

## **CHARTING A NEW COURSE: *METAL-TECH V. UZBEKISTAN* AND THE TREATMENT OF CORRUPTION IN INVESTMENT ARBITRATION**

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Uzmetal Technology appeared to be a great success—only to plummet into bankruptcy after the government of Uzbekistan filed criminal charges against the company’s officers. Uzmetal was a joint venture between an Israeli metal manufacturer later known as Metal-Tech and two Uzbek government-owned companies, Almalik Mining Metallurgy Combinate (AGMK) and the Uzbek Refractory and Resistant Metals Integrated Plant (UzKTJM). Just as the young partnership began to turn a profit, however, the Uzbek government accused it of violating several criminal laws. The venture’s shareholders commenced involuntary bankruptcy proceedings, ultimately forcing the company to liquidate. When the Israeli investor’s claims in bankruptcy were denied, the investor sought compensation in arbitration. Sensing impropriety, the tribunal requested discovery regarding millions of dollars in consulting payments. The tribunal ultimately concluded that those payments were nothing more than thinly disguised bribes. As a result, the International Centre for Settlement of Investment Disputes (ICSID)

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tribunal in *Metal-Tech v. Uzbekistan*<sup>1</sup> rejected the investor's claim. This marked only the second time in ICSID history that a tribunal has rejected a claim due to bribery, and the first time a tribunal has done so for a treaty claim.

This Essay examines *Metal-Tech's* treatment of corruption, building upon the analytical structure set forth in this author's 2014 Note, *Streamlining the Corruption Defense*.<sup>2</sup> That Note's framework for analyzing ICSID awards involving allegations of corruption proves useful for examining the *Metal-Tech* award. Implementing that framework, this Essay concludes that the standard of proof applied by the tribunal represents a departure from prior ICSID jurisprudence. It also questions whether an application of comparative fault principles could have achieved a more just result. Finally, this Essay argues that the tribunal could have resolved some lingering questions by staying the proceedings pending the outcome of Uzbekistan's domestic corruption investigation.

Part I herein sets forth the facts underlying the dispute. Part II analyzes the distinctive aspects of the award and the tribunal's reasoning. Finally, Part III examines distinctive features of the award and assesses the award's implications for future ICSID claims tainted by bribery.

## I. ORIGINS OF THE DISPUTE

In 1998, *Metal-Tech* began negotiations with the government of Uzbekistan regarding the formation of a partnership to modernize the Uzbek molybdenum<sup>3</sup> industry.<sup>4</sup> Uzbekistan had been home to a

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1. *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013), <http://italaw.com/sites/default/files/case-documents/italaw3012.pdf>.

2. Michael A. Losco, Note, *Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction*, 63 DUKE L.J. 1201 (2014). For a recent and thorough overview of investment treaty arbitration cases dealing with corruption, see generally Carolyn B. Lamm, Brody K. Greenwald & Kristen M. Young, *From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption*, 29 ICSID REV. 328 (2014).

3. Molybdenum is a "metallic element used to enhance the strength, durability, and corrosion resistance of steel, cast iron, and superalloys." *Metal-Tech*, ICSID Case No. ARB/10/3, Award, ¶ 1 n.2. "The versatility of molybdenum in enhancing a variety of alloy properties has ensured it a significant role in contemporary industrial technology, which increasingly requires materials that are serviceable under high stress, expanded temperature ranges, and highly corrosive environments . . . . Few of molybdenum's uses have acceptable substitutes." *Molybdenum Statistics and Information*, USGS MINERALS INFO., <http://minerals.usgs.gov/minerals/pubs/commodity/molybdenum> (last visited Oct. 23, 2014).

flourishing molybdenum industry in the 1980s, but the sector had fared poorly since the collapse of the Soviet Union. AGMK, Uzbekistan's only molybdenum-mining company, used such outdated technology that it was unable to produce molybdenum concentrate of acceptable quality for sale on the global market. Its extraction process was both dirty and inefficient. Unable to export its products, AGMK's sales were confined to a sole local customer, UzKTJM. UzKTJM was Uzbekistan's "primary producer and exporter of molybdenum products," but the low quality of AGMK's concentrate prevented UzKTJM from producing high-quality export products.<sup>5</sup> UzKTJM therefore utilized only a fraction of its capacity, and by 1998 it was operating at a loss and falling into debt. Both of these struggling entities were owned by the government of Uzbekistan.

