Fiat iustitia, ne pereat mundus: A Novel Approach to Corruption and Investment Arbitration

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Corruption has existed forever. Notwithstanding a seemingly universal condemnation as reflected in a number of international conventions, levels of corruption continue to be quite high across the globe. The public sector is most troubled with it. There are countries where grand corruption deeply rooted at highest government levels constitutes the very essence of state policy. This article analyses whether it is appropriate in the investment arbitration context to deny contracts or investments procured by corruption any form of protection as the tribunals in World Duty Free, Metal-Tech and Spentex have done, relying on considerations of international (transnational) public policy. Based on a comparative analysis of how several jurisdictions deal with the issue, the article concludes that, subject to certain limitations, it is not against international (transnational) public policy to accord protection to contracts and investments tainted by corruption.

1 INTRODUCTION

Corruption is bad. It is an insidious plague,[1] a cancer[2] corroding societies and distorting competition.[3] Policy-makers across the globe have been voicing these and similar sentiments for more than two decades. During this period, there has been an unprecedented proliferation of national and international legislation in the field. In parallel, the international arbitration community has been engaged in a lively debate on the effects that findings of corruption should or should not have on an investor's claims based on contract or treaty breach. Holding that corruption is against international (transnational) public policy, the tribunals in *World Duty*

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1 Kofi Annan in his foreword to the United Nations Convention Against Corruption, www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed 19 June 2018).

2 James D. Wolfensohn in his address 'People and Development' to the 1996 World Bank Annual Meeting, http://documents.worldbank.org/curated/en/135801467993234363/pdf/99712-WP-Box393210B-PUBLIC-1996-10-01-People-and-Development.pdf (accessed 19 June 2018).

3 For a brief overview of the further pernicious effects of corruption, *see* Aloysius Llamzon, *Corruption in International Investment Arbitration* 25 et seq. (OUP 2014); B. Cremades & D. Cairns, *Transnational Public Policy in International Arbitral Decisionmaking: The Cases of Bribery, Money Laundering and Fraud*, in *Arbitration: Money Laundering, Corruption and Fraud* 65, 77 et seq. (K. Karsten & A. Berkeley eds, 2003); Claus von Wobeser, *The Corruption Defense and Preserving the Rule of Law*, in *International Arbitration and the Rule of Law: Contribution and Conformity* 203, 203 et seq. (Andrea Menaker ed., 2017).

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Free v. Kenya,[4] *Metal-Tech v. Uzbekistan*[5] and *Spentex v. Uzbekistan*[6] peremptorily dismissed all investor claims.

This article suggests a more nuanced approach. To provide background, it starts with an overview of the global anti-corruption campaign: its genesis, its further development to this present day, and its impact on the real world (section 2). It then delineates the scope of a public policy condemning corruption and explains how it plays out under various legal systems in relation to contracts procured by it (section 3). The article further dwells on the question whether there is any basis for attributing to the host state the knowledge of its corrupt officials for purposes of upholding any such contract in application of the concepts of estoppel, acquiescence and/or waiver (section 4). After addressing potential investor claims for restitution or unjust enrichment subsequent to the avoidance of a contract tainted by corruption (section 5), the article concludes by sketching out the impact on investment treaty arbitration of the lessons learnt in the contractual context (section 6). It will show that, subject to certain limitations, it is not against international (transnational) public policy to accord protection to contracts and investments tainted by corruption.

2 GLOBAL ANTI-CORRUPTION CAMPAIGN: MYTHS AND TRUTHS

2.1 Political and legislative framework

2.1[a] *US Foreign Corrupt Practices Act*

Through to (at least) the 1970s, the Western world considered bribing foreign public officials and other influential people as an 'unsavoury but unavoidable (and therefore acceptable) cost of doing business in the developing world.'[7] In pragmatic recognition of 'local customs' in large parts of the developing world, many countries of the industrialized world, including Germany, even allowed for tax deductibility of bribes paid to foreign public officials.[8]

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4 *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 Oct. 2006.

5 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013.

6 *Spentex Netherlands B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26. The award of 27 Dec. 2016 is not yet published, but Vladislav Djanic provides a summary report in 10 IA Reporter 3–9 (2017).

7 Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, 25 ICSID Rev. 47 (2010).

8 *See* the OECD's *Update on Tax Legislation on the Tax Treatment of Bribes to Foreign Public Officials in Countries Parties to the OECD Anti-Bribery Convention* of June 2011, www.oecd.org/tax/crime/41353070.pdf (accessed 19 June 2018).

There is general acceptance that the US Foreign Corrupt Practices Act (FCPA) marks the starting point of the paradigm shift recorded over the past four decades. It is worthwhile refreshing one's memory of what prompted the passage of the FCPA. In the aftermath of the Lockheed scandal,[9] the US Securities and Exchange Commission (SEC) investigated questionable or illegal foreign corporate payments and practices. The findings were alarming: More than 400 US corporations, including over 100 Fortune 500 companies, had paid out well in excess of USD 300 million[10] in corporate funds to foreign government officials, politicians, and political parties.[11] Driven mostly by US-centric concerns,[12] US policy-makers reacted by starting the parliamentary process for the enactment of the FCPA.[13] Ethical considerations played a minor role.[14] If there was an intention

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9 The US aircraft manufacturer publicly admitted in 1976 having paid some USD 22 million in bribes to foreign officials, including a USD 1.1 million bribe to Prince Bernhard of the Netherlands.

10 At an average inflation rate of 3.55% per year between 1977 and 2017, this would equate to USD 1.2 billion in 2017.

11 SEC Report to the US Senate Banking, Housing and Urban Affairs Committee of 12 May 1976, www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf (accessed 19 June 2018); Sen. Rpt. 95-114 at 3 et seq. (2 May 1977) (hereinafter 'Senate Report'), www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/senaterpt-95-114.pdf (accessed 19 June 2018); H.R. Rpt. 95-640 at 4 (28 Sept. 1977) (hereinafter 'House Report'), www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/houseprt-95-640.pdf (accessed 19 June 2018).

12 House Report, *supra* n. 11, at 5 et seq., stated the following reasons to demonstrate a need for legislation: 'Bribery of foreign officials by some American companies casts a shadow on *all US companies*. The exposure of such activity can damage a company's image, lead to costly lawsuits, cause the cancellation of contracts, and result in the appropriation of valuable assets overseas … Despite the fact that the payments which this bill would prohibit are made to foreign officials, in many cases the resulting adverse competitive affects are entirely domestic. Former Secretary of Commerce Richardson pointed out that in a number of instances, 'payments have been made not to "out-compete" foreign competitors, but rather to gain an edge over *other US manufacturers*.' Corporate bribery also creates severe foreign policy problems *for the United States*. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations … Finally, a strong antibribery statute would actually help *US corporations* resist corrupt demands.' (emphasis added). Senate Report, *supra* n. 11, at 3, reflected the following additional considerations: 'The image of *American* democracy abroad has been tarnished. Confidence in the financial integrity of *our* corporations has been impaired. The efficient functioning of *our* capital markets has been hampered.' (emphasis added).

13 After having passed Congress, President Jimmy Carter eventually approved and signed the FCPA on 19 Dec. 1977.

14 The Senate (Committee on Banking, Housing, and Urban Affairs) referred to ethical considerations only incidentally by quoting Secretary of the Treasury Blumenthal who had testified in support of the proposed legislation that 'Paying bribes – apart from being morally repugnant and illegal in most countries – is simply not necessary for the successful conduct of business here or overseas' (Senate Report, *supra* n. 11, at 4). Similarly, the House of Representatives, while addressing ethical concerns more directly, did not dedicate more than two sentences to them: 'The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public' (House Report, *supra* n. 11, at 5).

to contribute to the improvement of living conditions and government integrity in developing countries, policy-makers did not show it. There is no sign of any such considerations in the legislative materials.

