Chapter 4.
International Enforcement Through Counterclaims

Building on the analysis of substantive investor obligations carried out in the previous Chapter, the analysis will now turn more closely to how states may procedurally enforce such obligations through arbitral counterclaims. It is submitted that under many IIAs, counterclaims are already possible today.

It seems that states have only recently realised the potentials of counterclaims even though investment arbitration has always provided for this instrument (I.). While there are some important jurisdiction and admissibility requirements, these are more lenient than is often believed (II.). Of course, host states always have the possibility to take steps against investors within their domestic legal system. Nevertheless, counterclaims have important advantages as an international enforcement mechanism for protecting the public interest (III.). Yet, by their nature, they remain a reactive instrument, requiring the investor to file an arbitral claim against the host state first. As of today, there is no basis for the host state to initiate a self-standing claim without such a prior, so-called primary claim by the investor (IV.).

I. The discovery of counterclaims for a new purpose

Counterclaims are well-established in different international dispute settlement procedures.[1] They form separate and self-standing claims that the

1 For a study on counterclaims before the ICJ see Constantine Antonopoulos, *Counterclaims Before the International Court of Justice* (T.M.C. Asser Press 2011); for a short general overview on the widespread possibility to file counterclaims see Zachary Douglas, 'The Enforcement of Environmental Norms in Investment Treaty Arbitration' in Pierre-Marie Dupuy and Jorge E Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge University Press 2013) 427; see further Hege E Veenstra-Kjos, 'Counterclaims by Host States in Investment Treaty Arbitration' (2007) 4(4) Transnational Dispute Management 1, 4–5; for a historical analysis of early cases see Bradley Larschan and Guive Mirfendereski, 'The Status of Counterclaims in International Law, with Particular Reference to International Arbitration Involving a Private

respondent files against the claimant in response to the latter's primary or original claim. Building on similar instruments in domestic legal systems, their main purpose is to merge the procedure on the primary claim with the respondent's counterclaim to achieve higher procedural economy.[2]

Although investment counterclaims have only recently sparked greater attention, *inter alia* in the UNCITRAL Working Group III on ISDS reform,[3] generally, investment arbitration has always allowed for them. When states created investment arbitration, they modelled it on commercial arbitration. There, the possibility of counterclaims between private actors is well-established. The ICSID Convention even explicitly allows counterclaims in Art 46[4] as well as in Rule 40 of the ICSID Rules of Arbitration.[5] One can find similar wording in the UNCITRAL Arbitration

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Party and a Foreign State' (1986–1987) 15(1) Denver Journal of International Law and Policy 11, 18–24.

2 Dafina Atanasova, Adrián Martínez Benoit and Josef Ostransky, 'The Legal Framework for Counterclaims in Investment Treaty Arbitration' (2014) 31(3) Journal of International Arbitration 357, 359–360.

3 See for example Maxim Scherer, Stuart Bruce and Juliane Reschke, 'Environmental Counterclaims in Investment Treaty Arbitration' (2021) ICSID Review 36(2) 413, 414; see the discussions and policy suggestions for counterclaims in Art 18 (E) IISD, *Model International Agreement on Investment for Sustainable Development* (2005); UNCTAD 'Investment Policy Framework for Sustainable Development' UNCTAD/DIAE/PCB/2015/5 (2015), 109–110; IISD, *A Sustainability Toolkit for Trade Negotiators: Trade and Investment as Vehicles for Achieving the 2030 Sustainable Development Agenda* (2017) para 5.5.2, Option 4; IISD, *Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements: Report of the Expert Meeting Held in Versoix, Switzerland, January 11–12, 2018* (2018) 15; on the UNCITRAL Working Group III see UNCITRAL 'Possible Reform of Investor-State Dispute Settlement (ISDS), Multiple Proceedings and Counterclaims' (22 January 2020) UN Doc A/CN.9/WG.III/WP.193, paras 32–45.

4 Art 46 ICSID Convention stipulates: 'Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.'

5 Art 40 ICSID Rules of Arbitration states: '(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre. (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding. (3) The Tribunal shall fix a time

Rules, both in their 1976 version in Art 19 (3) and in their 2010 version with a changed wording in Art 21 (3).[6] *Schwebel* pointedly commented that assumptions on arbitration as a one-way street 'are as colorful as they are misconceived'.[7]

And indeed, states have, in the past and on various occasions, filed counterclaims in investment arbitration and before the Iran-US Claims Tribunal. Yet, these only accounted for approximately two percent of the total investment arbitration claims.[8] Many of them related to private law-related matters of the contractual relationship between the host state and the investor. They did not address investors' conduct towards the public interest. It is useful in this regard to recall that in the first years, investment arbitration often built on arbitration clauses in investment contracts rather than IIAs. As a consequence, these disputes often led to rather technical

limit within which the party against which an ancillary claim is presented may file its observations thereon.' On the history of the ICSID Convention in this regard see IBRD 'Report of the Executive Directors on the Convention of the Settlement of Investment Disputes Between States and Nationals of Other States' ICSID/15/Rev.1, 35–49 (18 March 1965) para 13; Thomas Kendra, 'State Counterclaims in Investment Arbitration – a New Lease of Life?' (2013) 29(4) Arbitration International 575, 577–578.

6 Art 19 (3) of the 1976 UNCITRAL Arbitration Rules stipulates: 'In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purposes of a set-off.' Art 21 (3) of the 2010 UNCITRAL Model Arbitration Rules states: 'In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.' On other investment arbitration rules and their position to counterclaims see Guido Carducci, 'Dealing with Set-Off and Counterclaims in International Commercial and Investment Arbitration' (2013) 3 Yearbook on International Arbitration 173, 178–180.

7 Stephen M Schwebel, 'A BIT About ICSID' (2008) 23(1) ICSID Review 1, 5; similarly Jackson S Kern, 'Investor Responsibility as Familiar Frontier' (2019) 113 AJIL Unbound 28, 29–30 who points to the history of international investment law as a 'two-way system'.

8 Mark W Friedman and Ina C Popova, 'Can State Counterclaims Salvage Investment Arbitration?' (2014) 8(2) World Arbitration & Mediation Review 139, 149; José A Rivas, 'ICSID Treaty Counterclaims: Case Law and Treaty Evolution' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2015) 779.

contractual counterclaims by the host state against the investor.[9] By and large, these counterclaims have remained unsuccessful.[10]

Most cases on counterclaims in investment *treaty* arbitration only came up in the last years.[11] Even then, most counterclaims related to matters that one would consider to belong to contract law, such as the payment of maintenance costs for a vessel in winter or the meeting of obligations under a bank operation certificate.[12] The five awards on counterclaims discussed in Chapter 3 form the forefront of counterclaims on genuine matters of public interest. Therefore, the use of counterclaims for holding investors accountable in their conduct towards the public interest is not the invention of a new IIA feature – but rather the discovery of a pre-existing tool for a new purpose.

II. Lenient jurisdiction and admissibility requirements

In light of the emerging practice of counterclaims with this new purpose, it is necessary to reflect on their jurisdiction and admissibility requirements. Some argue that they are restrictive, admitting counterclaims only in exceptional circumstances.[13] This Section will submit the contrary and show that these requirements are relatively lenient,[14] namely: the consent

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9 On this trend Hege E Kjos, *Applicable Law in Investor-State Arbitration* (Oxford University Press 2013) 131–133; Julien Chaisse and Rahul Donde, 'The State of Investor-State Arbitration' (2018) 51(1) The International Lawyer 47, 60–61; for an overview on investment contract counterclaims see Vohryzek-Griest, 'State Counterclaims in Investor-State Disputes: A History of 30 Years of Failure' (2009) 15 Revista Colombiana de Derecho Internacional 83, 92–111.