In January 2000, after conducting a feasibility study and receiving authorization from the Uzbek Cabinet of Ministers, Metal-Tech and the Uzbek companies established the joint venture Uzmetal Technology. Metal-Tech would "contribute its technology, know-how and access to international markets as well as part of the financing needed for a new plant";<sup>6</sup> AGMK and UzKTJM would contribute buildings, equipment, and raw materials. Metal-Tech would act as a middleman for the venture, purchasing all of Uzmetal's products and selling them on the global market.<sup>7</sup> Metal-Tech was to receive a 50 percent stake in the venture in exchange for a capital contribution of \$500,000.<sup>8</sup> The total value of the project was expected to exceed \$19 million.

Uzmetal's facilities opened in October 2002, and by 2005 the venture was turning a profit. In May 2006, Uzmetal's General Meeting of Participants decided to distribute dividends. But less than a month later, the Public Prosecutor's Office for the Tashkent Region initiated criminal proceedings "on the ground that officials of Uzmetal had abused their authority and caused harm to Uzbekistan."<sup>9</sup> Uzbekistan's Cabinet of Ministers adopted a resolution abrogating Uzmetal's rights to purchase raw materials and, according

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4. *Metal-Tech*, ICSID Case No. ARB/10/3, Award, ¶ 7. At the time, Metal-Tech was known as Metek Metal Technology, Ltd. *Id.* ¶ 1 n.1.

5. *Id.* ¶ 7.

6. *Id.* ¶ 10.

7. *Id.* ¶ 27.

8. *Id.* ¶ 15.

9. *Id.* ¶ 37.

to Metal-Tech, “cancel[ing] its exclusive right to export Uzmetal’s refined molybdenum oxide.”<sup>10</sup>

A frenzy of legal proceedings followed. UzKTJM sued to enforce distribution of its share of the May 2006 dividends, which alone amounted to over \$162 million. On the same day, Uzmetal brought suit to invalidate the decision to distribute dividends, but the Tashkent District Economic Court dismissed Uzmetal’s claim. Days later, “UzKTJM initiated bankruptcy proceedings against Uzmetal on the basis of Uzmetal’s failure to pay the dividends.”<sup>11</sup> The court placed Uzmetal in bankruptcy under the supervision of a temporary manager, who rejected Metal-Tech’s bankruptcy claims. Consequently, AGMK and UzKTJM, as the only recognized creditors of Uzmetal, met and voted to liquidate the venture. On January 14, 2008, less than five months after the beginning of bankruptcy proceedings, the Uzbek Court of Cassation initiated the liquidation of Uzmetal. Those proceedings lasted until late 2009; that December, “Uzmetal was delisted from the state registry of legal entities.”<sup>12</sup>

## II. THE AWARD

This Part begins by reviewing the important procedural aspects of the arbitration. It then outlines the arguments of the parties, and it concludes by explaining the tribunal’s decision and reasoning.

### A. *Arbitration Proceedings*

On January 26, 2010, Metal-Tech submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes, pursuant to the consent given in Article 8 of the Israel-Uzbekistan Bilateral Investment Treaty (BIT).<sup>13</sup> Metal-Tech sought declarations that Uzbekistan had breached international law, Uzbek law, and certain provisions of the Israel-Uzbekistan BIT by failing to accord its investment fair and equitable treatment, failing to provide full and constant protection and security, and by expropriating the investment without due process of law and without payment of

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10. *Id.* ¶ 38.

11. *Id.* ¶ 46.

12. *Id.* ¶ 53.

13. For more information about the ICSID, the requirement of consent to ICSID arbitration, and bilateral investment treaties, see *Losco*, *supra* note 2, at 1205–09.

prompt, adequate, and effective compensation.<sup>14</sup> It sought compensation of approximately \$174 million.<sup>15</sup>