2.1[b] *Subsequent Developments*

Soon after the passage of the FCPA, US companies started complaining about being placed at a disadvantage to their foreign competitors.[15] This prompted efforts by the US government to reach agreement with its principal economic industrial allies on some sort of international corruption ban. It took almost two decades for these efforts to come to fruition.[16] Starting from 1996, seven major anti-corruption conventions emerged within seven years,[17] including the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997 ('OECD Convention') and the United Nations Convention Against Corruption of 31 October 2003 (UNCAC). Over time – and certainly following the conclusion of the UNCAC – increased attention has been paid to the corrosive effects that corruption has on society in general and the evils this produces: erosion of democracy and the rule of law; violations of human rights; poor quality of life; and a fertile soil for organized crime. Indeed, leading commentators contend that nowadays the fight against corruption forms an integral 'part of the global focus on improving human well-being and government functioning.'[18] International

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[15] In response to these complaints, the US General Accounting Office (GAO) noted in a report dated 4 Mar. 1981 that there was a need for a strong international agreement and the United States should stay in the lead with a view to achieving 'some type of anti-bribery ban among the United States and its principal economic industrial allies.' It then articulated a recommendation that Congress closely monitor the status of US efforts and urged the President to pursue such agreement actively (Report of the GAO of 4 Mar. 1981 (hereinafter 'GAO Report'), www.gao.gov/assets/140/132199.pdf (accessed 19 June 2018), at 48). *See also* the official Information Sheet on the OECD Convention that expressly pinpoints complaints by US companies about competitive disadvantages as the *key driver* behind the convention, www.oecd.org/gov/ethics/2406452.pdf (accessed 19 June 2018): 'The work on the Convention began in 1989. It *primarily* aimed to level the playing field for companies active on the international market. Companies originating from a country where bribery of foreign public officials was criminalized felt that they were facing competitive disadvantages for accessing international markets compared to their counterparts from countries where foreign bribery was not criminalized.' (emphasis added). *See also* Cremades & Cairns, *supra* n. 3, at 69.

[16] Efforts at the level of the United Nations had failed at first (*see* GAO Report, *supra* n. 15, at 37).

[17] Inter-American Convention Against Corruption of 29 Mar. 1996 ('IACAC'); Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union of 26 May 1997 ('EU Convention'); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 Nov. 1997 ('OECD Convention'); Council of Europe Criminal Law Convention on Corruption of 27 Jan. 1999 ('CoE Criminal Law Convention'); Council of Europe Civil Law Convention on Corruption of 4 Nov. 1999; African Union Convention on Preventing and Combating Corruption of 11 July 2003 ('AUCPCC'); and United Nations Convention Against Corruption of 31 Oct. 2003 ('UNCAC').

[18] Susan Rose-Ackermann, *Introduction: The Role of International Actors in Fighting Corruption*, in *Anti-Corruption Policy – Can International Actors Play a Constructive Role?*, 3, 34 (S. Rose-Ackerman &

institutions such as the World Bank[19] and the IMF[20] have adopted anti-corruption strategies and policies; the ICC has issued Rules on Combating Corruption.[21]

2.1[c] *Brief Overview of Various Conventions*

The conventions differ in scope and depth. The OECD Convention only deals with active bribery of *foreign* public officials.[22] It is entirely silent on passive bribery and/or domestic corruption, both in the public and private sector. Other conventions aim at harmonizing legislation on domestic corruption only and do not address corruption involving foreign public officials.[23] Subject to certain carve-outs and limitations, others (including the UNCAC) cover corruption both at home and abroad.[24] Except for the OECD Convention, all conventions ban both active and passive corruption. Some conventions relate to the public sector only,[25] others to both the public and private sector.[26] While some conventions (including the UNCAC) address trading in influence,[27] others do not. Small facilitation payments are outside the scope of the OECD Convention altogether. The UNCAC covers facilitation payments made to public officials at *home*,[28] whereas it obliges contracting states to criminalize the payment of bribes to *foreign* public officials only if made 'in order to obtain or retain business or other undue advantage in relation to the conduct of international business.'[29] Small facilitation payments to foreign officials are thus outside the UNCAC's scope.[30]

P. Carrington eds, 2013); Joost Pauwelyn, *Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-Corruption Policy*, in *Anti-Corruption Policy – Can International Actors Play a Constructive Role?*, 247 (S. Rose-Ackerman & P. Carrington eds, 2013).

19 *See* www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf (accessed 19 June 2018).

20 *See* www.imf.org/en/About/Factsheets/The-IMF-and-Good-Governance (accessed 19 June 2018).

21 *See* https://cdn.iccwbo.org/content/uploads/sites/3/2011/10/ICC-Rules-on-Combating-Corruption-2011.pdf (accessed 19 June 2018).

22 OECD Convention, Art. 1(1).

23 EU Convention, Arts 2(2) and 3(2); AUCPCC, Art. 4(1) in conjunction with Art. 5(1). However, the EU Convention also deals with corruption involving EU officials (EU Convention, Art. 4(1)) (details of all conventions, *supra* n. 17).

24 *See* e.g. UNCAC, Arts 15 and 16; CoE Criminal Law Convention, Arts 2, 3 and 5 (details of all conventions, *supra* n. 17).

25 IACAC, EU Convention and OECD Convention (details of all conventions, *supra* n. 17).

26 CoE Criminal Law Convention, AUCPCC and UNCAC (details of all conventions, *supra* n. 17).

27 CoE Criminal Law Convention, Art. 12; AUCPCC, Art. 4(1)(f); and UNCAC, Art. 18 (details of all conventions, *supra* n. 17).

28 UNCAC, Art. 15(a) addresses in broadest terms 'The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.'

29 *See* UNCAC, Art. 16.

30 In fact, Australia, Canada, New Zealand and the United States expressly allow for facilitation payments. *See* Australian Criminal Code Act 1995 (Commonwealth), s. 70.4; Canadian Corruption of Foreign Public Officials Act, s. 3(4); New Zealand Crimes Act, s. 105C(3); and 15 U.S.C. ss 78dd-2 (b). South Korea repealed the facilitation payment defence as late as in Oct. 2014.

There are many more differences between the various conventions.[31] There is, however, one thing they all have in common: none of them is self-executing. They rather stipulate obligations of, or articulate recommendations to, the contracting states to introduce a legal framework that complies with the provisions of the respective convention. Some conventions, rather than expressing recommendations in lieu of obligations, allow contracting states to make reservations with respect to certain obligations. For example, whereas the UNCAC *recommends* criminalizing trading in influence,[32] the Council of Europe Criminal Law Convention on Corruption of 27 January 1999 ('CoE Criminal Law Convention') contains an *obligation* to criminalize trading in influence, but a contracting state could reserve its right not to establish trading in influence as a criminal offence under its domestic law.[33] Several contracting states actually made such reservation, including Denmark, France, Germany, Italy, Sweden, and the United Kingdom.

2.1[d] *State of Implementation*

Contracting states have not shown excessive zeal in ratifying the various conventions. Notably, most contracting states (including many first world countries) ratified the UNCAC only years after its adoption in October 2003.[34] Furthermore, various reports on the state of implementation and enforcement of the UNCAC and the OECD Convention suggest that existing anti-corruption laws in different countries and their actual enforcement fail to form a coherent picture of compliance with the obligations under these conventions:

- UNCAC: In 2017, the United Nations Office on Drugs and Crime (UNDOC) noted serious implementation deficiencies in the legislation, not to mention in the enforcement efforts, of many countries, including in the core areas of active and passive bribery of domestic public officials,[35] as well as active and passive bribery of foreign public officials.[36]

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31 For a somewhat more comprehensive overview, *see* F. Haugeneder & C. Liebscher, *Investment Arbitration – Corruption and Investment Arbitration: Substantive Standards and Proof*, in *Austrian Arbitration Yearbook 2009* 539–564 (C. Klausegger, P. Klein et al. eds, 2009).

32 *See* UNCAC, Art. 18.

33 *See* CoE Criminal Law Convention, Arts 12 and 37(1).

34 France: July 2005; Australia: Dec. 2005; United Kingdom: Feb. 2006; Spain: June 2006; United States: Oct. 2006; Sweden: Sept. 2007; Belgium: Sept. 2008; Switzerland: Sept. 2009; Italy: Oct. 2009; Ireland: Nov. 2011; Germany: Nov. 2014; New Zealand: Dec. 2015; and Japan: July 2017.

35 United Nations Office on Drugs and Crime (UNDOC), *State of Implementation of the United Nations Convention Against Corruption* (2d ed., 2017), 13 et seq., www.unodc.org/documents/treaties/UNCAC/COSP/session7/V.17-04679_E-book.pdf (accessed 19 June 2018).

36 *Ibid*. at 29. The report even notes: '[C]omparatively few States parties have introduced or taken steps towards establishing as criminal offences the bribery of foreign public officials and officials of public international organizations.'