10 Vohryzek-Griest (n 9) 86–87; Mark A Clodfelter and Diana Tsutieva, 'Counterclaims in Investment Treaty Arbitration' in Catherine Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd edn, Oxford University Press 2018) para 17.03.

11 Rivas (n 8) 779.

12 *Antoine Goetz & Consorts and S.A. Affinange des Métaux v Republic of Burundi (Goetz II)*, ICSID Case No. ARB/01/2, Sentence (21 June 2012) para 285.

13 See for example Andrea K Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17(2) Lewis & Clark Law Review 461, 461.

14 Similarly for example Stephan Schill and Vladislav Djanic, 'International Investment Law and Community Interests' in Eyāl Benveniśtî and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018) 244–245; more cautiously, calling for revisions of IIAs, are Clodfelter and Tsutieva (n 10) para 17.96; for a sceptical perspective see Friedman and Popova (n 8) 152–153.

to arbitrate by the disputing parties (1.), the jurisdiction *ratione personae* (2.) and *materiae* as related to matters of the public interest (3.) and to domestic obligations (4.), and the direct relation to the primary claim's subject matter (5.).

1. Consent by the disputing parties

Just as any investment arbitration claim, a counterclaim must firstly be covered by the jurisdiction of the investment tribunal. Because the counterclaim is nothing but a regular investment arbitration claim, the host state and the investor must both agree to submit it to investment arbitration. This can take place explicitly and *ad hoc*, as done for example by the parties in *Burlington v Ecuador*.[15]

If there is no such explicit agreement, one could argue that there is no consent in case the investor objects against the tribunal's jurisdiction for the counterclaim. Instead, investment tribunals have accepted that the consent to a counterclaim is already present in the arbitration agreement that materialised *through investors' primary claim*.[16] In other words: by filing their primary claim, investors have already consented to a possible counterclaim. To understand this argument, it is necessary to recall how the arbitration agreement materialises: Investors accept the host state's standing offer to arbitrate – embodied in the IIA's arbitration clause – by filing their primary claim. The IIA defines the terms of this arbitration agreement. Building on this construction, one can argue that the arbitration agreement also covers the filing of counterclaims at a later point in time because the IIA allows for such a procedural instrument – for example, because it incorporates counterclaim-friendly third instruments such as the above-mentioned ICSID Convention and UNCITRAL Model Arbitration Rules. What is more, Art 46 ICSID Convention even presumes that the disputing parties consent to counterclaims in their agreement on arbitration for the primary claim.[17]

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15 *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims (7 February 2017) paras 60–61, 71–72.

16 *Syridion Roussalis v Romania*, ICSID Case No. ARB/06/1, Award (7 December 2011) para 866; *Goetz v Burundi (Goetz II)* (n 12) para 278.

17 This follows from the negative formulation: '*Except as the parties otherwise agree*, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are

Yet, some argue that investors may narrow the scope of their consent when accepting the host state's offer – and may also exclude consent on a future counterclaim. Indeed, this is one of the unsuccessful preliminary objections that the investor raised against Argentina's counterclaim in *Urbaser v Argentina*. Here, the investor contended that it had not accepted Argentina's offer to arbitrate to the full extent – but only as it allows to file the primary claim against Argentina. This argument is about cutting out those parts of the offer that appear unfavourable to the investor. In the case of *Urbaser v Argentina*, the investor even argued to have done this implicitly.[18]

The more compelling position is that the investor must accept the host state's offer to arbitrate as it stands without modification.[19] Following gen-

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otherwise within the jurisdiction of the Centre.' (emphasis added) The role of the first part of the provision is not entirely clear given that at the end the Article positively demands the parties' consent. Yet, the state parties explicitly chose the negative formulation over a positive one which is best understood as an interpretive presumption of consent for counterclaims if there are no particular indications against it in the arbitration agreement, see also Christoph Schreuer, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) Art 46 paras 6–11; even more strongly advocating a general presumption of jurisdiction for counterclaims is Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) para 488; Clodfelter and Tsutieva (n 10) para 17.24.

18 *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) paras 1123–1125; cf Jorge E Viñuales, 'Investment Law and Sustainable Development: The Environment Breaks into Investment Disputes' in Marc Bungenberg and others (eds), International Investment Law (Nomos 2015) para 19.

19 Supported by Walid Ben Hamida, 'L'arbitrage Etat-investisseur cherche son équilibre perdu: Dans quelle mesure l'État peut introduire des demandes reconventionnelles contre l'investisseur privé?' (2005) 7(4) International Law FORUM du droit international 261, 269; Douglas, *International* (n 17) para 491; Douglas, 'Enforcement' (n 1) 429; Kjos (n 9) 135; Jose D Amado, Jackson S Kern and Martin D Rodriguez, *Arbitrating the Conduct of International Investors* (Cambridge University Press 2018) 84–85; for the contrary position see Schreuer (n 17) Art 46 para 94 who argues that consent is restricted to the extent necessary for the investor's specific claim; see also Gustavo Laborde, 'The Case for Host State Claims in Investment Arbitration' (2010) 1(1) Journal of International Dispute Settlement 97, 109 who argues that investors can accept the offer 'for as little as a single dispute, in full, or anywhere in between'; Stefan Dudas, 'Treaty Counterclaims Under the ICSID Convention' in Crina Baltag (ed), *ICSID Convention After 50 Years: Unsettled Issues* (Wolters Kluwer 2017) 404 who observes that the arbitration agreement mirrors the BIT dispute resolution clause only 'most of the times'; Hugo Thomé, 'Holding Transnational Corporations Accountable for En-

eral contract law principles, a modified acceptance of an offer represents a new offer with the respective new terms.[20] Otherwise, the investor could bind the host state to terms against the state's will – contradicting the contractual and procedural equality between the disputing parties. After all, cutting out parts of the state's offer could substantially alter the procedural balance between the parties. The state cannot have an interest to allow a cherry-picking of investment arbitration rules, especially if standardised model rules are supposed to apply. Otherwise, the investor would also, for example, have the possibility to exclude certain procedural rights of the host state to present evidence or gain other advantages – an absurd result. This position against cherry-picking has been affirmed by the ICSID award in *Roussalis v Romania*.[21]

Delving deeper into the possible constellations of consent-giving, two come to mind: First, an investor may file an investment claim with reference to an IIA that allows for counterclaims without explicitly modifying the terms of the state's offer. Such a conduct must be interpreted as affirming the state's offer without modification and hence as consent to possible counterclaims. This was also the conclusion by the Tribunal in *Urbaser v Argentina*.[22] Second, a foreign investor may explicitly rule out to consent to counterclaims but otherwise accept the state's offer, embodied again in an IIA that allows for counterclaims. Here, the investor's filing of an investment claim does not constitute an acceptance of the state's offer to arbitrate because offer and acceptance do not coincide. Therefore, an investment tribunal would have to already reject its jurisdiction for the investor's primary claim.

However, there is a complication if in the second scenario the host state appears before an investment tribunal and argues on any matter without having reserved a preliminary objection against the tribunal's jurisdiction. Under the doctrine of *forum prorogatum*, in such a case, a state implicitly consents to a tribunal's jurisdiction. The PCIJ affirmed this doctrine in the case of *Rights of Minorities in Upper Silesia* and the ICJ has continued to recognise it ever since.[23] However, investment arbitration under institu-

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vironmental Harm Through Counterclaims in Investor-State Dispute Settlement: Myth or Reality?' (2021) 22(5–6) Journal of World Investment & Trade 651, 675–675 arguing that states 'have the final word and determine the scope of consent'.

20 Ben Hamida (n 19) 269.

21 *Roussalis v Romania*, Award (n 16) para 866.