Prior to the January 2012 hearing on jurisdiction and liability, Uzbekistan notified the tribunal that the Uzbek Prosecutor General had commenced an investigation into Uzmetal's participation in a criminal enterprise involving kickbacks to Uzbek government officials.<sup>16</sup> At the January hearing, Metal-Tech's chairman, Ariel Rosenberg, revealed that Metal-Tech had made payments totaling approximately \$4 million to several consultants for "lobbyist activity" under consulting agreements dating back to 1998.<sup>17</sup> This revelation directly contradicted previously submitted evidence indicating that the consultants were hired in 2005 "for assistance with Uzmetal's day-to-day operations."<sup>18</sup> Feeling it had a "duty to inquire,"<sup>19</sup> the tribunal ordered further discovery regarding the consulting payments pursuant to its authority under Article 43 of the ICSID Convention.<sup>20</sup>

The tribunal observed that the evidence raised a number of internationally accepted "red flags" for corruption.<sup>21</sup> These red flags included the size of the payments made to the consultants; the lack of proof that the consultants provided any legitimate services; the consultants' lack of qualifications or experience in the sector; their connections with public officials in charge of the investment; and the conclusion of sham contracts with mysterious foreign entities "designed to conceal the true nature of the relationship among the parties."<sup>22</sup>

The consulting payments, which amounted to nearly 20 percent of the entire project cost, exceeded Metal-Tech's initial cash contribution to the joint venture and far exceeded local salaries.<sup>23</sup> The

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14. *Metal-Tech*, ICSID Case No. ARB/10/3, Award, ¶ 55.

15. *Id.* ¶ 108.

16. *Id.* ¶ 76.

17. *Id.* ¶ 86.

18. Sebastian Perry, *Uzbek claim dismissed because of corruption*, GLOBAL ARB. REV. (Nov. 26, 2013), <http://globalarbitrationreview.com/news/article/32072/uzbek-claim-dismissed-corruption>; *Metal-Tech*, ICSID Case No. ARB/10/3, Award, ¶ 86.

19. *Metal-Tech*, ICSID Case No. ARB/10/3, Award, ¶ 241.

20. *Id.* ¶¶ 86, 92; *see* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 43, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

21. *Metal-Tech*, ICSID Case No. ARB/10/3, Award, ¶ 293.

22. *Id.* ¶ 218.

23. *Id.* ¶ 199. One of the consultants received a salary of \$100 per month from Uzmetal yet received a \$5,000 per month "bonus" from Metal-Tech. *Id.* ¶ 200.

consulting contracts required that the consultants be paid regardless of the services they rendered,<sup>24</sup> and Metal-Tech repeatedly failed to provide evidence of the services provided in exchange for their “substantial compensation.”<sup>25</sup> None of the consultants possessed any professional qualification for the services they were supposedly hired to perform, and none had any experience in the molybdenum industry.<sup>26</sup> These “consultants” included a retired police investigator who happened to be the brother of the Uzbek prime minister,<sup>27</sup> a pharmaceutical scientist and newspaper manager,<sup>28</sup> and a human resources functionary in the office of the president of Uzbekistan.<sup>29</sup> Moreover, the vast majority of payments were made indirectly, through opaque Swiss and British Virgin Islands holding companies owned by the consultants, rather than directly to the consultants themselves.<sup>30</sup>

### *B. Arguments of the Parties*

Uzbekistan objected to the tribunal’s exercise of jurisdiction, alleging that Metal-Tech had “engaged in corruption and made fraudulent and material misrepresentations to gain approval for its investment.”<sup>31</sup> The Israel-Uzbekistan BIT contained a legality provision requiring that a covered investment be implemented in accordance with the laws of the host state; Uzbek law made it a crime to give or receive a bribe, directly or through an intermediary.<sup>32</sup> Because Metal-Tech had engaged in corruption at the time of the procurement of the contract, it argued, the investment had been “implemented” in violation of Uzbek law, negating Uzbekistan’s consent to arbitration.<sup>33</sup>

Metal-Tech argued that the definition of “implemented” required that the investment be made, not operated, in violation of host state law in order to defeat jurisdiction.<sup>34</sup> It argued that the

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24. *Id.* ¶ 204.

25. *Id.* ¶ 207.

26. *Id.* ¶ 208.

27. *Id.* ¶¶ 210, 226.

28. *Id.* ¶ 212.

29. *Id.* ¶ 209.

30. *Id.* ¶¶ 219–224.

31. *Id.* ¶ 110.

32. *Id.* ¶ 282.

33. *Id.* ¶¶ 110, 372–373.