- OECD Convention: In 2015, Transparency International observed that only about four signatory countries were engaging in 'active' enforcement, while six countries had levels of moderate or limited enforcement and in twenty-nine countries there was little to no enforcement at all.[37]

2.2 Effects of the global anti-corruption campaign on the real world

2.2[a] *Enforcement Efforts in the United States and in the United Kingdom*

The United States and the United Kingdom are considered active enforcers, and enormous fines imposed by US and UK enforcement agencies have hit the headlines across the globe. However, on closer inspection doubts may surface as to the integrity of these enforcement efforts. Some commentators denounce 'moral ironies' in the enforcement practices, 'arguably entrenching big business in its historical view that corruption and enforcement expenses are simply a cost of doing business.'[38] There are in fact large US government contractors among the sinners with the biggest fines.[39] Yet, the US government has debarred *none* of them from doing business with it. On the contrary, the Department of Justice (DoJ) and SEC have a reputation for structuring settlements (in cooperation with enforcement agencies in the European Union) in a manner that avoids mandatory debarment in order to safeguard jobs and keep alive trusted government contractors.[40] It was thus possible for Siemens, Halliburton, KBR and BAE Systems to obtain over USD 10 billion in US government contracts in financial year (FY) 2010 shortly before or after settling and paying approximately USD 1.8 billion in fines.[41]

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[37] Transparency International, *Exporting Corruption: Progress Report 2015: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery*, www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd (accessed 19 June 2018). The four 'active' countries are the United States, the United Kingdom, Germany, and Switzerland (at 12). This echoes observations of the New York City Bar of 2011: 'While all state parties to the [OECD] Convention have passed laws criminalizing foreign bribery, not all of these laws are effective (or, perhaps, even applied) in practice' (New York City Bar, Committee on International Business Transactions, Dec. 2011, *The FCPA and its impact on international business transactions – Should anything be done to minimize the consequences of the US' unique position on combating offshore corruption?*, at 12, www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf (accessed 19 June 2018)).

[38] A. Keith Thompson, *Does anti-corruption legislation work?*, 7 World Cust. J. 39, 40 (2013).

[39] E.g. Alcatel-Lucent, Alcoa, Alstom, BAE Systems, Daimler, Halliburton, KBR, JGC Corporation, Johnson & Johnson, Panalpina, and Siemens.

[40] For a comprehensive overview, *see* Jessica Tillipman, *The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences*, Briefing Papers (Thomson West), No. 11-9 (Aug. 2011); Thompson, *supra* n. 38.

[41] *See* Tillipman, *supra* n. 40, at 3.

In the United Kingdom, the situation is similar. Following the introduction of Deferred Prosecution Agreements (DPAs) in 2014,[42] the Serious Fraud Office (SFO) obtained court blessing for a number of DPAs granting the offenders significant discounts on the penalties that would normally have been payable in case of a guilty plea. For the court to approve a DPA, it must be satisfied, inter alia, that the DPA is in the interests of justice.[43] In the very first case, the court considered the mere fact that the offender, Standard Bank plc, had self-reported a substantial bribe as sufficient justification for approving the DPA.[44] Another case involved Rolls-Royce, an important government supplier. Rolls-Royce was guilty of having paid multiple bribes over an extended period of time across many jurisdictions. Rolls-Royce had not even self-reported. The case further presented a number of aggravating factors, including the involvement of (very) senior Rolls-Royce employees. This notwithstanding, the court approved the DPA with Rolls-Royce holding that it was still in the interests of justice mainly for the following reasons:

- from the start of the investigation, Rolls-Royce had been extremely cooperative and forthcoming;
- Rolls-Royce had improved its corporate compliance significantly and actually undergone a complete change of culture and personnel;
- a prosecution of Rolls-Royce would have substantial adverse impact on employees and others innocent of any misconduct.

To understand the extent of the impact a prosecution would have on innocent parties, the court first considered the impact on Rolls-Royce. It noted that:

- a conviction would affect the ability of Rolls-Royce to trade in the world because many countries operate public sector procurement rules which would debar participation following conviction;
- debarment would lead to exclusion from other contracts and reduced research and development caused by the loss of a key revenue stream;

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42 Crime and Courts Act 2013, Sch. 17.

43 *Ibid*., Sch. 17, Part 1, para. 8(1)(a).

44 The case involved Standard Bank plc having self-reported to the SFO the payment of quite a substantial bribe to Tanzanian government officials for purposes of securing an advisory mandate in the context of a sovereign note private placement of USD 600 million. The bank's London based Global Head of Debt Capital Markets was deeply involved in the transaction, and he had huge red flags right under his nose. The court argued nevertheless that it was '*obviously* in the interests of justice that following the self-report the SFO [had] been able to investigate the circumstances in which a UK registered bank acquiesced in an arrangement that had many *hallmarks of bribery on a large scale*' (emphasis added). *See Serious Fraud Office v. Standard Bank plc*, judgment of 30 Nov. 2015, Case No: U20150854, para. 22, www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf (accessed 19 June 2018).

- debarment and exclusion would have significant, and potentially business critical, effects on the financial position of Rolls-Royce;
- repercussions for Rolls-Royce could (1) adversely affect the U.K. defence industry, where Rolls-Royce has a critical role; (2) have consequential financial effects on the supply chain; (3) impair competition in highly concentrated markets; (4) cause a potentially significant fall in share price; (5) result in group-wide redundancies and/or restructuring; and (6) weaken Rolls-Royce's financial covenant for pensions.[45]

In this context, it bears remembering that the OECD Convention explicitly stipulates in its Article 5, second sentence, that enforcement shall *not* be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved. In *SFO v. Rolls-Royce*, the court took in fact pains to clarify that none of the above factors was determinative of its decision and that, indeed, the national economic interest was irrelevant. It went on to say, however, that these factors constituted counter-vailing factors to be weighed in the balance when considering the public interest and the interests of justice. One might argue that this is tantamount to introducing considerations of national economic interest through the backdoor. In any event, the decision has been subject to criticism, including from the OECD itself, for potentially undermining incentives to self-report if companies can fail to disclose and still receive a DPA with a huge discount on penalties if they cooperate.[46]

2.2[b] *High Levels of Perceived Corruption*

It seems that the multiple international conventions have not brought about any significant changes in the real world. Pursuant to Transparency International's Corruption Perceptions Index (CPI) 2017,[47] 69% of countries scored below 50 on a scale ranging from 0 (worst performance) to 100 (best performance). Even 53% of G-20 countries scored below 50. The regions with the lowest average scores are Sub-Saharan Africa (32), Eastern Europe and Central Asia (34), and Middle East and North Africa (38).

According to Transparency International's Global Corruption Report of 2009, the scale and scope of bribery in the public sector is staggering and seems

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45 *See Serious Fraud Office v. Rolls-Royce plc*, judgment of 17 Jan. 2017, Case No: U20170036, paras 52 et seq., www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf (accessed 19 June 2018).

46 OECD, *Implementing the OECD Anti-Bribery Convention – Phase 4 Report: United Kingdom*, at 17.

47 *See* www.transparency.org/news/feature/corruption_perceptions_index_2017 (accessed 19 June 2018).

to be getting worse.[48] A 2014 OECD briefing confirms this. It estimates that the amount of bribes paid globally every year exceeds the incredible level of USD 1 trillion.[49] In several countries it is inconceivable to succeed and survive without paying substantial bribes. Any individual business has two choices only: either it joins the competition to pay the highest bribe, thereby further fuelling the upward corruption spiral at the expense of *all* businesses in the relevant market, or it drops out and thereby jeopardizes its own survival in the long run – a classic prisoner's dilemma.[50] Fully conscious of these facts of life, governments of capital exporting countries are rumoured to intervene on behalf of 'their' investors to support them in securing deals even under dubious circumstances on potentially illegal terms.[51]

2.2[c] *Relative Weakness or Total Absence of the Rule of Law in Many Countries*

Across cultures and countries, indexes measuring corruption, the force of the rule of law and the effectiveness of governments are highly correlated. The bivariate correlations among Transparency International's CPI and the World Bank's Rule of Law Index[52] and Government Effectiveness Index[53] exceed 0.9, which is 'about as high as correlations between imperfect social science measures can be'.[54] Just take two countries that have gained prominence in the international arbitration community: Kenya and Uzbekistan. I am, of course, referring to *World Duty Free*[55] and *Metal-Tech*.[56] The facts underlying these cases date back to the years 1989/1990 (Kenya) and 1998–2000 (Uzbekistan).