22 *Urbaser v Argentina*, Award (n 18) paras 1146–1148.

23 *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v Poland)* (Judgment) [1928] PCIJ Rep Series A No 15, 24–25; *The Corfu Channel Case (UK v*

tional rules such as Art 25 (1) ICSID Convention require consent in writing. It depends on how formally one understands this criterion and the concrete actions in the pleadings if the doctrine of *forum prorogatum* may apply – a matter that remains controversial.[24] Therefore, host states are well advised to raise preliminary objections before an investment tribunal to prevent an unfavourable arbitration agreement. Of course, *forum prorogatum* may also apply to the converse situation and produce the necessary consent of the investor to a counterclaim in case of remaining doubt.[25]

All in all, it is the state which defines the terms of investment arbitration through its offer to investors. If the host state's offer to arbitrate encompasses a jurisdiction for counterclaims, the investor must either accept the whole 'package' or step away from the filing of an investment claim.

2. Jurisdiction ratione personae

The last Section has shown how the disputing parties may influence the tribunal's jurisdiction for counterclaims in the way they give their consent. It laid out that IIAs which incorporate the ICSID Convention and the UNCITRAL Model Arbitration Rules are open to counterclaims. However, given that the IIA's arbitration clause *specifies* the terms of the arbitration agreement, it is a separate question if the IIA *itself* allows for the filing of counterclaims or rules them out on a general level. A possible obstacle is that the IIA's arbitration clause contains wording which allows only investors to file claims. As a matter of jurisdiction *ratione personae*, this would rule out the filing of counterclaims by states. Tribunals and scholars approach this question differently. Rather restrictively, some focus only on the wording of the respective clause (a). In contrast, others have very broadly affirmed tribunals jurisdiction for counterclaims '*ipso facto*' (b). It is submitted that one should prefer a holistic interpretive approach that takes account of the wording, context and telos of the arbitration clause – with the consequence that tribunals indeed have jurisdiction over counterclaims under many IIAs (c).

Albania) (Preliminary Objection) [1948] ICJ Rep 15, 27; *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177, paras 60–64.

24 See only Schreuer (n 17) Art 25 paras 481–498 with further references.

25 cf Kendra (n 5) 593.

a) Approaches which focus on the wording

Especially older arbitral decisions place a heavy emphasis on the wording of the IIAs' arbitration clause in approaching the present question, almost to the exclusion of other considerations. This line of cases distinguishes different typical formulations in IIAs to determine jurisdiction for counterclaims.[26]

IIAs hardly ever contain wording that expressly affirms jurisdiction for counterclaims or names both parties as having the right to file a claim. Such rare examples can be found in Art 28 (9) COMESA Investment Agreement[27] or Art 11 (2) Germany-Poland BIT.[28] Much more common are other formulations. One typical category of arbitration clauses expresses that it is the foreign investor who can file an investment arbitration claim, and only the foreign investor. It does so by explicitly naming 'the foreign investor' as the actor entrusted to file an investment claim. Alternatively, but with the same result, there are clauses which allow claims based on the violation of an investor right. *Roussalis v Romania* represents an investment arbitration case that illustrates these constellations. The Tribunal encountered an arbitration clause in Art 9 Greece-Romania BIT[29] with the wording:

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26 For an overview of typical formulations in IIAs see Veenstra-Kjos (n 1) 15–23; Douglas, *International* (n 17) paras 443–446.

27 Art 28 (9) Investment Agreement for the COMESA Common Investment Area (adopted 23 May 2007) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download› accessed 7 December 2021 (COMESA Investment Agreement): 'A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages.'

28 Art 11 (2) Germany-Poland BIT (adopted 10 November 1989, entered into force 24 February 1991, date of termination 18 October 2019) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1393/download› accessed 7 December 2021 (Germany-Poland BIT): 'If a dispute under paragraph 2 of Article 4 or under Article 5 has not been settled within six months after it has been raised by one of the parties to the dispute, either of the parties to the dispute shall be entitled to appeal to an international arbitral tribunal.'

29 Greece-Romania BIT (adopted 23 May 1997, entered into force 11 June 1998) ‹https://edit.wti.org/document/show/f236f60e-3166-4763-a8bc-00bee9e4fc18› accessed 7 December 2021 (Greece-Romania BIT).

> […] If such [investment] disputes cannot be settled within six months from the date either party requested amicable settlement, the investor concerned may submit the dispute either to the competent courts of the Contracting Party in the territory of which the investment has been made or to international arbitration. […]

The Tribunal highlighted that the provision's language only left it to the investor to file an investment arbitration claim, and thus conversely excluded the filing of a counterclaim.[30] In addition, because the BIT did not contain any investor obligations, there was no basis for a counterclaim under the applicable substantive law of the arbitration.[31] Important recent IIAs embody such language restricted to the person or rights of the investor such as Art X.17 CETA or Art 3.1 (2) (b) and (e) EU-Singapore Investment Protection Agreement.[32]

Other arbitration clauses do not contain such textual restrictions. A good example is Art 17 OIC Agreement, the basis of the proceedings in *Al-Warraq v Indonesia*:

> […] a) If the two parties to the dispute do not reach an agreement as a result of their resort to conciliation, or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not accept the solutions proposed therein, then each party has the right to resort to the Arbitration Tribunal for a final decision on the dispute.

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30 *Roussalis v Romania*, Award (n 16) para 869; similarly *Rusoro Mining Limited v The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) paras 623–628.

31 ibid 871; cf Martin Jarrett, Sergio Puig and Steven R Ratner, 'Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals' (2021) Journal of International Dispute Settlement 1, 15, advance article version ‹https://doi.org/10.1093/jnlids/idab035› accessed 7 December 2021 on the problem that there must be a substantive obligation that the state must be able to base its claim on.

32 Comprehensive Economic and Trade Agreement (adopted 30 October 2016) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3593/download› accessed 7 December 2021 (CETA); EU-Singapore Investment Protection Agreement (adopted 15 October 2018) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download› accessed 7 December 2021 (EU-Singapore IPA).

One can find similar clauses for example in Art 9 BLEU-Burundi BIT[33] which was applied in *Goetz v Burundi (Goetz II)*,[34] and Art 11 Ukraine-Germany BIT[35] invoked in *Inmaris v Ukraine*,[36] both proceedings involving a counterclaim by the host state. These Tribunals relied solely on the wording of these provisions in determining if the IIA in question generally provided for jurisdiction for counterclaims.[37]

Overall, to focus on the IIA's wording represents a restrictive approach to counterclaims because there are many IIAs with wording that points against such jurisdiction.

b) Jurisdiction for counterclaims 'ipso-facto'

The opposite approach affirms investment tribunals' jurisdiction to hear counterclaims on teleological grounds without giving regard to the specific wording of IIAs' arbitration clauses. *Reisman* in his dissenting declaration in *Roussalis v Romania* suggested this method. The fact alone that state parties had agreed in an IIA to apply the ICSID Convention was sufficient to establish jurisdiction for counterclaims – given that Art 46 ICSID Convention allows for counterclaims and is incorporated into the arbitration agreement. *Reisman* argued that counterclaims do not only operate to the detriment of the investor. They also provide states with the advantage of not having to pursue their counterargument through

33 Convention entre l'Union Économique Belgo-Luxembourgeoise et la République du Burundi Concernant l'Encouragement et la Protection Réciproques des Investissements (adopted 13 April 1989, entered into force 12 September 1993) ‹https://www.investorstatelawguide.com/documents/documents/BIT-0137%20-%20Belgium-Luxembourg-Burundi%20BIT%20(1989)%20[french].pdf› accessed 7 December 2021 (Belgium-Luxembourg Economic Union-Burundi BIT).

