remedy other than the rejection of jurisdiction is necessary.

Opening the scope of CBC²⁰⁰ could be an effective replacement of the rejection of the claimant's claim at the jurisdictional stage. The benefit of this approach for the host State is that if it can defeat the claimant's claim on merit and prove its counterclaim, it may get an award for damages and costs. Even if it fails to defeat the claimant's claim, if it succeeds in proving its counterclaim, then it may receive payment of damages as well as having to pay. Finally, if the host State fails both the claim and counterclaim, at least the host State's conduct towards the foreign investors will not be tarnished as a country that takes advantage of its own corrupt or illegal acts. Therefore, new investment treaties should consider inserting an anti-corruption obligation provision. This will send a message to foreign investors that they will weaken their position in the future dispute and provide grounds for the host State to seek CBC if they are involved in corrupt acts. Besides, new investment treaties can also explicitly mention host States' right to counterclaim and clearly state that separate consent of investors is not required for host States' counterclaims. Adopting such an explicit provision would remove the ambiguity on host States' counterclaim in ISDS and con-

196 L. Peterson and V. Djanic, 'In an Innovative Award, Arbitrators Pressure Uzbekistan – Under Threat of Adverse Cost Order – To Donate to UN Anti-Corruption Initiative; Also Propose Future Treaty-Drafting Changes that Would Penalize States for Corruption', *IAReporter*, 22 June 2017, available at www.iareporter.com/articles/in-an-innovative-award-arbitrators-pressure-uzbekistan-under-threat-of-adverse-cost-order-to-donate-to-un-anti-corruption-initiative-also-propose-future-treaty-drafting-changes-that-would/ (last visited 12 September 2021).

197 *Ibid.*

198 A. Ali and E. Romero, 'Arbitration of Corruption Allegations', in D. Roughton and K. Beale (eds.), *International Comparative Legal Guide to: Investor-State Arbitration 2019* (2018), at 13; Kevin E. Davis, 'Contracts Procured Through Bribery of Public Officials: Zero Tolerance Versus Proportional Liability', 50(4) *International Law and Politics* 1261, at 1267, 1311-1313 (2018); Klaw, above n. 26, at 94-96; Devendra, above n. 24, at 275-87; J. Drude, 'Fiat iustitia, ne pereat mundus: A Novel Approach to Corruption and Investment Arbitration', 35(6) *Journal of International Arbitration* 665, at 716-18 (2018); M. Habazin, 'Investor Corruption as a Defense Strategy of Host States in International Investment Arbitration: Investors' Corrupt Acts Give an Unfair Advantage to Host States in Investment Arbitration', 18(3) *Cardozo Journal of Conflict Resolution* 805, at 824-828 (2017).

199 T. Meshel, 'The Use and Misuse of the Corruption Defence in International Investment Arbitration', 30(3) *Journal of International Arbitration* 267, at 268-9 (2013); Tamada, above n. 193, at 119.

200 C. Vijayvergia and P. Belmannu, 'Exploring the Prospects of host-State Counterclaims in Corruption Disputes', 36(4) *Arbitration International*, at 583-600 (2020).

192 See, BITs, above n. 8.

193 D. Tamada, 'Host States as Claimants', in S. Lalani and R. Lazo (eds.), *The Role of the State in Investor-State Arbitration* (2015) 103, at 119.

194 *Metal-Tech*, above n. 25, para. 422.

195 *Ibid.*

tribute to enhancing the legitimacy of this dispute resolution system.

5.2 Supplementing Existing IIAs by the Adoption of a Bilateral or Multilateral International Law Instrument Creating Investors' Anti-Corruption Obligations and Allowing State CBCs

States could adopt an international law instrument to supplement existing IIAs that have no explicit clause involving an anti-corruption obligation and provide no option for host State counterclaims. Such supplementing treaties could create investors' obligations, allow counterclaims for host States and limit the allegation of corruption to being raised by counterclaim only. An additional benefit of this approach would be that foreign investors would not be subject to a current government's hostile treatment just because a previous rival government granted the foreign investment. In other words, the foreign investor may be saved or protected from being a victim of domestic political rivalry.

Investment treaties cannot give legality to corruption. However, the drawbacks of the corruption defence in ISDS can be avoided through treaty practice. States can mutually opt out of resorting to the corruption defence through treaties and allow any corruption-related issue from the host State to be raised as a counterclaim.

Some investment treaties already contain a provision stating that the host State cannot file a counterclaim on some issues.²⁰¹ In other words, restricting parties through investment treaties is not novel. Therefore, adopting supplementary hard law instruments to existing investment treaties that allow corruption issues to be raised only as a counterclaim in ISDS is not an unforeseen act. In this regard, The OECD Guidelines for Multinational Enterprises²⁰² could be followed as a prototype. It provided seven recommendations that enterprises should follow in 'Combating Bribery, Bribe Solicitation and Extortion'.²⁰³ It is a non-binding soft law instrument; however, a similar hard law instrument that creates anti-corruption obligations and explicitly allows corruption issues to be raised only as counterclaims could be adopted. This would be a safe and effective approach to protecting foreign investment and fruitful anti-corruption action. Moreover, the counterproductive impact of the corruption defence in ISDS could be avoided through the use of CBC.