34. *Id.* ¶¶ 176, 180.

investment had not been made in violation of Uzbek law, meaning that Metal-Tech had not violated the legality requirement and that therefore Uzbekistan's consent to arbitration remained valid. Metal-Tech further argued that the BIT's most favored nation (MFN) provision required that the tribunal incorporate the more favorable definition of "investment" contained in the Greece-Uzbekistan BIT, which did not include a legality requirement.<sup>35</sup>

### C. *The Tribunal's Decision and Reasoning*

The tribunal concluded that the word "implemented" in Article 1(1) of the BIT meant that an investment must be established in accordance with the laws of its host state, but that the provision was silent on whether it must also be operated in accordance with law.<sup>36</sup> The tribunal also concluded that, absent agreement by the parties to the contrary, the MFN clause did not permit importation of a more favorable definition of investment because the terms "investment" and "investor" were used in the MFN provision itself.<sup>37</sup> A claimant must first have an investment "*under* the treaty to claim *through* the treaty."<sup>38</sup>

Because the BIT was silent with respect to presumptions, burden shifting, and inferences to be drawn from a lack of evidence, the tribunal determined that it had "relative freedom in determining the standard necessary to sustain a determination of corruption."<sup>39</sup> Applying the widely recognized international standard that each party bears the burden of proving the facts on which it relies, the tribunal inquired whether corruption had been established with "reasonable certainty."<sup>40</sup> It declared that because corruption is difficult to establish, it can be proved through circumstantial evidence.<sup>41</sup> Without asserting that Uzbekistan had established the existence of corruption *prima facie*, the tribunal noted that the facts did establish *suspicious* of corruption.<sup>42</sup> It therefore required explanations regarding those suspicions.<sup>43</sup> Moreover, it would draw

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35. *Id.* ¶¶ 132, 135.

36. *Id.* ¶ 185.

37. *Id.* ¶¶ 144–145.

38. *Id.* ¶ 145.

39. *Id.* ¶¶ 237–238.

40. *Id.* ¶ 243.

41. *Id.*

42. *Id.* ¶ 239.

43. *Id.*

appropriate inferences against Metal-Tech for its failure to produce evidence that it had been ordered to produce.<sup>44</sup>

Because Metal-Tech was unable to rebut the suspicions of illicit conduct, the tribunal concluded that Metal-Tech had engaged in corruption in violation of Uzbek law.<sup>45</sup> Accordingly, it determined that the investment had not been implemented in accordance with the laws of the host state as required by Article 1(1) of the BIT.<sup>46</sup> Uzbekistan's consent to arbitration in Article 8(1) of the BIT therefore did not apply to claims arising from the joint venture, and the tribunal could not assert jurisdiction over the dispute.<sup>47</sup> As a result of its inability to assert jurisdiction over Metal-Tech's claims, it also lacked jurisdiction over Uzbekistan's counterclaims.<sup>48</sup>

Noting that it had discretion to allocate costs, the tribunal ordered the parties to bear their own expenses and to split the fees charged by ICSID.<sup>49</sup> It observed that the presence of corruption had deprived Metal-Tech of protection and relieved Uzbekistan of any liability.<sup>50</sup> However, Uzbekistan had participated in the same corruption that allowed it to escape liability.<sup>51</sup> Indeed, such participation "is implicit in the very nature of corruption."<sup>52</sup> It was therefore fair, the tribunal reasoned, for the parties to share the costs of the arbitration.<sup>53</sup>

### III. MAKING SENSE OF *METAL-TECH*

How does the *Metal-Tech* tribunal's reasoning compare to that of past tribunals? What are the implications of the tribunal's decision, and what could it have done differently? This Part begins by examining the significant attributes of the award with a view to assessing how it resembles and differs from previous ICSID jurisprudence. Next, this Part compares the evidentiary burden and standard of proof applied by the tribunal to the standards applied by

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44. *Id.* ¶ 245.

45. *Id.* ¶¶ 239, 372, 390.

46. *Id.* ¶ 373.

47. *Id.* ¶¶ 239, 372, 390.

48. *Id.* ¶ 413.

49. *Id.* ¶ 423.

50. *Id.* ¶ 422.