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48 Transparency International, *Global Corruption Report 2009: Corruption and the Private Sector*, at XXV.

49 CleanGovBiz, *The rationale for fighting corruption*, www.oecd.org/cleangovbiz/49693613.pdf (accessed 19 June 2018).

50 Olaf Meyer, *Korruption im Vertrag*, 112 et seq. (Mohr Siebeck, 2017).

51 For a colourful description of these interventions, *see* Karen Mill, *Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto*, in *International Commercial Arbitration: Important Contemporary Questions* 288, 291 et seq. (Albert Jan van den Berg ed., 2003).

52 The Rule of Law Index captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence. For more details, *see* http://info.worldbank.org/governance/wgi/#doc (accessed 19 June 2018).

53 The Government Effectiveness Index captures perceptions of the quality of public services; the quality of the civil service and the degree of its independence from political pressures; the quality of policy formulation and implementation; and the credibility of the government's commitment to such policies. For more details, *see* http://info.worldbank.org/governance/wgi/#doc (accessed 19 June 2018).

54 Robert Klitgaard, *Corruption and Development*, in *International Development: A Global Perspective on Theory and Practice*, 150 et seq. (P. Battersby & R. Roy eds, 2017); *see also* Anne Peters, *Corruption and Human Rights*, 20 Working paper series Basel Institute on Governance, 7 et seq. (2015).

55 *World Duty Free v. Kenya*, *supra* n. 4.

56 *Metal-Tech v. Uzbekistan*, *supra* n. 5. There are, of course, also the more recent cases of *Spentex v. Uzbekistan*, *supra* n. 6; and *Vladislav Kim et al. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 Mar. 2017.

In those years, corruption up to the highest government levels was endemic in both countries,[57] and the rule of law had little to no force at all.[58] What does this mean translated into plain English? Notwithstanding constitutional guaranties of a separation of powers, the rulers in both countries controlled the judiciary and virtually all governance systems.[59] There were political and other extrajudicial killings, arbitrary arrests and detention, torture and other cruel, inhuman, or degrading treatment.[60] In both countries, there was persistent and deliberate misuse of the legal system for harassing opponents and critics of the government.[61] Unsurprisingly, a culture of corruption and impunity reigned.[62] Prosecutions on corruption charges, rather than following a consistent enforcement policy, were nothing but the expression of power struggles among the country's elite – a means to get rid of political opponents.[63]

In sum, in certain countries the law has no force. It is an instrument in the hands of a powerful few that they play *ad libitum*. In countries that can be so characterized, one will normally encounter so-called grand corruption – systemic corruption deep-rooted in highest government levels. Where corruption is so embedded in a country's system of government, it represents the 'essence of state policy,'[64] and any such country is best described as 'true kleptocracy.'[65]

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57 The oldest data available for Kenya relate to the year 1996. In that year, the country ranked 52nd out of 54 countries surveyed by Transparency International with a CPI score of 2.21 (on a scale ranging from 0 to 10) (*see* Transparency International: Corruption Perception Index 1996, www.transparency.org/files/content/tool/1996_CPI_EN.pdf (accessed 19 June 2018). In 1999, Uzbekistan ranked 94th out of 99 countries surveyed by Transparency International with a CPI score of 1.8 (on a scale ranging from zero to ten) (Transparency International: Corruption Perception Index 1999, www.transparency.org/research/cpi/cpi_1999/0/ (accessed 19 June 2018).

58 In 1996, Kenya had a score of 16.27 (on a scale ranging from 0 to 100) on the World Bank's Rule of Law Index, while Uzbekistan scored 12.92 in 1998 and 15.31 in 2000 (*see* the World Bank's interactive Worldwide Governance Indicators, http://info.worldbank.org/governance/wgi/#reports (accessed 19 June 2018).

59 US State Department, *Kenya Country Report on Human Rights 1999*, www.state.gov/j/drl/rls/hrrpt/1999/252.htm (accessed 19 June 2018); US State Department, *Uzbekistan Country Report on Human Rights 1999*, www.state.gov/j/drl/rls/hrrpt/1999/369.htm (accessed 19 June 2018).

60 US State Department, *Kenya Country Report on Human Rights 1999*, and US State Department, *Uzbekistan Country Report on Human Rights 1999* (both *supra* n. 59).

61 US State Department, *Kenya Country Report on Human Rights 1999*, and US State Department, *Uzbekistan Country Report on Human Rights 1999* (both *supra* n. 59).

62 Bertelsmann Stiftung, *BTI 2016 – Kenya Country Report*, at 11.

63 *Ibid.*, at 34; Bertelsmann Stiftung, *BTI 2016 – Uzbekistan Country Report*, at 10; Freedom House, *Uzbekistan Country Report 2015*, at 2.

64 Sonja Starr, *Extraordinary crimes at ordinary times: international justice beyond crisis situations*, 101 Nw. U. L. Rev. 1257, 1304 et seq. (2007).

65 *Ibid.*, at 1304 et seq.; Kevin Lim, *Upholding Corrupt Investors' Claims Against Complicit or Compliant Host States – Where Angels Should not Fear to Tread*, in *Yearbook on International Investment Law & Policy 2011–2012* 601, 661 et seq. (Karl P. Sauvant ed., 2013).

2.3 Summary of findings

It is arguable that the global anti-corruption campaign's genesis hinges more on economic rather than ethical considerations. Following the enactment of the FCPA, securing a level playing field for businesses from the United States and its principal economic industrial allies was the driving force. Over time, increased attention may have been paid to improving human well-being and government functioning, but many countries appear to lack enthusiasm for embracing the campaign. Enforcement practices in both the United States and the United Kingdom are not immune from criticism.

More generally, there seems to be a mismatch between what states say about corruption and what they consider acceptable conduct.[66] In fact, (some) first world governments seem to have no problem aggressively pushing their national champions in whatever notoriously corrupt environments they may be moving. In fair reflection of this reality, Transparency International noted that '[t]he principal cause of lagging enforcement is lack of political will.'[67] No wonder nothing much has changed in the real world. Levels of perceived corruption continue to be very high across different geographies. Dozens of countries still score very poorly on the World Bank's Rule of Law Index. Regimes with a culture of corruption and impunity abound. Even in the first world, eagerness to enforce laws against foreign corrupt practices varies significantly from country to country.[68]

Is then the global anti-corruption campaign as reflected in multiple international conventions nothing but the Western world's 'myth system'?[69] Do we still have a global 'operational code'[70] pursuant to which corruption is just an unsavoury but integral part of doing business at least in certain parts of the world? This article does not purport to give an answer to the question. In any event, it seems that the magnitude of the problem continues to be overwhelming.

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66 L. Yves Fortier, *Arbitrators, corruption, and the poetic experience: 'When power corrupts, poetry cleanses'*, 31 Arb. Int'l 367, 371 (2015). *See also* Richard H. Kreindler, *Aspects of Illegality in the Formation and Performance of Contracts*, in *International Commercial Arbitration: Important Contemporary Questions* 209, 254 (Albert Jan van den Berg ed., 2003).

67 Fritz Heimann & Gillian Dell, *OECD Anti-Bribery Convention: Progress Report* 8 (Transparency International 2008).

68 Transparency International, *Exporting Corruption: Progress Report 2015*, *supra* n. 37; New York City Bar, Committee on International Business Transactions, *supra* n. 37, at 12 et seq.; Peters, *supra* n. 54, at 8.

69 More than forty years ago, Reisman described the myth system as 'a picture of a group as its members would like to imagine it and to some extent do imagine it.' However, there are discrepancies between the myth system and the way key actors actually behave that suggest to apply another name for the resulting *unofficial* but nonetheless effective guidelines for behaviour in those discrepant sectors – the 'operational code.' *See* W Michael Reisman, *Myth System and Operational Code*, Yale Law School Faculty Scholarship Series, paper 721, 229, 229 et seq., http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1711&context=fss_papers (accessed 19 June 2018).