5.3 Eliminate the Connectedness Requirement of Counterclaims in IIAs

As mentioned in Section 3.1.2, the connectedness of the counterclaim with the principal claim is another issue causing difficulty for host States bringing CBCs. At pres-

201 Art. 15 and Art. 26 of Energy Charter Treaty. Art. 15 of the treaty provides that 'In any proceeding under Article 26, a Contracting Party shall not assert as a defence, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract.'

202 OECD, *OECD Guidelines for Multinational Enterprises: 2011 Edition* (2011).

203 *Ibid.*, at 47-50.

ent, the ICSID Convention and Arbitration Rules both require a counterclaim to be arising directly out of the subject matter of the investor's principal claim.²⁰⁴ However, there seems to be no single approach to this connectedness requirement. It is unclear whether the connectedness requirement has to be factual or legal, or both. If factual, how much factual connectivity is required or if legal, how close the legal connectivity should be, is also vague. There is no established parameter available for tribunals to apply in determining the connectedness requirement. It is challenging to ascertain how much connection should be treated as directly connected. The UNCITRAL Arbitration Rules earlier had a connectedness requirement;²⁰⁵ later it was dropped from the rules in the 2010 amendment.²⁰⁶ In July 2017, UNCITRAL entrusted Working Group III the mandate to identify concerns relating to the ISDS mechanism and formulate possible reform options, including in regard to counterclaims. As of May 2022, Working Group III has completed the first round of preliminary consideration of reform options.²⁰⁷ However, a secretariat note titled 'Possible reform of investor-State dispute settlement (ISDS): Multiple proceedings and counterclaims' mentions that the Working Group wishes to formulate provisions on investors' obligations which would form the basis for a State's counterclaims.²⁰⁸ To address the admissibility concern, formulating clauses for the use by States in their offer to arbitrate in investment treaties would be broad enough to cover any counterclaim that States may have.²⁰⁹ The Working Group is expecting to finish its mandate by 2024 and final report to be adopted following the UN process in 2025.²¹⁰

Recently, the 2006 ICSID Arbitration Rules have been amended.²¹¹ On 20 January 2022, ICSID published the 'Proposed Amendments to the Regulations and Rules for ICSID Convention Proceedings',²¹² and on 21 March 2022, member States approved the proposed amendment in a vote. Amended rules come into effect from 1 July 2022. The new amended version of rules has not dropped the counterclaim's connectedness require-

204 Art. 46 ICSID Convention, Rule 40 ICSID Arbitration Rules, 2006, Art. 48 ICSID Arbitration Rules, 2022. These instruments provide '...incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute...'

205 Art. 19(3) UNCITRAL Arbitration Rules 1976. This article provides that '...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.'

206 Art. 21(3) UNCITRAL Arbitration Rules 2010.

207 UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, available at: www.ohchr.org/sites/default/files/Documents/Issues/Business/WG/Submissions/Others/UNCITRAL.pdf (last visited 14 July 2022).

208 <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/006/03/PDF/V2000603.pdf?OpenElement> (last visited 14 July 2022), paras. 39-42.

209 *Ibid.*, paras. 43-44.

210 UNCITRAL Working Group, above n. 207.

211 <https://icsid.worldbank.org/rules-regulations/2022-rules-and-regulations/resources> (last visited 4 December 2022).

212 <https://icsid.worldbank.org/resources/rules-amendments#:~:text=ICSID%20submitted%20resolutions%20on%20the,effect%20on%20July%201%2C%202022> (last visited 7 March 2022).

ment.²¹³ Only minor linguistic changes have been brought to the relevant provision.²¹⁴ However, in future, if the counterclaim's connectedness requirement is dropped from the ICSID Rules of Arbitration, the same should be done in the ICSID Convention, because such a change in rules alone will not clear the ambiguity. Considering the asymmetry in the ISDS system under ICSID and the backlash against the international investment law regime, opening an option for counterclaims by host States without connectedness to the claim of the foreign investor could minimise the backlash of host States. Moreover, it would create the impression that host States can also seek relief against the foreign investor provided that the foreign investor has breached its treaty obligation. CBC can contribute to the current urge to rebalance the system. Therefore, in new investment treaties and supplementing instruments to treaties in force, States should remove the connectedness requirement.

5.4 Reducing the Standard of Proof for CBC

ICSID Arbitration Rules or tribunals in their practice can develop a standard for determining the allegation that anti-corruption obligations have been violated. At present, tribunals have no uniform standard of proof in determining the allegation of corruption.²¹⁵ On most occasions, tribunals have applied a high standard of proof.²¹⁶ Corruption is an act of a hidden nature; thus, it is tough to discover and prove it.²¹⁷ For example, in the *Siemens v. Argentina*²¹⁸ case, after the ICSID tribunal ordered Argentina to pay USD 217 million in the award,²¹⁹ the US Department of Justice's investigation discovered that Siemens was involved in corrupting governments worldwide, including the Government of Argentina, in obtaining investment contracts.²²⁰ Therefore, the higher the standard of proof a tribunal sets, the more difficult it will be to prove corruption.