51. *Id.*

52. *Id.*

53. *Id.*



past tribunals. It notes that *Metal-Tech*'s application of a relatively low standard of proof, combined with a reliance on circumstantial evidence and a willingness to shift the burden of proof to the claimant, marks a shift away from the evidentiary approaches used by other ICSID tribunals. Next, this Part observes that lingering questions remain about the true nature of the corruption at play. It concludes by arguing that these questions could have been resolved if the parties and tribunal had been willing to wait for evidence uncovered by a domestic investigation.

*Streamlining the Corruption Defense* identifies four legal attributes that are relevant to evaluating the treatment of corruption in ICSID arbitration. These include: (1) the nature of the wrongful conduct; (2) the law applied by the tribunal; (3) the evidentiary burden and standard of proof; and (4) the remedy afforded to the claimant.<sup>54</sup> Together, these attributes provide a useful conceptual framework for analyzing the *Metal-Tech* award.

First, as noted by the tribunal, *Metal-Tech*'s consulting payments constituted mutual corruption in the procurement of the investment. It is not apparent, however, whether they were "soft" or "hard" in character because it is unclear how the funds paid to the consultants were ultimately used. At least one of the consultants was a public official himself, but he seems not to have had direct authority over the approval of the project. If the consultants retained the funds themselves in exchange for exerting undue influence on public officials, the payments would constitute "soft" corruption.<sup>55</sup> Alternatively, if they funneled some of the funds to public officials as bribes, the payments would constitute "hard" corruption.<sup>56</sup>

Second, the *Metal-Tech* tribunal's decision was based on the legality of the investment (accordance with laws), as opposed to an international or transnational public policy, or good faith. Taking a minimalist approach, the tribunal declined to apply the concept of international public policy to the case at hand because it would be unnecessary to do so after having determining that it lacked jurisdiction to hear the case.<sup>57</sup>

Third, the tribunal assessed the evidence of corruption under a "reasonable certainty" standard, drawing inferences from

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54. For an explanation of each of these characteristics, see Losco, *supra* note 2, at 1218–31.

55. See Losco, *supra* note 2, at 1220.

56. See *id.* at 1220–21.

57. *Metal-Tech*, ICSID Case No. ARB/10/3, Award, ¶ 374.

circumstantial evidence. It declared that the “factual matrix d[id] not require the tribunal to resort to presumptions or rules of burden of proof.”<sup>58</sup>

Finally, the remedy was jurisdictional in nature. Metal-Tech’s failure to implement its investment in accordance with Uzbek law negated Uzbekistan’s consent to arbitration, and as a result the tribunal could not claim jurisdiction over the dispute.

Neither the nature of the wrongful conduct, nor the law applied by the tribunal, nor the remedy applied differed significantly from the experience of prior ICSID tribunals. This Essay will proceed by analyzing the attribute that stands out most from prior ICSID jurisprudence: the tribunal’s novel approach to assessing the evidence of corruption.

#### A. *A New Course: Standard of Proof and ICSID Jurisprudence*

*Metal-Tech* is the first ICSID decision to deny an investor’s BIT claim due to bribery.<sup>59</sup> In this respect, the award is important because it suggests a new approach for dealing with bribery in BIT claims. One particularly interesting aspect of the award is its approach to the standard of proof for corruption claims. The tribunal noted that although it was “not bound by previous decisions of ICSID or other arbitral tribunals,” it should pay those decisions “due regard.”<sup>60</sup> It further noted that, absent “compelling reasons to the contrary,” it had a “duty to follow solutions” consistently established in comparable cases.<sup>61</sup> Yet the tribunal embarked down its own path while creatively construing existing ICSID jurisprudence to give the impression that it was following in the footsteps of prior tribunals.

ICSID tribunals have generally applied high standards of proof to corruption allegations.<sup>62</sup> *Metal-Tech* marks a departure from this chain of ICSID jurisprudence. *Siag v. Egypt*<sup>63</sup> applied a “clear and

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58. *Id.* ¶ 243.

59. *See* Lamm et al., *supra* note 2, at 329; Losco, *supra* note 2, at 1219.

60. *Metal-Tech*, ICSID Case No. ARB/10/3, Award, ¶ 116.

61. *Id.*

62. Losco, *supra* note 2, at 1228–30; *see also* Florian Haugeneder & Christoph Liebscher, *Corruption and Investment Arbitration: Substantive Standards and Proof*, in AUSTRIAN ARBITRATION YEARBOOK 2009, at 538, 555–56 (Christian Klausegger et al. eds., 2009) (“Establishing corruption is, as a matter of fact, difficult.”).