34 *Goetz v Burundi (Goetz II)* (n 12).

35 Ukraine-Germany BIT (adopted 15 February 1993, entered into force 29 June 1996) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1442/download› accessed 7 December 2021 (Ukraine-Germany BIT).

36 *Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine*, ICSID Case No. ARB/08/8, Award (1 March 2012) paras 431–432.

37 *Saluka Investments BV v The Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim (UNCITRAL, 7 May 2004) para 39; *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v The Government of Mongolia*, Award on Jurisdiction and Liability (UNCITRAL, 28 April 2011) para 689; *Roussalis v Romania*, Award (n 16) paras 868–875; *Inmaris v Ukraine*, Award (n 36) para 432; see also Rivas (n 8) 804–808.

additional domestic measures or proceedings. Then, states would face a potential new investment claim against these new measures. It would make sense for both disputing parties to deal with the dispute in full before the arbitral tribunal to save time and avoid unnecessary transaction costs.[38] This teleological argumentation was explicitly affirmed by the Tribunal in *Goetz v Burundi (Goetz II)* in distinction to *Roussalis v Romania*.[39] Therefore, *Goetz v Burundi (Goetz II)* represents a lenient approach to the jurisdictional requirements of counterclaims.

c) A holistic interpretive approach

It is suggested that an adequate solution lies in between these two approaches. To interpret the arbitration agreement that embodies the IIAs' arbitration clause, it is necessary to resort to international rules of treaty interpretation enshrined in Art 31 and 32 VCLT. These rules call for a holistic interpretation of the IIA, taking into account wording, context and *telos* among other factors.[40]

One should affirm jurisdiction for counterclaims in an often-encountered constellation: The arbitration clause's wording is neutral as to its personal scope and the IIA incorporates the ICSID Convention or the UNCITRAL Arbitration Rules. In line with *Reisman*, referring to a set of rules that allows for counterclaims is a contextual argument that they are a default option available in the interest of arbitral economy.[41] In interpreting an arbitration clause, however, this argument should not be absolute. Other textual and contextual aspects should be considered as well.[42]

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38 *Syridion Roussalis v Romania*, ICSID Case No. ARB/06/1, Declaration of Arbitrator Reisman (28 November 2011).

39 *Goetz v Burundi (Goetz II)* (n 12) paras 279–280; cf *Oxus Gold v Republic of Uzbekistan*, Award (UNCITRAL, 17 December 2015) paras 947–948 which left this controversy open.

40 Similarly Atanasova, Martínez Benoit and Ostransky (n 2) 371; Scherer, Bruce and Reschke (n 3) 419–424 construed as a question of consent.

41 Indeed, from the beginning, the ICSID Convention was conceived to offer equal access to investors and states and welcomed the possibility of counterclaims, see only Vohryzek-Griest (n 9) 87–89. See also *David Aven et al. v The Republic of Costa Rica*, Case No. UNCT/15/3, Final Award (UNCITRAL, 18 September 2018) para 741 which affirmed jurisdiction for a counterclaim inter alia for the reason that this has 'practical advantages on procedural economy and efficiency'.

42 In this regard correct Atanasova, Martínez Benoit and Ostransky (n 2) 367; Dudas (n 19) 392–393.

Similarly, the wording of the arbitration clause should not by itself be exclusively decisive.[43] Even if it names only the investor as the person to file an investment claim, counterclaims can still be possible. One could well understand such wording as only deciding which party was allowed to file the *primary* claim while leaving open the possibility for a subsequent counterclaim.[44] Indeed, this was the approach of the UNCITRAL Tribunal in *Aven v Costa Rica* which affirmed jurisdiction for a counterclaim despite Art 10.28 CAFTA-DR[45] defining 'claimant' as 'an investor of a Party that is a party to an investment dispute with another Party'.[46] In the same vein, the recent awards in *Al-Warraq v Indonesia* and *Urbaser v Argentina* only highlighted the broad language of the respective arbitration clauses to affirm their jurisdiction as one argument among others.[47]

An important contextual argument in favour of jurisdiction for counterclaims is the presence of direct obligations. If an IIA provides for both rights and obligations, it is reasonable to assume that arbitration should likewise encompass both. Indeed, this was an important argument that the Tribunal in *Al-Warraq v Indonesia* used to affirm its jurisdiction for a counterclaim based on Art 9 OIC Agreement.[48]

Another contextual argument is the mentioning of counterclaims in IIA provisions other than the arbitration clause. For example, US FTAs with Korea, Colombia and Peru as well as US BITs with Rwanda and Uruguay contain a clause that

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43 Supported by Thomé (n 19) 677; for an approach that appears to primarily centre on the wording of the arbitration clause see Barnali Choudhury, 'Investor Obligations for Human Rights' (2020) 35(1–2) ICSID Review 82, 95; Jarrett, Puig and Ratner (n 31) 15–16.

44 Similarly Atanasova, Martínez Benoit and Ostransky (n 2) 376–377; see also Veenstra-Kjos (n 1) 21–22 who argues that only if both the personal and the substantive scope has been limited to the state and its obligations, counterclaims should be excluded. The contrary position underlines that a counterclaim is nothing other than a claim, see for example Bjorklund (n 13) 468.

45 Dominican Republic-Central America FTA (adopted 5 August 2004, entered into force 1 March 2006) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2482/download› accessed 7 December 2021 (CAFTA-DR).

46 *Aven v Costa Rica* (n 41) paras 731, 738–740.

47 *Hesham Talaat M. Al-Warraq v The Republic of Indonesia*, Final Award (UNCITRAL, 15 December 2014) paras 660–661; *Urbaser v Argentina*, Award (n 18) paras 1143–1144.

48 *Al-Warraq v Indonesia*, Final Award (n 47) paras 662–663.

> [a] respondent may not assert as a defence, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

It implies that in all other cases, there is jurisdiction for counterclaims.[49] This holds true even though these IIAs contain arbitration clauses with restrictive wording. They mention only the right to file an investment claim for a breach of an investor right, an investment authorisation or an investment agreement in the arbitration clause.[50] But if this wording would categorically rule out counterclaims, their mentioning in other provisions would be without meaning.[51] Even more clearly, the Trans-Pacific Partnership (TPP) that was eventually abandoned by the US quite explicitly provided in its Art 9.19 (2) that '[…] the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant.' Interestingly, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) builds on the TPP's text by reference. Yet, it precisely suspends this paragraph on counterclaims from entering into effect.[52]

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49 Art 11.20 (9) US-Korea FTA (adopted 30 June 2007, entered into force 15 March 2012) ‹https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/09/US-Korea.pdf› accessed 7 December 2021 (US-Korea FTA); Art 10.20 (7) US-Colombia Trade Promotion Agreement (adopted 22 November 2006, entered into force 15 May 2012) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2737/download› accessed 7 December 2021 (US-Colombia FTA); Art 10.20 (7) US-Peru Trade Promotion Agreement (adopted 12 April 2006, entered into force 1 February 2009) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2721/download› accessed 7 December 2021 (US-Peru FTA); Art 28 (7) US-Rwanda BIT (adopted 19 February 2008, entered into force 1 January 2012) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2241/download› accessed 7 December 2021 (US-Rwanda BIT); Art 28 (7) US-Uruguay BIT (adopted 4 November 2005, entered into force 31 October 2006) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2380/download› accessed 7 December 2021 (US-Uruguay BIT); Rivas (n 8) 814. The presented contextual argument is supported by Clodfelter and Tsutieva (n 10) para 17.48.

50 Art 11.16 (1) (a) US-Korea FTA; Art 10.16 (1) (a) US-Colombia FTA; Art 10.16 (1) (a) US-Peru FTA; Art 24 (1) (a) US-Rwanda BIT; Art 24 (1) (a) US-Uruguay BIT.