70 Reisman, *supra* n. 69, at 231.

The economic principles driving the behaviour of relevant market participants suggest that there is no escaping corruption in the public sector unless multi-pronged game-changing reforms are implemented to eliminate or at least reduce monopolistic power of state officials to allocate scarce resources.[71]

3 TRANSNATIONAL PUBLIC POLICY

3.1 Corruption

Irrespective of the state of affairs in the real world, there is broad consensus among courts, tribunals and scholars that there is universal condemnation of corruption. Corruption is seen as being contrary to public policy in virtually all jurisdictions across the globe and, as a reflection thereof, to transnational public policy.[72] The

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[71] Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform*, Ch. 4 (CUP 1999).

[72] *Honeywell International Middle East Ltd. v. Meydan Group LLC* [2014] EWHC 1344 (TCC), para. 182; *Westacre Investments Inc. v. Jugoimport-SDRP Holding Co. Ltd.* [1999] EWCA Civ 1401, para. 64; Swiss Federal Court (Bundesgericht), judgment of 2 Sept. 1993, BGE 119 II 380 et seq., at 384 consideration 4b; German Federal Court of Justice (Bundesgerichtshof, BGH), judgment of 18 Jan. 2018, I ZR 150/15, para. 23; *World Duty Free*, *supra* n. 4, paras 139 et seq.; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 Dec. 2000, para. 111; *Metal-Tech*, *supra* n. 5, paras 290 et seq.; *Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh et al.*, ICSID Case No. ARB/10/11 and ICSID Case No. ARB/10/18, Decision on Jurisdiction, 19 Aug. 2013, para. 430; *Gustav F. W. Hamester GmbH & Co. K.G. v. Republic of Ghana*, ICSID No. ARB/07/24, Award, 18 June 2010, para. 123; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 Apr. 2009, para. 100; *Kim v. Uzbekistan*, *supra* n. 56, para. 543; *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 Dec. 2017, para. 137; for a list of pertinent ICC cases, *see* Antonio Crivellaro, *Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence*, in *Arbitration: Money Laundering, Corruption and Fraud* 109–147 (K. Karsten & A. Berkeley eds, 2003); Mariano de Alba, *Drawing the line: addressing allegations of unclean hands in investment arbitration*, 12 Revista de Direito Internacional 321, 328 (2015); Yas Banifatemi, *The Impact of Corruption on 'Gateway Issues' of Arbitrability, Jurisdiction, Admissibility and Procedural Issues*, in *Addressing Issues of Corruption in Commercial and Investment Arbitration* 16, 18 and 21 (D. Baizeau & R. H. Kreindler eds, 2015); Jack Beatson, *International arbitration, public policy considerations, and conflicts of law: the perspectives of reviewing and enforcing courts*, 33 Arb. Int'l 175, 176 (2017); Michael Hwang & Kevin Lim, *Corruption in Arbitration – Law and Reality*, 8 Asian Int'l Arb. J. 1, 1 and 42 (2012); Doak Bishop, *Toward a More Flexible Approach to the International Legal Consequences of Corruption*, 25 ICSID Rev. 63 (2010); Utku Co□ar, *Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions*, in *Legitimacy: Myths, Realities, Challenges* 531, 549 (Albert Jan van den Berg ed., 2015); Cremades & Cairns, *supra* n. 3, at 77 et seqq.; Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29 ICSID Rev. 155, 181 (2014); Richard H. Kreindler, *Die Internationale Investitionsschiedsgerichtsbarkeit und die Korruption: Eine alte Herausforderung mit neuen Antworten*, at 2, 3 et seq. (SchiedsVZ 2010); Richard H. Kreindler, *Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine*, in *Between East and West: Essays in Honour of Ulf Franke* 309 (Kaj Hobér et al. eds, 2010); Carolyn B. Lamm, Hansel T. Pham et al., *Fraud and Corruption in International Arbitration*, in *Liber Amicorum Bernardo Cremades*, 699, 711 et seq. and 727 (M. A. Fernández-Ballesteros & D. Arias eds, 2010); Llamzon, *supra* n. 3, at 70; A. Llamzon & A. C. Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct*, in *Legitimacy: Myths, Realities, Challenges* 451, 462 (Albert Jan van den Berg ed., 2015); Andrea J. Menaker, *The Determinative Impact of Fraud and Corruption on Investment Arbitrations*, 25 ICSID Rev. 67,

proposition that corruption is contrary to transnational public policy rests on the premise that local laws, international conventions, case law and scholarly opinions alike express this universal condemnation. This prompts several observations.

First, there is *no* universal definition of corruption.[73] On the contrary, 'defining its own subject matter is … one of the greatest challenges facing the anti-corruption movement.'[74] Notably, the multiple international conventions in the field differ significantly in scope and depth.[75] It is true that the UNCAC has a very broad scope and an impressive 186[76] parties to it. However, the number of binding obligations that the UNCAC imposes on contracting states is rather limited. In fact, the parties to the UNCAC have committed only to the criminalization of corruption in the public sector, both at home and abroad. In relation to influence peddling and corruption in the private sector, the convention simply contains non-binding recommendations.[77] Moreover, Article 30(9) of the UNCAC leaves it to the contracting states to describe the offences established in accordance with the Convention and the applicable legal defences or other legal principles controlling the lawfulness of conduct.

Second, the proposition is oblivious to the fact that none of the international conventions in the field is self-executing. They create obligations as between the signatory states only and *not* between states and private individuals or entities.

Third, the proposition seems to be derived exclusively from what is on the books or, more correctly phrased, from what is *supposed* to be on the books. In the second edition of its report on the *State of Implementation of the United Nations Convention Against Corruption*, the United Nations Office on Drugs and Crime (UNDOC) noted serious implementation deficiencies in the *legislation*, not to mention the enforcement efforts, of many countries, including in the core areas

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72 et seq. (2010); Ruslan Mirzayev, *International Investment Protection Regime and Criminal Investigations*, 29 J. Int'l Arb. 71, 100 (2012); Sophie Nappert, *Nailing Corruption: Thoughts for a Gardener*, in *The Practice of Arbitration – Essays in Honour of Hans van Houtte* 161, 161 (P. Wautelet, T. Kruger & G. Coppens eds, 2012); Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration*, at 289 et seqq. (Kluwer Law International 2004); S. Wilske & T. J. Fox, *Corruption in International Arbitration and Problems with Standard of Proof: Baseless Allegations or Prima Facie Evidence?*, in *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* 489, 491 (S. M. Kröll, L. A. Mistelis et al. eds, 2011).

73 Banifatemi, *supra* n. 72, at 16; Cremades & Cairns, *supra* n. 3, at 67; von Wobeser, *supra* n. 3, at 204.

74 M. J. Bonell & O. Meyer, *The Impact of Corruption on International Commercial Contracts – General Report*, in *The Impact of Corruption on International Commercial Contracts* 1, 5 (M. J. Bonell & O. Meyer eds, 2015). *See also* Llamzon, *supra* n. 3, at 19 et seq.

75 *See* s. 0 *supra*.

76 As of 30 May 2018, www.unodc.org/unodc/en/corruption/ratification-status.html (accessed 19 June 2018).

77 *See* UNCAC, Arts 18 and 21. It bears highlighting that *Kim v. Uzbekistan*, *supra* n. 56, paras 595 et seq., is one of the rare instances where an investment tribunal has duly noted these details.

of active and passive bribery of *domestic* public officials,[78] as well as active and passive bribery of *foreign* public officials.[79]

Fourth, the proposition is rarely challenged for its harsh contrast with the real world – the state (or rather: lack) of effective enforcement across the globe. As mentioned,[80] in 2015 only about four signatory countries of the OECD Convention were engaging in 'active' enforcement, while six countries had levels of moderate or limited enforcement, and there was little to no enforcement at all in twenty-nine countries.[81] Unsurprisingly, in 2017 almost 70% of countries surveyed by Transparency International scored below 50 on the Corruption Perception Index. In light of these implementation deficiencies and the widespread lack of effective enforcement in many countries, it is doubtful that there is an established general principle of law supporting a transnational public policy against corruption.[82]

Fifth, against a backdrop of implementation deficiencies and lack of enforcement across different geographies, it seems that international tribunals, rather than relying on a principle which is recognized and *effectively* applied in a wide range of national legal systems,[83] have established the transnational public policy against corruption themselves. To this end, they drew inspiration from international conventions, codes of conduct of international organizations, international case law and other sources[84] as expressions of what *should* be.[85] In all likelihood, this *jurisprudence constante* of international tribunals does not translate into a general principle of morality actually *accepted* by civilized nations.[86] Yet, it merits support. International arbitration has an important role to play in the global fight against corruption.[87] Within its limits,[88] international arbitration has the means of doing so

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78 UNDOC, *supra* n. 35, at 13 et seq.