63. *Siag v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009), [http://italaw.com/sites/default/files/case-documents/ita0786\\_0.pdf](http://italaw.com/sites/default/files/case-documents/ita0786_0.pdf).

convincing evidence” standard,<sup>64</sup> over the dissent of arbitrator Francisco Orrego Vicuña, who argued for the application of a lower standard permitting the tribunal discretion to make inferences from “concordant circumstantial evidence.”<sup>65</sup> Other tribunals have applied a high burden of proof but have declined to define the precise burden.<sup>66</sup>

*Metal-Tech*, on the other hand, applied a standard of “reasonable certainty.”<sup>67</sup> The tribunal noted that because corruption is difficult to establish, it is “generally admitted that it can be shown through circumstantial evidence.”<sup>68</sup> In support of this proposition, the tribunal cited the 2012 *Oostergetel*<sup>69</sup> award—an arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Rules. *Oostergetel* in turn cited a third award, *Rumeli Telekom*,<sup>70</sup> for the proposition that corruption can be proven by circumstantial evidence.<sup>71</sup> However, the *Oostergetel* tribunal found that such evidence was entirely lacking in the case before it.<sup>72</sup> The *Rumeli* tribunal, dealing with allegations of conspiracy rather than bribery, concluded that because direct evidence of a conspiracy is unlikely to be available, circumstantial evidence may suffice to support such an allegation—but only if that evidence “leads clearly and convincingly to the inference that a conspiracy has occurred.”<sup>73</sup>

64. *Id.* ¶ 326.

65. *Siag*, ICSID Case No. ARB/05/15, Award, Dissenting Opinion of Professor Francisco Orrego Vicuña at 4 (quoting ABDULHAY SAYED, CORRUPTION IN INTERNATIONAL TRADE AND COMMERCIAL ARBITRATION 93–94 (2004)).

66. *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, ¶¶ 172–175 (Dec. 19, 2008), 48 I.L.M. 496 (2009); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶ 111 (Dec. 8, 2000), 41 I.L.M. 896 (2002). *See generally* Losco, *supra* note 2, at 1229–30 & nn.209–11 (contrasting the “clear and convincing evidence” standard of *Siag* with the undefined standards applied by other tribunals).

67. *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶ 243 (Oct. 4, 2013), <http://italaw.com/sites/default/files/case-documents/italaw3012.pdf>.

68. *Id.*

69. *Oostergetel v. Slovak Republic*, Final Award, ¶ 303 (Apr. 23, 2012), <http://www.italaw.com/sites/default/files/case-documents/ita0933.pdf>. It is interesting to note that Professor Gabrielle Kaufmann-Kohler presided over both the *Metal-Tech* and *Oostergetel* tribunals. *Id.*

70. *Rumeli Telekom A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, ¶ 709 (July 29, 2008), <http://italaw.com/sites/default/files/case-documents/ita0728.pdf>.

71. *Oostergetel*, Final Award, ¶ 303.

72. *Id.*

73. *Rumeli Telekom*, ICSID Case No. ARB/05/16, Award, ¶ 709.

Here, the tribunal seems to have followed the approach advocated by Orrego Vicuña, admitting the difficulty of proving corruption and basing its conclusion on evidence adduced by Uzbekistan combined with Metal-Tech's inability to explain away the resulting "suspicions."<sup>74</sup> Though commercial arbitration tribunals have occasionally deployed similar reasoning,<sup>75</sup> *Metal-Tech* is the first ICSID tribunal to find the existence of corruption using this strategy.<sup>76</sup> Whether this burden-shifting approach catches on among future ICSID tribunals will likely depend on the peculiar facts of future cases and the weight future tribunals accord to *Metal-Tech's* reasoning.<sup>77</sup>

### B. A Blunt Remedy

*Metal-Tech* demonstrated that resolution of corruption allegations at the jurisdictional stage is a blunt remedy. Here, the division of costs seems to be a signal that the tribunal perceived inequity in the result. Uzbekistan was able to invoke Metal-Tech's corrupt conduct as an absolute bar to its own liability, even though at least one Uzbek official took part in that conduct. The tribunal therefore sought to levy some penalty on the host state for its complicity in the corrupt activity; unable to exercise jurisdiction over the merits of the dispute, the tribunal had to use its only remaining tool—costs—to do so.