51 Left open by Rivas (n 8) 815–816.

52 See Art 9.19 (2) Transpacific Partnership (adopted 4 February 2016) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3573/download› accessed 7 December 2021 compared with Annex No. 2 (b) (ii) Comprehensive and Progressive Agreement for Trans-Pacific Partnership (adopted 8

3. Jurisdiction ratione materiae for public interest-related matters

The investment tribunal must also have jurisdiction *ratione materiae* for the public interest matters that form the basis of the counterclaim.[53] If IIAs enshrine direct obligations as discussed above,[54] this requirement is easily met.

Nevertheless, there are voices that are reluctant to accept an investment tribunal's jurisdiction *ratione materiae* for counterclaims related to the public interest. The underlying concern appears to be that the protecting of human rights, the environment and labour standards or the combatting of corruption is not the task of an *investment* tribunal (close to the doctrine of *forum non conveniens*). It lied outside of its jurisdiction as a matter of principle.[55]

These concerns are not compelling in their generality. One may rebut that, on the contrary, international investment tribunals regularly engage with matters of public interest as they interpret investor rights. This has been one of the prime reasons for the right to regulate debate of the last years. Rather, if a tribunal has jurisdiction on matters of the public interest depends on the interpretation of the specific arbitration agreement.[56] One

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March 2018, entered into force 30 December 2018) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5672/download› accessed 7 December 2021. For a comparative analysis of Asian IIAs see Trisha Mitra and Rahul Donde, 'Claims and Counterclaims Under Asian Multilateral Investment Treaties' in Leïla Choukroune (ed), *Judging the State in International Trade and Investment Law* (Springer Singapore 2016) 116–124.

53 Ursula Kriebaum, 'Foreign Investments & Human Rights: The Actors and Their Different Roles' (2013) 10(1–17) Transnational Dispute Management on the example of human rights.

54 See Chapter 3.

55 See for example Jorge E Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012) 91 who takes a sceptical stance related to independent environmental heads of claims by investors against host states.

56 Supported by Tarcisio Gazzini and Yannick Radi, 'Foreign Investment with a Human Face – with Special Reference to Rights of Indigenous Peoples' in Rainer Hofmann and Christian J Tams (eds), *International Investment Law and Its Others* (Nomos 2012) 93–94; Vid Prislan, 'Non-Investment Obligations in Investment Treaty Arbitration: Towards a Greater Role for States?' in Freya Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (Cambridge University Press 2013) 455–457; Eric de Brabandere, 'Human Rights and International Investment Law' in Markus Krajewski and Rhea Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar Publishing 2019) 627–629

may recall the important finding of the Tribunal in *AAPL v Sri Lanka* that international investment law

> […] is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.[57]

4. Jurisdiction ratione materiae for domestic public law

Furthermore, the Tribunal in *Paushok v Mongolia* accepted an additional, jurisdictional objection. It rejected jurisdiction to hear counterclaims based on the host state's domestic public law. The decision relates to the category of internationalised domestic investor obligations discussed above in Chapter 3.VI. Its reasoning is not convincing.

In this case, Mongolia filed a counterclaim based on domestic tax law. The Tribunal found that this was a matter exclusively for Mongolian domestic courts to decide. Affirming jurisdiction would allow to enforce Mongolia's domestic public law extraterritorially. The Tribunal considered this to be contrary to the 'universally accepted rule that public law may not be extraterritorially enforced'.[58] It borrowed these words from the Iran-US Claims Tribunal's award in *Computer Sciences* which had rejected a counterclaim based on tax law obligations for the same reason.[59]

This argument is hard to sustain. The rule that the Tribunal finds to be universally accepted does not exist in international law. It is of course true that sovereign equality and the principle of non-intervention enshrined in Art 2 (1) and (7) of the UN-Charter prohibit a state from enforcing its

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who, however, emphasises the jurisdictional limitations; Amado, Kern and Rodriguez (n 19) 109–113.

57 *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990) para 21; see also *Limited Liability Company AMTO v Ukraine*, SCC Case No 080/2005, Final Award (26 March 2008) para 118 which – methodologically correctly – interpreted the applicable Energy Charter Treaty and found that it does not contain any obligations of the investor which could form the basis of the counterclaim raised, hence rejecting its jurisdiction.

58 *Paushok v Mongolia* (n 37) para 695.

59 *Computer Sciences Corporation v The Government of the Islamic Republic of Iran and Others* (Award) (1986) 10 Iran-USCTR 269, paras 55–56.

law in the territory of another sovereign state. However, the other state is free to consent to such an extraterritorial enforcement.[60] Thus, if two states agree in an IIA to allow for counterclaims based on the respective host state's domestic law, this entails the mutual consent to accept the resulting awards – without regard to any prerogative of domestic courts.

What is more, the ICSID Convention and the 2010 UNCITRAL Arbitration Rules do not restrict counterclaims only to violations of a contract to which the investor is a party. This is a decisive difference to the Iran-US Claims Tribunal: Art II.1 of the Declaration concerning the Settlement of Claims of the Algiers Accords allows for counterclaims only if they 'arise out of the same contract, transaction or occurrence that constitute the subject matter of that national's claim'.[61] Therefore, one cannot transfer the Iran-US Claims Tribunal's jurisprudence to investment arbitration as the Tribunal did in *Paushok v Mongolia*.[62]

Recent investment tribunals have not followed this problematic argumentation. On the contrary, as discussed above, the Tribunals in *Perenco v Ecuador* and *Burlington v Ecuador* have been very active in interpreting and applying domestic administrative and constitutional law.[63] This confirms that there are no fundamental obstacles against applying domestic law in counterclaims.

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60 cf on the intervention by invitation in the *ius ad bellum* Georg Nolte, *Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung* (Springer 1999); on international police cooperation see the analysis by Carsten Bormann, *Transnationale Informationsgewinnung durch Nachrichtendienste und Polizei: Eine Untersuchung von Zulässigkeit und Verwertbarkeit* (Peter Lang GmbH Internationaler Verlag der Wissenschaften 2016); on the European arrest warrant system see Frank Schorkopf, 'European Arrest Warrant' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (January 2009). In the same vein Xuan Shao, 'Environmental and Human Rights Counterclaims in International Investment Arbtiration: at the Crossroads of Domestic and International Law' (2021) 24(1) Journal of International Economic Law 157, 170–171.

61 Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Algiers Accords (19 January 1981) ‹https://iusct.com/wp-content/uploads/2021/02/1-General-Declaration_.pdf› accessed 7 December 2021 (Algiers Accords).

62 Atanasova, Martínez Benoit and Ostransky (n 2) 385.

63 See Chapter 3.VI.2.

5. Direct relation to the primary claim's subject matter

Lastly, the counterclaim must arise directly out of the same dispute's subject matter. This requirement, best understood as an admissibility criterion,[64] reflects the purpose of counterclaims to promote arbitral economy and efficiency. A tribunal should discuss matters that belong together in the same proceedings to avoid unnecessary duplications. It appears that this requirement has substantially evolved in the practice of investment tribunals from a very restrictive to a much more lenient stance.