79 *Ibid.*, at 29. The report even notes: '[C]omparatively few States parties have introduced or taken steps towards establishing as criminal offences the bribery of foreign public officials and officials of public international organizations.'

80 *See* s. 0 *supra*.

81 *Supra* n. 37.

82 In 2000, Sheppard, as rapporteur of the ILA's Committee on International Commercial Arbitration, worded very cautiously, 'it is *arguable* that there is an international consensus that corruption and bribery are contrary to international public policy' (emphasis added) (*see* Audley Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement*, 19 Arb. Int'l 217, 235 et seq. (2003)).

83 Quoting Martin Hunter & Gui Conde e Silva, 'the concept of "transnational public policy" involves the identification of principles that are commonly recognized by political and legal systems around the world' (Martin Hunter & Gui Conde e Silva, *Transnational Public Policy and its Application in Investment Arbitration*, 4 J. World Inv. 367 (2003)).

84 For a non-exhaustive list of sources of transnational public policy, *see* Sheppard, *supra* n. 82, at 220.

85 For an impressive panorama of international case law corroborating this thesis, *see* Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in *Comparative Arbitration Practice and Public Policy in Arbitration* 258–318 (Pieter Sanders ed., 1987).

86 Sheppard, *supra* n. 82, at 220; Hunter & Conde e Silva, *supra* n. 83, at 368.

87 Nappert, *supra* n. 72, at 168.

88 Kreindler, *supra* n. 66, at 257 et seq.

at its disposal.[89] Arbitrators should indeed aspire to achieve certain ideals of international justice and morality.[90] However, this does not give tribunals carte blanche to engage in an 'exercise in moral subjectivism.'[91] They must still apply the *law* rather than one general policy in an absolutist and inconsiderate manner. Policies do affect the interpretation of the law and drive the development of principled rules. Yet, this must occur in a transparent assessment of the relevant considerations, including a reasoned balancing of *objectively* conflicting policy goals to avoid that the very fight against corruption creates incentives to engage in corruption.

Sixth, there is *no* transnational public policy condemning influence peddling.[92] In relation to influence peddling, the UNCAC contains a *recommendation* only. The state of the convention's implementation is deplorable.[93] Therefore, rather than contending a purportedly universal condemnation of *all* sorts of corruption, investment tribunals must establish whether the facts of the case can either be qualified as the payment of a bribe to a public official in order that the official act or refrain from acting in the exercise of his or her official duties, or be subsumed under applicable local laws, where they exist, criminalizing trading in influence. If there are doubts as to whether local criminal laws prohibit influence peddling, one cannot do away with them by simply asserting that certain propositions 'are by now largely non-controversial propositions under all modern legal systems.'[94]

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89 Nappert, *supra* n. 72, at 168.

90 Fortier, *supra* n. 66, at 376.

91 Even though he uses it in an entirely different context, the expression is taken from Constantine Partasides, *Remedies for Findings of Illegality in Investment Arbitration*, in *International Arbitration and the Rule of Law: Contribution and Conformity* 740 (Andrea Menaker ed., 2017).

92 Hwang & Lim, *supra* n. 72, at 42. English courts have declared enforceable foreign arbitral awards upholding contracts concerning trading in influence. *See Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd.*, High Court, Queen's Bench Division, judgment of 24 May 1999 [1999] 2 Lloyd's Rep. 224 et seq.; *Westacre v. Jugoimport*, *supra* n. 72, paras 34 et seq.

93 UNDOC, *supra* n. 35, at 42 et seq.: 'In some countries, mostly from the Group of Western European and other States, the adoption of implementing legislation was considered but eventually rejected. This rejection came because the concept of trading in influence was considered overly vague and not in keeping with the level of clarity and predictability required in criminal law or because the legislator, taking also into account the difficulty of distinguishing trading in influence from socially acceptable forms of pressure …, decided to focus on the most dangerous acts, especially those that undermine confidence in public administration, justice and the authorities in general, preferring the path of prevention and establishing rules of professional ethics for the conduct in question.'

94 However, this is exactly what the *Metal-Tech* tribunal did. In order to determine that there was corruption, it relied on a commentary conveniently published by the Ministry of Internal Affairs which the tribunal admitted not to be authoritative. Among other things, the commentary (which, by the way, Uzbekistan introduced only together with its post hearing brief) stated that 'The object of bribery can be handed (transferred) either directly to an official who is the bribetaker or with his/her permission to the members of his/her family and other people related to him/her' (*Metal-Tech v. Uzbekistan*, *supra* n. 5, para. 285). In an apparent misinterpretation of both the commentary and the standards applied in modern legal systems, the tribunal concluded that 'a payment to a relative of an official is equivalent to a payment to the official himself' (para. 288). One of the recipients of substantial payments was the brother of the Uzbek Prime Minister. In my reading of the award,

Moreover, it is worthwhile considering whether local laws against influence peddling should be taken into account only if they are effectively and generally enforced on a non-discriminatory basis. Where a culture of corruption and impunity reigns and corruption represents the very 'essence of state policy,'[95] local anti-bribery laws just constitute '*leges imperfectae*' or '*leges simulatae*.' They are nothing but instruments cynically applied in practice to permit elites to do what ordinary people, if and when convenient for the elites, are prohibited from doing[96] and to stabilize the elite's power.[97] Under these circumstances, one may question why local laws 'prohibiting' influence peddling should have any impact on the protection of an investment obtained in breach of this 'prohibition.'[98]

Seventh, establishing whether there has been any offence in the core area of bribery necessitates a careful analysis of whether the purported bribes were paid to an *official* of the host state (including through an intermediary) in order that *this* official act or refrain from acting in the exercise of his or her official duties. The recent case of the former governor of Virginia, Robert McDonnell, prominently illustrates the importance of this necessity. While in office, McDonnell had accepted USD 175,000 in loans, gifts, and other benefits for himself and his wife from a Virginia entrepreneur in exchange for making introductions to a number of people that might be instrumental in procuring certain public research studies helpful for the entrepreneur's business. The Supreme Court of the United States acquitted McDonnell of all charges on grounds that he had not committed an 'official act.' Any such act required the formal exercise of governmental power on something specific and focused that is pending or may by law be brought before a public official. Arranging meetings and talking to other officials did not fit the definition of 'official act.'[99]

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there was, however, no evidence on the record that these payments had been channelled to the Prime Minister or, for that matter, that the Prime Minister had known and 'permitted' the payments made to his brother as required pursuant to the commentary. On the facts of the case, one might be induced to suspect influence peddling. As it seems, influence peddling is not a criminal offence in Uzbekistan (at least this is what the articles of the Uzbek Criminal Code quoted in the tribunal's decision suggest). Apparently, the tribunal wanted to make up for this by referring to 'largely non-controversial propositions under all modern legal systems.' Given that there is by no means a universal condemnation of influence peddling, the reference to all modern legal systems is unhelpful.

95 Starr, *supra* n. 64, at 1304 et seq.

96 Reisman, *supra* n. 69, at 242 et seq.

97 J. Charap & C. Harm, *Institutionalized Corruption and the Kleptocratic State*, in *Governance, Corruption and Economic Performance* 150 (G. T. Abed & S. Gupta eds, 2002): 'corruption serves as a hostage mechanism to minimize the probability of defection or insurrection by lower-level insiders of the corrupt bureaucracy: they are effectively constrained – due to their own participation – from turning to the public to denounce the system. On the other hand, the dictator can, when necessary, find a reason why an uncooperative bureaucrat is found guilty of corruption. Corruption is both the carrot and the stick that strengthen loyalty.' On the subject, *see also* Rose-Ackerman, *supra* n. 71, Ch. 11.

98 Stephan Wilske, *Sanctions for Unethical and Illegal Behavior in International Arbitration: A Double-Edged Sword?*, 3 Asia Contemp. Arb. J. 211, 224 (2010) (fn. 56).

99 *McDonnell v. United States*, 579 US (2016).