Different types of higher 'standard of proof' applied by tribunals in corruption-related cases were 'beyond reasonable doubt', 'clear and convincing proof' and 'irrefutable proof'.²²¹ These high 'standards of proof' frustrated

host States from proving corruption and barred tribunals' jurisdiction over investors' claims. While one group of commentators has criticised tribunals for adopting a high standard of proof in corruption cases,²²² the other group supported it.²²³ However, if States are allowed to bring corruption issues only as a counterclaim, then the standard of proof can be reduced to 'circumstantial evidence', 'more likely than not' 'reasonable certainty',²²⁴ 'red flags'²²⁵ or 'connecting the dots' methods. It will benefit both parties because, on the one hand, it will reduce the difficulty the host State encounters in establishing their counterclaim of corruption (if any), and the investor, on the other hand, will not lose the opportunity to be heard by the tribunal in regard to its claim. However, even then, one issue will remain unresolved, i.e. dependency of the counterclaim on the original claim. The tribunal rejected jurisdiction over the counterclaim in *Metal-tech* as it found had no jurisdiction over the claim (see Section 4.1). In other words, CBC will not be fruitful unless and until the tribunal finds jurisdiction over the claimant's claim. As it is a matter of interpretation, tribunals should reject such dependency in interpreting counterclaims in future cases.

6 Conclusion

This study has discussed and analysed different aspects and challenges of counterclaims before ICSID ISDS tribunals in general and CBC in particular. It is an undeniable fact that corruption exists in the foreign investment sector. However, appropriate and effective steps must be taken to address this problem. The author finds the criticism reasonable that host States tend to resort to a 'corruption defence' to disguise their responsibility for corruption in foreign investment and deprive foreign investors of protection through ISDS for their treaty claims. In the author's view, this approach is counterproductive to the shared developmental goal of international investment law and international anti-corruption law. It is therefore argued that in addressing corruption issues, opening the scope of the host State's CBC would solve the problems associated with the corruption defence. To overcome the current challenges of CBC, this study suggested in Section 5 to include an explicit require-

213 https://icsid.worldbank.org/sites/default/files/publications/rule_amendment_proposals_convention.pdf (last visited 7 March 2022).

214 *Ibid.*

215 F. Haugeneder, 'Corruption in Investor-State Arbitration', 10(3) *The Journal of World Investment & Trade* 323, at 338 (2009).

216 Greenwald and Ivers, above n. 24, at 25-26.

217 Haugeneder, above n. 215; A. Martinez, 'Invoking State Defenses in Investment Treaty Arbitration', in M. Waibel, A. Kaushal, K. Liz and C. Balchin (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010) 315, at 328.

218 *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (17 January 2007).

219 *Ibid.*, para. 403; Betz, above n. 23, at 81.

220 L. Peterson, 'Siemens Pleads Guilty to Breach of Foreign Corrupt-Practices Act; Evidence of Arbitration Over Illicit Payments', *IARReporter*, 17 December 2008, available at www.iareporter.com/articles/siemens-pleads-guilty-to-breach-of-foreign-corrupt-practices-act-evidence-of-arbitration-over-illicit-payments/ (last visited 18 July 2022).

221 *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo*, ICSID Case No. ARB/05/21, Award on Objection to Jurisdiction and Admissibility (29 July 2008) para. 53; Betz, above n. 23, at 85.

222 Haugeneder, above n. 215. The author criticised high standard of proof on the ground that corruption is usually difficult to establish and a higher threshold regarding proof put an undue disadvantage on the party alleging corruption. Besides, a high standard of proof may be warranted in criminal cases, but investor-State arbitration only deals with the monetary consequences of violations of investment treaties or investment contracts. The consequence of a finding of liability based on corruption are no different from liability for other reasons. It is therefore not apparent why in the case of corruption a higher standard should apply.

223 EDF, above n. 23, para. 221. Tribunal held that 'there is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption'.

224 *Metal-Tech*, above n. 25, para. 243; Betz, above n. 23, at 119; A. Llamzon, *Corruption in International Investment Arbitration* (2014), at 120.

225 Claimed to be used in *Spentex*, above n. 25; See also Peterson and Djanić, above n. 196.

ment for investors' compliance with anti-corruption laws in new investment treaties, along with a clause allowing the host State's counterclaim. It also suggests adopting binding bilateral or multilateral international law instruments to create an anti-corruption obligation for investors and allow States to raise CBCs to supplement existing investment treaties in force. In new IIAs and supplementary instruments to existing treaties, States should explicitly restrict corruption issues in ISDS to be raised only as a counterclaim. Moreover, it suggests eliminating connectedness requirements for the counterclaim and reducing the standard of proof for the CBC in order to facilitate a viable CBC.