The earlier restrictive approach is present, for example, in the award in *Saluka v Czech Republic*. Here, the UNCITRAL Tribunal rejected a counterclaim that the investor had violated Czech domestic law. It required that claims and counterclaims constituted an 'indivisible whole',[65] building on the investment contract case of *Klöckner v Cameroon*.[66] Essentially, it demanded them to be grounded in the same legal instrument. Because the investor's primary claim was based on a contract and the Czech Republic's counterclaim on general Czech law, the Tribunal rejected to find a sufficient nexus. Instead, it indicated that it was up to Czech domestic courts to decide on this matter.[67]

Similarly, the UNCITRAL Tribunal in *Paushok v Mongolia* also rejected jurisdiction for the counterclaim based on general Mongolian domestic law. It pointed to Art 19 (3) of the UNCITRAL Arbitration Rules, requiring the counterclaim to arise out of an investment contract or other contract to which the investor was a party.[68]

Yet, both decisions must be appreciated in the light of the then still applicable UNCITRAL Arbitration Rules of 1976 which stipulated in Art 19 (3):

> In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising

64 See the discussion by Atanasova, Martínez Benoit and Ostransky (n 2) 379–380; similarly Veenstra-Kjos (n 1) 30.

65 *Saluka v Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim (n 37) para 79.

66 *Klöckner Industrie-Anlagen GmbH, Klöckner Belge S.A. et Klöckner Handelsmaatschappij v République unie du Cameroun et Sté camerounaise des engrais (SOCAME)*, ICSID Case No. ARB/81/2, Sentence (21 October 1983) 17.

67 *Saluka v Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim (n 37) paras 61–80.

68 *Paushok v Mongolia* (n 37) para 694.

> out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

Precisely this formulation was changed to a more lenient wording in the 2010 UNCITRAL Arbitration Rules which now stipulate in Art 21 (3):

> In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.[69]

Indeed, more recently, tribunals did not give weight to the different legal bases of the primary claim and counterclaim. Essentially, they demanded that they relate to the same investment activity. For example, the ICSID Tribunal in *Goetz v Burundi (Goetz II)* found the close proximity of the underlying facts of both claims to be decisive.[70] In the same vein, the ICSID Tribunal in *Burlington v Ecuador* only briefly remarked that 'the counterclaims arise directly out of the subject-matter of the dispute, namely Burlington's investment in Blocks 7 and 21'.[71] The ICSID Tribunal in *Urbaser v Argentina* explicitly held that a factual connection of principal claim and counterclaim would be sufficient to affirm jurisdiction, while taking legal aspects into account as an addition.[72] The UNCITRAL Tribunal in *Al-Warraq v Indonesia* applied the same test under the revised 2010 UNCITRAL Arbitration Rules. It only dismissed the counterclaim because the host state had not filed a counterclaim against the complainant but against a third person.[73]

Therefore, one may conclude that there is a trend in recent investment arbitration towards interpreting the requirement of connectedness leniently. It is sufficient that claim and counterclaim relate to the same investment determined mainly by the facts of the case.[74]

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69 See further Clodfelter and Tsutieva (n 10) paras 17.88–17.93.

70 *Goetz v Burundi (Goetz II)* (n 12) para 285.

71 *Burlington v Ecuador*, Decision on Counterclaims (n 15) para 62.

72 *Urbaser v Argentina*, Award (n 18) para 1151.

73 *Al-Warraq v Indonesia*, Final Award (n 47) paras 667–669.

74 Supported by Veenstra-Kjos (n 1) 44–46; James Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24(3) Arbitration International 351, 366; Douglas, 'Enforcement' (n 1) 431–433; Clodfelter and Tsutieva (n 10) para 17.36; Shahrizal M Zin, 'Reappraising Access to Justice in ISDS: A Critical Review on State Recourse to Counterclaim' in Alan M Anderson and Ben Beaumont (eds), *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?*

III. Counterclaims' relevance for extraterritorial enforcement

The tendency towards more lenient jurisdiction and admissibility requirements for counterclaims may lead to more successful awards against foreign investors in the near future following *Perenco v Ecuador* and *Burlington v Ecuador*. What is the consequence of a successful counterclaim? Why would host states aim to pursue this avenue in addition or instead of domestic enforcement through courts and executive agencies?

At first glance, one may see the filing of counterclaims as a litigation strategy. The host state can proactively defend itself against the investor's claim, turning the parties' traditional roles in investment arbitrations around. However, the potential repercussions of counterclaims go much further.

The host state can benefit from investment arbitration's international enforcement regime against the investor in the same manner that investors profited from it in the past.[75] States do not even face the hurdle of state immunity – the last resort for the state to defend itself against the enforcement of an arbitral award.[76] From the perspective of the host state, there are a number of potential advantages over domestic enforcement. They depend on the political situation and the state of its legal system. For example, the host state may simply face legal constrains under domestic law in acting against the foreign investor that it does not encounter with regard to counterclaims. Furthermore, the state may be unable to effectively enforce a domestic obligation, for example because of a lack of economic, police or political resources, or corruption in its institutions.[77]

(Wolters Kluwer 2020) 244–245; Ted Gleason, 'Examining Host-State Counterclaims for Environmental Damage in Investor-State Dispute Settlement from Human Rights and Transnational Public Policy Perspectives' (2021) 21(3) International Environmental Agreements 427, 431; more cautiously Atanasova, Martínez Benoit and Ostransky (n 2) 387; Thomé (n 19) 679; Shao (n 60) 169–172.

75 Bjorklund (n 13) 464; Viñuales, 'Investment' (n 18) para 17; Patrick Abel, 'Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration: Fallacies and Potentials of the 2016 ICSID Urbaser v. Argentina Award' [2018] Brill Open Law 1, 24.

76 cf Art 55 ICSID Convention.

77 Mehmet Toral and Thomas Schultz, 'The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations' in Michael A Waibel (ed), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer Law & Business 2010) 600–601; Mitra and Donde (n 52) 109–110; Jarrett, Puig and Ratner (n 31) 17–18; Molly Anning, 'Counterclaims Admissibility in

What is more, counterclaims allow for extraterritorial enforcement. The investor may have significant assets in third countries. Due to its territorial confines, these are usually out of reach for the host state. However, as illustrated, awards rendered through counterclaims are part of the far-reaching enforcement networks of the New York and the ICSID Conventions.[78] They are quite easily enforceable in third states, in particular far more easily than judgments of foreign domestic courts. This means that counterclaims extend the host state's reach beyond its territory.[79] This is particularly remarkable if the award is grounded in the application of domestic obligations, because these are then enforced in a third state.[80] Notwithstanding, one should not forget that only the investor who is party to the arbitral proceedings is the person against whom enforcement can take place. Generally, one cannot enforce an award against assets of other separate companies or persons belonging to an investor's corporate group. This can effectively limit the reach of such awards given the sometimes-intricate corporate structures of multinational enterprises.

IV. Obstacles to primary claims by host states against foreign investors

Even appreciating the promising features of counterclaims as a tool for international enforcement, they remain a reactive means. *Per definitionem*, host states can only file them after the investor has initiated the primary claim. In this light, requirements for counterclaims function as gatekeepers for international enforcement of direct obligations. In contrast, in other procedural contexts, they only promote procedural efficiency. This Section will inquire how, if at all, the state may actively enforce direct obligations through *primary* investment claims against the foreign investor.

It will show that there is little basis for such primary claims in investment law's present state. The necessary consent of the disputing parties generally prevents host states from filing a primary claim (1.) if the state did not reach consent through indirect means (2.). While technically possible, establishing a legal fiction of consent by the investor may often

Investment Arbitration' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 1285.

78 See Chapter 3.VI.3.c); see also Jarrett, Puig and Ratner (n 31) 18.

79 Laborde (n 19) 99 pointing to further strategic arguments in the comparison to domestic enforcement means; Toral and Schultz (n 77) 600–601; Anning (n 77) 1285; Shao (n 60) 173.

80 cf the concerns of some investment tribunals above in Chapter 4.II.4.

preclude the award from being enforceable in the system of the New York and ICSID Conventions (3.). There may be greater possibilities for primary claims before international investment *courts* – yet, again to the price of losing access to the mentioned enforcement systems (4.).