Eighth, the policy should be applied with 'a due sense of proportionality'[100] and due regard to the instructive teachings that can be distilled from the solutions developed under various national laws.[101]

Ninth and most importantly, accepting the existence of a limited transnational public policy condemning *some* forms of corruption does *not* amount to acknowledging that one generally condemning contracts or investments obtained through corruption equally exists. Quite the opposite holds true as will be shown now.

3.2 Contracts procured by corruption

The investor in *World Duty Free* had pleaded claims based on a *contract* governed by English (and Kenyan) law. The dictum at the centre of the *World Duty Free* award is this:

> This Tribunal is convinced that bribery is contrary … to transnational public policy. Thus, claims based on … contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.[102]

This is plainly wrong. The international conventions against corruption do *not* oblige signatory states to adopt legislation to the effect that contracts obtained through corruption *must* be void and unenforceable. To the extent that they deal at all with the civil law impact of corruption on contracts procured by it, they rather afford contracting states a great deal of flexibility.[103]

Many jurisdictions across the globe have indeed adopted flexible approaches. For example, contracts procured by corruption are *not* void *ab initio* under English law. Instead, the injured party has a number of options. If counter-restitution is still possible, it may rescind the contract. Otherwise, it may terminate the contract forthwith. Alternatively, it may honour and enforce the contract. This is well established in case law.[104] If the law places the decision to uphold, terminate or rescind a contract obtained by corruption in the hands of one contractual party, public policy concerns become moot points. It follows that 'where a contract has

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[100] *Patel v. Mirza* [2016] UKSC 42, para. 101.

[101] Partasides, *supra* n. 91, at 744.

[102] *World Duty Free v. Kenya*, *supra* n. 4, para. 157.

[103] *See* UNCAC, Art. 34 and CoE Civil Law Convention, Art. 8(2) (details of both conventions, *supra* n. 17).

[104] *See Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha, and Telegraph Co.* [1875] 9 Ch. App. 515, 527, 532–33; *Armagas v. Mundogas* [1986] 1 A.C. 717, 742–43; *LogicRose v. Southend United Football Club* [1988] 1 W.L.R. 1256; *Wilson v. Hurstanger* [2007] EWCA Civ 299, para. 39; *Honeywell v. Meydan*, *supra* n. 72, paras 178 and 183. *See also* the legal opinion of Lord Mustill cited extensively in *World Duty Free v. Kenya*, *supra* n. 4, para. 164. The position finds support in doctrine: Partasides, *supra* n. 91, at 744; M. Gearing & R. Kwong, *The Common Law Consequences and Effects of Allegations or a Positive Finding of Corruption*, in *Addressing Issues of Corruption in Commercial and Investment Arbitration* 158, 160 (D. Baizeau & R. H. Kreindler eds, 2015).

been induced by bribery it is *not* contrary to English public policy for the contract to be enforced' (emphasis added).[105]

The positions under the laws of many other jurisdictions are quite similar. Only few legal systems treat a contract obtained by corruption as void and (supposedly) incapable of being ratified.[106] In most jurisdictions, under either the rules on mistake and fraud or the principles of agency, the contract procured by corruption will have pending validity subject to approval by the principal or be valid and can be avoided at the option of the principal.[107] Pursuant to Dutch law, a contract induced by corruption will be valid. However, the injured principal may invalidate it (agent's lack of authority; defects of consent).[108] Swiss law takes the same approach as confirmed by several decisions of the Swiss Federal Court (Bundesgericht).[109] In Germany, case law may appear somewhat confusing at first sight, but the results it produces are by and large the same. The contract will be valid if it does not present elements disadvantageous to the 'injured' party,[110] unless the corrupt agent acted in manifest abuse of its power of representation.[111] In the latter case, the validity of the contract will be pending and subject to ratification by the principal.[112] Where it is disadvantageous to the principal, the contract will be void as *contra bonos mores*.[113] This serves the protection of the injured party only. Therefore, the injured party can, explicitly or by implication, waive the protection and still 'ratify' the contract.[114] The injured party

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105 *National Iranian Oil Co. v. Crescent Petroleum Co. Int'l Ltd & Crescent Gas Corp. Ltd.* [2016] EWHC 510 (Comm), para. 49; *Honeywell v. Meydan*, *supra* n. 72, para. 184.

106 Bonell & Meyer, *supra* n. 74, at 21 et seq.

107 Hwang & Lim, *supra* n. 72, at 44 et seq.; Carita Wallgren-Lindholm, *Consequences and Effects of Allegations or of a Positive Finding of Corruption*, in *Addressing Issues of Corruption in Commercial and Investment Arbitration* 184 (D. Baizeau & R. H. Kreindler eds, 2015); Bonell & Meyer, *supra* n. 74, at 21 et seq. *See also* the country reports in *The Civil Law Consequences of Corruption* (Olaf Meyer ed., Nomos 2009); and *The Impact of Corruption on International Commercial Contracts* (M. J. Bonell & O. Meyer eds, Springer 2015). *See* again Bonell & Meyer, *supra* n. 74, at 21 et seq.

108 A. O. Makinwa & X. E. Kramer, *Contracts Tainted by Corruption: Does Dutch Civil Law Augment the Criminalization of Corruption*, in *The Impact of Corruption on International Commercial Contracts* 205, 214 et seqq. (M. J. Bonell & O. Meyer eds, 2015).

109 Bundesgericht, judgment of 21 Feb. 2003, BGE 129 III 320 consid. 5.2; Bundesgericht, judgment of 2 Sept. 1993, BGE 119 II 380, consid. 4.c. *See also* Christa Kissling, *Impact of Bribery on Contracts Under Swiss Civil Law*, in *The Impact of Corruption on International Commercial Contracts* 351, 371 et seqq. (M. J. Bonell & O. Meyer eds, 2015).

110 BGH, judgment of 6 May 1999 – VII ZR 132/97, BGHZ 141, 357 = NJW 1999, 2266, para. 15; BGH, judgment of 10 Jan. 1990 – VIII ZR 337/88NJW-RR 1990, 442, 443.

111 BGH, judgment of 6 May 1999, *supra* n. 110, para. 22.

112 *Ibid.*, para. 22.

113 BGH, judgment of 18 Jan. 2018 – I ZR 150/15, para. 54, http://juris.bundesgerichtshof.de (accessed 19 June 2018); BGH, judgment of 4 Nov. 1999 – IX ZR 320/98, NJW 2000, 511–12 = WM 2000, 21–23, para. 27; BGH, judgment of 6 May 1999, *supra* n. 110, para. 15.

114 BGH, judgment of 4 Nov. 1999, *supra* n. 113, para. 29. *See also* Christian Armbrüster, in *Münchener Kommentar, Bürgerliches Gesetzbuch*, s. 138, para. 128 (7th ed., Beck 2015); Jürgen Ellenberger, *Palandt, Bürgerliches Gesetzbuch*, s. 138, para. 63 (77th ed., Beck 2018); Arnd Arnold, *Erman, Bürgerliches Gesetzbuch*, s. 138, para. 80 (14th ed., Otto Schmidt 2014); R. Sack & P. Fischinger, *Staudinger,*

may terminate the contract forthwith even after having ratified it.[115] As in the United Kingdom, it is thus the decision of one of the contractual parties that determines the validity of the contract under German law. Hence, the enforcement of a contract procured by corruption is *not* contrary to German public policy.[116]

The UNIDROIT Principles 2016 point in the same direction: if the principal becomes aware of the payment of a bribe, it may choose whether to treat the contract procured by the bribe as effective.[117]

International law itself expresses the same position in dealing with treaties induced by corruption. Just as in the private law context, it is, pursuant to the Vienna Convention on the Law of Treaties (VCLT), Article 50, within the innocent party's discretion whether it wishes to invalidate a tainted treaty.