But Uzbekistan suffered another penalty for its complicity in the corrupt conduct before the *Metal-Tech* tribunal. Because the tribunal could not assert jurisdiction, it rejected Uzbekistan's counterclaims against Metal-Tech. Lacking jurisdiction over the dispute, the tribunal was unable to adjudicate the claims of either party. The loss of counterclaims is a significant attribute of the outcome, especially considering that Peru recently settled three claims against investors for \$40 million.<sup>78</sup> States may be less inclined to taint investments with corrupt conduct if investment arbitration is a two-way street. In other

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74. *Metal-Tech*, ICSID Case No. ARB/10/3, Award, ¶¶ 239, 372.

75. Haugeneder & Liebscher, *supra* note 62, at 552–55.

76. *See* Losco, *supra* note 2, at 1219.

77. *See* Haugeneder & Liebscher, *supra* note 62, at 555–56 (“[E]valuation of evidence is more important than the abstract definition of the applied standard.”).

78. *Peru settles trio of power line claims*, GLOBAL ARB. REV. (Mar. 28, 2014), <http://globalarbitrationreview.com/news/article/32533/peru-settles-trio-power-line-claims>.

words, states can utilize investment arbitration as a forum to recover for harm suffered due to investors' conduct.

Perhaps even more potent than the loss of counterclaims are the reputational effects of a corruption finding. As one commentator has observed, it may well signal "game over" for corrupt host countries.<sup>79</sup> The increasing frequency and visibility of investor-state arbitrations<sup>80</sup> suggests that the availability of this forum has become an important consideration for investors. Some evidence suggests that corruption matters to investors.<sup>81</sup> A robust corruption defense should elevate the importance of corruption relative to the quality of host state institutions, since corruption can deprive investors of an important forum for dispute resolution. By giving investors something to lose, we should expect to see the correlation between corruption and reduced inflows of foreign direct investment (FDI) become even stronger.

As noted in *Streamlining the Corruption Defense*, recognizing a comparative fault standard for corruption might be another way to penalize the host state for its complicity.<sup>82</sup> In cases like *Metal-Tech* where the remedy is jurisdictional, however, a tribunal would have no legal basis for applying such a standard. Before awarding damages according to relative culpability, the tribunal would have to create a legal fiction in order to assert jurisdiction. This would be tantamount to an exercise of the tribunal's power *ex aequo et bono*,<sup>83</sup> which requires the consent of the parties. To do so without the parties' consent would constitute an excess of powers and potentially a failure to state the reasons on which the award is based, both of which are grounds for annulment of the award.<sup>84</sup>

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79. Tamar Meshel, *Metal-Tech Ltd. v. Republic of Uzbekistan – 'Strike Two' Against Investor Claimants Facing the Corruption Defense*, INTLAWGRRLS (Dec. 18, 2013), <http://ilg2.org/2013/12/18/metal-tech-ltd-v-republic-of-uzbekistan-strike-two-against-investor-claimants-facing-the-corruption-defense/>.

80. U.N. Conference on Trade and Dev., *Investor-State Disputes: Prevention and Alternatives to Arbitration 4*, U.N. Doc. UNCTAD/DIAE/IA/2009/11 (2010).

81. Ali Al-Sadig, *Effects of Corruption on FDI Inflows*, 29 CATO J. 267, 289 (2009), available at <http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/2009/5/cj29n2-4.pdf>.

82. Losco, *supra* note 2, at 1219–20.

83. The power to decide disputes *ex aequo et bono* "free[s] the decision-maker from the rigidities of positive law" and "permit[s] considerations of equity, justice and fairness." Christoph Schreuer, *Decisions Ex Aequo et Bono Under the ICSID Convention*, 11 ICSID REV. 37, 37 (1996), available at <http://icsidreview.oxfordjournals.org/content/11/1/37.full.pdf>.

84. *Id.* at 53.