1. Lacking investor consent

Interestingly, there have been a few instances in which a host state or one of its public entities filed a primary investment *contract* claim against the foreign investor. They remained without success for various particular reasons of less interest for the present analysis.[81] The central obstacle to such primary claims is the requirement of consent.

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81 In the 1976 case of *Gabon v Société Serete S.A.* ICSID Case No. ARB/76/1, Order Taking Note of the Discontinuance Issued by the Tribunal (27 February 1978), Gabon filed an investment arbitration claim against the foreign investor for a breach of a construction contract which was then settled and discontinued, see Toral and Schultz (n 77) 589; Mitra and Donde (n 52) 111. – In 1998 the state enterprise Tanzania Electricity Supply Company filed an investment arbitration contract claim against a foreign investor concerning a dispute over a power production agreement. Apparently, the state-owned enterprise favoured international arbitration over domestic courts which it considered to suffer from corruption and be partial to the foreign investor. It was then the investor who brought a claim to domestic Tanzanian courts. Eventually, the parties consented to bring the matter before an ICSID Tribunal, but the case was discontinued later, see *Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Final Award (12 July 2001) paras 10–13; Toral and Schultz (n 77) 591–595; Mitra and Donde (n 52) 111. – In 2007 the Indonesian Province of East Kalimantan filed an investment arbitration contract claim against a foreign investor (*Government of the Province of East Kalimantan v PT Kaltim Prima Coal and Others*). It abstained from resorting to measures under domestic law because it was in a political conflict with the central Indonesian government. The ICSID Tribunal explicitly held that it 'finds nothing in the ICSID Convention [which] prevents a State or its subdivisions or agencies from appearing as claimant in an arbitration based on a contract. The question might receive a different response if the basis for jurisdiction were an investment treaty which, in principle, reserves the right to bring an arbitration to investors and does not grant substantive protections to States.', see *Government of the Province of East Kalimantan v PT Kaltim Prima Coal and Others*, ICSID Case No. ARB/07/3, Award on Jurisdiction (28 December 2009) para 174. However, the ICSID Tribunal dismissed the case for the reason that the Province did not validly represent the state of Indonesia and had neither been designated to ICSID by Indonesia as a constituent subdivision or agency under Art 25 (1) ICSID Convention, see *Government of the Province of East Kalimantan v PT Kaltim Prima Coal and Others*

As seen, the arbitration clause in an IIA embodies the host state's offer to arbitrate to investors. If the investor does not file a claim first, there is no arbitration agreement. In turn, the filing of a primary claim by the host state against the investor must be understood as an offer to arbitrate. The investor does not need to accept it. Without such an arbitration agreement, international investment tribunals have no jurisdiction. Therefore, it seems that there is a structural obstacle against the filing of a primary investment arbitration claim by the host state if the investor does not voluntarily consent.[82]

2. Indirect ways of acquiring investors' consent

An elegant way of inducing the investors' consent is to use options outside of investment law. After all, investors can declare their consent to investment arbitration in other ways than the filing of an investment claim against the host state. For example, host states may require the investor to declare consent to investment arbitration *in abstracto* and in advance by making it a condition under domestic law for admitting the investment to the host state.[83] They could also offer positive incentives for such a declaration such as financial support. Then, this declaration by the investor would be the offer to the host state to file a primary claim. The host state would accept this offer by filing such an arbitral claim against the investor with reference to the investor's declaration. Hence, a consensus of the disputing parties would materialise in reversed roles compared to how primary claims filed by investors against the host state are usually understood to bring about such a consensus.[84]

3. Legal fictions of investor consent

But are there ways to establish jurisdiction of an investment tribunal even against the will of the investor and to realise a form of compulsory

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(n 81) paras 177–202; Toral and Schultz (n 77) 595–600; Mitra and Donde (n 52) 111.

82 cf the assessment by Friedman and Popova (n 8) 153–160.

83 Schreuer (n 17) Art 25 para 455; Amado, Kern and Rodriguez (n 19) 82–84.

84 On how the consent of the disputing parties is construed in the standard cases of claims by the investor against the host state see already Chapter 4.II.1.

jurisdiction in this regard? One could think of establishing the investor's consent as a legal fiction or irrebuttable presumption through IIAs. States indeed lay down forms of legal fictions or irrebuttable presumptions for *their* consent to investment arbitration in IIAs. For example, they have agreed on clauses which state that the IIA qualifies for jurisdiction under the ICSID Convention.[85] Similarly, states have stipulated in IIAs that the taking up of an investment by a foreign investor establishes consent to investment arbitration and satisfies the requirements of the ICSID and New York Conventions.[86] Following these techniques, an IIA could, for example, presume investors' consent to host states' primary claims because they are conducting an investment in the host state.

Such an approach would quite harshly depart from the consensual model of investment arbitration. However, there is nothing in international law that bars such an irrebuttable presumption or legal fiction from operating.[87] Some scholars object by pointing to consent as the elementary basis of international dispute settlement as it was for example applicable for proceedings before the ICJ.[88] Yet, the requirement of consent applies only to states, vested in the principle of sovereignty and sovereign equality enshrined in Art 2 (1) UN-Charter.[89] In international law, there is no

85 For example: '1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement. 2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of: (a) Chapter II (Jurisdiction of the Centre) of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and (b) Article II of the New York Convention for an "agreement in writing."', Art 11.17 US-Korea FTA; similarly Art 8.25 Comprehensive Economic and Trade Agreement (adopted 30 October 2016) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3593/download› accessed 7 December 2021 (CETA).

86 cf Amado, Kern and Rodriguez (n 19) 91–92.

87 But see the contrary position for example by Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press, Wolters Kluwer Law & Business 2015) para 2.01.

88 Atanasova, Martínez Benoit and Ostransky (n 2) 365.

89 Note the reasoning of the PCIJ in *Status of Eastern Carelia* (Advisory Opinion) [1923] PCIJ Rep Series B No 5, 27: 'This rule [the requirement of consent], moreover, only accepts and applies a principle which is a fundamental principle of international law, namely, the principle of the independence of States. It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.' What is more, the principle of consent is not as absolute in practice as sometimes believed, see Alain Pellet, 'Judicial Settlement of International Disputes' in Anne Peters (ed), *Max Planck Ency-*

similar ground for rejecting jurisdiction of an international tribunal over private actors. To the contrary, international criminal tribunals serve as a prime example of how states create compulsory jurisdiction without non-state actors' consent.[90] Rather, to create such a compulsory forum is an exertion of states' sovereign power – doing together what they regularly do alone by creating compulsory jurisdiction of domestic courts.

A different question is if it would still be adequate to consider an investment tribunal based on an investor's fictitious consent to conduct *investment arbitration*. The different methods of international dispute settlement such as adjudication, arbitration, mediation, conciliation and others are archetypes. Their properties can be combined in practice to create hybrid forms.[91] Even an investment tribunal based on the investor's fictitious consent could, for example, leave the selection of arbiters to the disputing parties. This is often considered a characteristic of arbitration in contrast to adjudication. In addition, one may argue that already today states one-sidedly dictate the procedure and applicable law in investment arbitration:

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clopedia of Public International Law (July 2013) paras 7–24; Patrick Abel, 'Negative Zuständigkeitskonflikte internationaler Gerichte durch Subsidiaritätsklauseln: Zur Bedeutung des Maritime Delimitation in the Indian Ocean-Urteils des IGH für die internationale Streitbeilegung' (2018) 78(2) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 339, 370.

90 See for example Art 12 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute). See also the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea which has compulsory jurisdiction for disputes by states or the Authority against a contractor operating in the Area as defined in Art 187 (c), (d), (e) United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS). There, one may argue that consent is provided by the contractors through the concluding of the respective contract for activities on the Area. But, firstly, this is not presupposed by the Convention, and secondly does Art 187 (d) even accord jurisdiction for disputes with a 'prospective contractor'. See also Art 20 (2) Annex VI of the Convention, the Statute of the International Tribunal for the Law of the Sea, which stipulates: 'The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI [such as Art 187] or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.'

91 For example supported by John G Merrills, *International Dispute Settlement* (6th edn, Cambridge University Press 2017) 307; Bernardo Sepúlveda-Amor, 'Opening Remarks' in Laurence Boisson de Chazournes, Marcelo G Kohen and Jorge E Viñuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Martinus Nijhoff Publishers 2013) 8–10.

through the IIA and standardised rules such as the ICSID Convention and UNCITRAL Arbitration Rules.

More specific obstacles could follow from Art 25 ICSID Convention which many consider to impose objective jurisdictional requirements independent of the arbitral agreement between the disputing parties.[92] Indeed, the Tribunal in *AMT v Zaire* expressly held that '[…] two States cannot, by virtue of Article 25 of the Convention, compel any of their nationals to appear before the Centre; this is a power that the Convention has not granted to the States.'[93] But the Tribunal dealt only with the general question if the existence of an IIA with an ICSID arbitration clause was sufficient to provide jurisdiction. It solely pointed out that, in addition to the IIA arbitration clause, consent by the disputing parties is required. It did not address the separate question of whether such consent can validly be grounded in an irrebuttable presumption or in a legal fiction.[94]

Yet another question is that of the enforcement of such awards against investors. It is submitted that their enforcement could take place in the home and the host state, on the basis that *they* are bound to accept the fiction as part of their mutual obligations under the IIA. It is a different matter if third states would have to recognise and enforce such an award. The said international obligation in the IIA has only an *inter-se* binding effect between its state parties.[95] There is a high danger that third states which are party to the New York Convention could refuse to recognise and enforce such an investment award. They could argue that the arbitration agreement was invalid, or that the decision was beyond the scope of the submission to arbitration, or that the arbitral tribunal was not properly constituted (Art V (a), (c) or (d) New York Convention). Under the ICSID Convention, such a rejection would presuppose a successful annulment under Art 52 ICSID Convention.[96]

All in all, it is technically possible for states to replace the actual consent of a foreign investor by a legal fiction.[97] However, it remains doubtful

92 Schreuer (n 17) Art 25 paras 5–8.

93 *American Manufacturing & Trading, Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award (21 February 1997) para 5.18.

94 A contrary position appears to be presented by Schreuer (n 17) Art 25 paras 451–452 who, however, comments on the different question if an arbitration clause in an IIA alone suffices to qualify for an ICSID Tribunal's jurisdiction.

95 On *pacta tertiis* see already Chapter 2.III.

96 The same concerns share Amado, Kern and Rodriguez (n 19) 93, n 29.

97 See also the elaborate procedural suggestions *de lege ferenda* to include in one way or another third private parties in investment arbitraiton by ibid, 19–69.

whether an investment tribunal would find this to be a sufficient consensual basis for its jurisdiction. Third states are likely to challenge that such an award operates within the New York Convention system or subject to the ICSID Convention.

4. Primary claims before international investment courts?

Thinking about investment arbitration based on fictitious investor consent leads to the question if not other models or institutions of international dispute settlement fit primary claims of host states better. In contrast to arbitral tribunals, courts are the fora that give less control to the parties over the proceedings. Their jurisdiction is generally predefined in their constituent treaty.[98]

Even beyond providing the floor for primary claims by states, the setting of a court could possibly also allow third persons the right to bring claims against the foreign investor.[99] Especially in the case that direct obligations protect human rights or workers' rights, third parties' interests are directly at stake.

As of today, there are no international investment courts. Recently, there have been suggestions to create such an institution, for example by UNCTAD and the IISD in 2015 and 2016 respectively.[100] Currently, the EU pursues this goal in the investment protection chapters of its FTAs and in separate investment agreements: For example, Art 3.38–3.59 EU-Viet-

98 On the differences between courts and arbitral tribunals Pellet (n 89) paras 53–63.

99 A concept that may find inspiration in the model of the Court of Justice of the EU and access of individuals to claim violations of fundamental freedoms, though mostly only indirectly through domestic courts, see on this comparison in the context of labour rights Patrick Abel, 'Comparative Conclusions on Arbitral Dispute Settlement in Trade-Labour Matters Under US FTAs' in Henner Gött (ed), *Labour Standards in International Economic Law* (Springer International Publishing 2018) 179–181; in the same direction Ernst-Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law* (Bloomsbury Publishing 2017) 303–304; analysed as one potential model for including more symmetry into international investment arbitration by Amado, Kern and Rodriguez (n 19) 19–23.

100 Joerg Weber and Catharine Titi, 'UNCTAD's Roadmap for IIA Reform of Investment Dispute Settlement' (2015) 21(4) New Zealand Business Law Quarterly 319; IISD, *Investment-Related Dispute Settlement: Towards an Inclusive Multilateral Approach* (2017).

nam Investment Protection Agreement[101] and Art 8.18–8.45 CETA contain respective provisions on an international investment court – but these norms have not yet come into force at the time of writing.[102] However, even in the above-mentioned EU FTAs, consent by the disputing parties – including the investor – is still required.[103] They focus on reforming other features such as the replacing of party-elected arbiters by pre-determined judges.[104] The 2017 IISD reflections on possible future multilateral investment dispute settlement procedures go further. They consider that states could create a forum with broad compulsory jurisdiction for investment disputes that also allows for claims by stakeholders.[105]

However, even if a different model of an international investment court would abandon the requirement of consent by the foreign investor, its judgments would not qualify for the ICSID Conventions' recognition and enforcement system and would stand the risk that domestic courts would

101 EU-Vietnam Investment Protection Agreement (adopted 30 June 2019) ‹https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5868/download› accessed 7 December 2021 (EU-Vietnam IPA), a mixed-agreement complementing the EU-Vietnam FTA (adopted 30 June 2019, entered into force 1 August 2020) ‹https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement/texts-agreements_en› accessed 7 December 2021 (EU-Vietnam FTA) as an EU-only agreement.

102 In the long run the EU aims at creating a Multilateral Investment Court to which different single IIAs can relate and be connected with another, see Council of the European Union 'Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes' 12981/17 ADD 1 (1 March 2018); generally on the Multilateral Investment Court see Rob Howse, 'Designing a Multilateral Investment Court: Issues and Options' (2017) 36(1) Yearbook of European Law 209; Marc Bungenberg and August Reinisch, *Draft Statute of the Multilateral Investment Court* (Nomos 2021). If this project will be realised remains to be seen, especially in light of rather restrictive judgments of the European Court of Justice on the EU's competence in international investment law and investment arbitration, see Opinion C-2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* [2017] ECLI:EU:C:2017:376 paras 78–110, 285–293; on intra-EU investment arbitration see Case C-284/16 *Slovak Republic v Achmea BV* [2018] ECLI:EU:C:2018:158 paras 31–60.

103 Art 3.36 EU-Vietnam IPA and Art 8.25 CETA.

104 Howse (n 102) 221.

105 IISD, *Dispute Settlement* (n 100) 5–6; from the literature see the proposal by George K Foster, 'Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties' (2013) 17(2) Lewis & Clark Law Review 361, 398–408.

reject recognition and enforcement under the New York Convention.[106] Both presuppose a (foreign) arbitral award and do not apply to court judgments. The departing from the arbitration model would come at the price of losing one of the most appealing features of investment law: its highly effective international enforcement system.

106 Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (2nd edn, Springer 2020) paras 495–540, 642–650.