C. *A Better Approach?*

The *Metal-Tech* tribunal proved itself adept at uncovering corruption by shifting the evidentiary burden to the claimant and according substantial weight to circumstantial evidence. However, Uzbek domestic law enforcement authorities played an indispensable role in the case. The tribunal never would have been alerted to the presence of corruption if not for the intervention of domestic authorities. Even after the issuance of the award, lingering questions remain regarding the true nature of the parties' corrupt conduct. Because the parties produced limited evidence of corruption,<sup>85</sup> we do not know how the funds paid to the consultants were ultimately used. Were they retained by the consultants themselves in exchange for exerting undue influence on public officials, or were some of the funds funneled to public officials as bribes? If the tribunal had stayed the case pending the outcome of a domestic investigation, it could have directed Uzbekistan to produce the records of that investigation.

*Streamlining the Corruption Defense* advocates precisely such a strategy.<sup>86</sup> Unlike claimants, who may refuse to cooperate even when a tribunal orders the production of evidence,<sup>87</sup> respondent states have an incentive to uncover and produce evidence of corruption. Though the tribunal here proved adept at uncovering corrupt conduct, state law enforcement authorities likely have greater ability to gather evidence than an arbitral tribunal. Though this might raise concerns about incentivizing badly behaved host states to abuse their authority, it would ensure the availability of the best evidence possible. The tribunal would retain discretion to decide on the admissibility and weight of that evidence. It could discount, or refuse to recognize altogether, evidence gathered in an unfair or abusive fashion. Parties and tribunals would simply need to assess whether the potential for enhanced accuracy is worth the delay.

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85. The tribunal's finding of corruption was based in large part on the testimony of one witness, Metal-Tech's chairman Ariel Rosenberg. "[T]he Claimant did not proffer any witness (other than Mr. Rosenberg) in support of its submission that legitimate services were rendered by the Consultants." *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶ 263 (Oct. 4, 2013), <http://italaw.com/sites/default/files/case-documents/italaw3012.pdf>. Uzbekistan's only oral testimony came from one of Metal-Tech's paid consultants, who was in Uzbek prison and admitted to cooperating in hopes that he might receive a reduction in his sentence. As a result, the tribunal did not accord any weight to his testimony. Uzbekistan did not allege corruption on the part of its witness. *Id.* ¶¶ 365–366.

86. Losco, *supra* note 2, at 1239–41.

87. Haugeneder & Liebscher, *supra* note 62, at 556.

## CONCLUSION

*Metal-Tech* is a significant development in ICSID corruption jurisprudence, applying a novel standard of proof to evidence of corruption. To be clear, *Metal-Tech* is not a complete departure from the accepted rules or practice regarding evidence in international arbitration. But it does mark a new approach to allegations of corruption in ICSID arbitration. The award also demonstrated that declining jurisdiction is a blunt remedy. Because reputational consequences are not immediately visible at the time an award is rendered, dismissing claims due to corruption may, as here, be an unpalatable decision for arbitrators. The loss of the host state's counterclaims is more readily apparent, but the strength of that incentive depends in large part on the underlying facts of the specific investment. Still, tribunals should not underestimate the reputational effects of a corruption finding.

Moreover, the outcome of the dispute hinged on the tribunal's interpretation of the BIT's legality requirement and of Uzbek anticorruption law. However, treaty provisions and domestic anticorruption laws differ by country. If Uzbekistan had no corruption law at all, for example, its consent to arbitration would have remained valid despite the existence of a legality requirement in the BIT. Would the tribunal have invoked principles of good faith or international public policy as a backstop? If the BIT lacked an explicit legality requirement, would the tribunal have found one to be implied?<sup>88</sup> These are questions that future ICSID tribunals may be called upon to address.

The *Metal-Tech* tribunal's decision also left some lingering questions about the nature of the corruption at play. Who were the ultimate recipients of the consulting payments? How many government officials were involved, and how high-ranking were they? Given the bluntness of the jurisdictional remedy, the answers to questions like these will impact our notions about the fairness of the results in cases involving allegations of corruption. Tribunals will have a better chance of formulating these answers if they enlist the investigative capabilities of host states. Finally, it remains to be seen whether future ICSID tribunals will follow *Metal-Tech's* lead or whether they will apply higher standards of proof, as past tribunals

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88. Uzbekistan raised precisely this argument, *Metal-Tech*, ICSID Case No. ARB/10/3, Award, ¶ 110, but the tribunal declined to address it. *Id.* ¶ 163.

have done. At the very least, *Metal-Tech* demonstrates that corruption in the formation of an investment will continue to act as a bar to recovery for claimants.