The tribunal in *Niko Resources*, in open disagreement with the tribunal in *World Duty Free*, even went as far as stating that, as a fundamental principle of fairness, 'the innocent victim of an illegality must have the choice whether it accepts the otherwise legal transaction in the terms as concluded or wishes to avoid it.'[118]

It is true that, in light of its manifold pernicious effects, competitors and the general public have an interest in containing corruption. However, corruption typically affects the 'innocent' party to a corruptly procured contract most directly, because the bribing party will seek to recoup the amount of the bribe by charging inflated prices to the innocent party or delivering reduced quality.[119] Specifically in scenarios where the parties have fully performed the main contract or are in (very) advanced stages of mutual performance, the 'innocent' party might have a strong interest nonetheless to uphold the contract as a reliable basis and framework for the exchanged performances. For example, it might be of vital importance to the 'innocent' party to keep, and secure warranty claims in relation to, the goods and/or services delivered by the bribing party. Considering that the law offers other

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Bürgerliches Gesetzbuch, s. 138, para. 504 (16th ed., Sellier-de Gruyter 2017). For a more critical view, *see* Rolf Sethe, *Zivilrechtliche Rechtsfolgen der Korruption am Beispiel von Bankgeschäften*, WM 2008, 2309 et seq. In relation to public sector contracts, a number of scholars take the view that the main contract is void as a matter of public policy: Wolfgang Hefermehl, *Soergel, Bürgerliches Gesetzbuch*, s. 134 (fn. 25) (13th ed., Kohlhammer 1999); Hilmar Raeschke-Kessler, *Corrupt Practices in the Foreign Investment Context: Contractual and Procedural Aspects*, in *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* 471, 482 (S. M. Kröll & N. Horn eds, 2004).

115 BGH, judgment of 4 Nov. 1999, *supra* n. 113, para. 31; BGH, judgment of 6 May 1999, *supra* n. 110, para. 22.

116 Matthias Weller, *Perspektiven des Europäischen Kollisionsrechts: Private Enforcement durch Internationales Privatrecht? Wirkungen von Korruption auf internationale Verträge*, in *Perspektiven des Wirtschaftsrechts 2014* 27, 39 (EBS Universität für Wirtschaft und Recht ed., 2014).

117 Illustration 16 to Art. 3.3.1 of the UNIDROIT Principles 2016.

118 *Niko Resources v. Bangladesh*, *supra* n. 72, para. 451.

119 *See* Llamzon, *supra* n. 3, at 26.

means of safeguarding the interests of competitors and the general public (damage claims, criminal prosecution), there are no good reasons to deprive the 'innocent' party of that option. In light of these vital interests of the 'innocent' party, public interests in securing a corruption-free environment stand back.[120]

In conclusion, there is *no* transnational public policy prohibiting the enforcement of contracts obtained by corruption where these are otherwise legal. On the contrary, applying the rules on agency or legal concepts such as estoppel, acquiescence or waiver, these contracts will be or become valid and binding under the laws of most jurisdictions if the 'innocent' party ratifies the corruptly procured contract and/or waives any termination/invalidation rights in full knowledge of the bribe. This may be done explicitly or implicitly (e.g. by honouring and performing the contract).[121] However, the injured party must have full knowledge of the circumstances of the contract's genesis (i.e. the payment of the bribe). As Lord Mustill put it in his legal opinion rendered in the *World Duty Free* case, 'A party cannot waive a right which he does not know to exist.'[122]

This begs the next, highly relevant question: whose knowledge is attributable to the injured party?

4 ESTOPPEL, ACQUIESCENCE AND WAIVER: THE QUESTION OF ATTRIBUTION

Claims based on breach of contract are outside the arena of public international law.[123] The ILC's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[124] and other rules of attribution at public international law do not apply.[125] Instead, one must consider the private law rules of attribution. The appropriate rules of attribution at public international law only come into play when a claim is based on treaty breach.

World Duty Free concerned a ten-year contract for the construction, maintenance and operation of duty-free complexes at Nairobi and Mombasa International Airports. In order to obtain the contract, the investor had made a 'personal donation' of USD 2 million to the then President of the Republic of

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120 Meyer, *supra* n. 50, at 205 et seq.; Weller, *supra* n. 116, at 39.

121 BGH, judgment of 4 Nov. 1999, *supra* n. 113, para. 29. *See also* Hwang & Lim, *supra* n. 72, at 45.

122 *World Duty Free v. Kenya*, *supra* n. 4, para. 164 (para. 10 of the legal opinion).

123 I will not discuss the interesting question of the legal status of concession agreements. On the subject, *see* Anne Peters, *Jenseits der Menschenrechte: Die Rechtsstellung des Individuums im Völkerrecht* 267 et seq. (Mohr Siebeck 2014).

124 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, annexed to U.N. General Assembly Resolution 56/83 of 12 Dec. 2001, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 19 June 2018).

125 James Crawford, *Investment Arbitration and the ILC Articles on State Responsibility*, 25 ICSID Rev. 127, 134 (2010); Lim, *supra* n. 65, at 615 et seq.

Kenya, Daniel arap Moi. The contract had been performed in accordance with its terms for a number of years, including, in addition to constructing and equipping the duty-free complexes, renovating and upgrading passenger facilities at both airports at the expense of World Duty Free. While the arbitration was pending, general elections were held in Kenya and Mwai Kibaki succeeded Daniel arap Moi as Kenyan President at the end of 2002. In spring 2003, Kenya's new government avoided the contract in response to World Duty Free having confessed during the arbitration to the making of the 'donation' to the former President. The tribunal accepted Kenya's avoidance of the contract. It held that Kenya had not acquiesced in the performance of the contract or waived its right to avoid it because the former President's knowledge of the bribe could not be imputed to Kenya. It drew a distinct line between the former President acting in his official capacity and the former President acting – apparently in some other capacity – as bribe-taker.[126] While 'schizophrenic'[127] is probably not a fair characterization of this approach, it bears noting that the tribunal's conclusions of law were not supported by any reasoned discussion of the principles of attribution in the context of a commercial contract governed by English/Kenyan law. Just like the corporate investor, Kenya could not act but through its representatives, and the former President had been its highest representative at the relevant time. Therefore, one would have expected a closer look at the applicable rules of attribution.[128]

In the recent case of *Jetvia v. Bilta*,[129] the UK Supreme Court summarized comprehensively the rules of attribution under English law based on a thorough analysis of existing case law. The elements relevant in the present context are as follows:

- The key to any question of attribution is to be found in considerations of context and purpose.[130]
- This entails that the court must fashion a special rule of attribution for the relevant substantive rule, taking into account the substantive rule's content and purpose (or policy).[131]
- It is necessary to determine in each case whether attribution is required to promote the policy of the substantive rule, or whether, if attribution is denied, that policy will be frustrated.[132]

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126 *World Duty Free v. Kenya*, *supra* n. 4, paras 169 and 185.
127 Sophie Nappert, *Raising Corruption as a Defence in Investment Arbitration*, in *Addressing Issues of Corruption in Commercial and Investment Arbitration* 175, 176 (D. Baizeau & R. H. Kreindler eds, 2015).
128 *Ibid.*, at 176.
129 *Jetivia S.A. et al. v. Bilta (UK) Ltd. (in liquidation) et al.* [2015] UKSC 23.
130 *Ibid.*, para. 9 (Lord Neuberger with whom Lords Clarke and Carnwath agreed) and para. 41 (Lord Mance).
131 *Ibid.*, paras 190 and 202 (Lords Toulson and Hodge).
132 *Ibid.*, paras 195 et seq. (Lords Toulson and Hodge).

- Where a third party makes a claim against the company, the rules of agency will normally suffice to attribute to the company not only the act of the director or employee but also his or her state of mind, where relevant.[133]
- A principal (company) pursuing a claim against an agent (director/employee) who has defrauded him shall not be attributed with the state of mind of that very agent (director/employee) so as to relieve either the agent (director/employee) or a third party who had *knowingly* assisted in the fraud.[134]
- If a claim by a company against a third party arises from that party's involvement in a breach of fiduciary duty by a director, there is no good policy reason to attribute to the company the act or the state of mind of the director who was in breach of his fiduciary duty.[135]

German courts and doctrine have developed a number of criteria for the attribution of knowledge in an evaluative process (*wertende Betrachtung*) effectively balancing policy goals in specific factual and statutory contexts. The following is of relevance:

- The knowledge of anyone (director, employee, agent, other representative) who, within a company's organization, is in charge of certain tasks as well as noting and forwarding information gathered in that context will normally be attributed to the company.[136]
- However, and this is very similar to the English law position, there is an important exception to this rule in cases of collusion. If a party exposed to a claim by, or wishing to bring a claim against, another party (the 'second party') was in bad faith agreement with the second party's representative to the effect that (some of) the representative's knowledge shall not be shared with the second party, such knowledge will not be attributed to the second party.[137]

While these rules will provide good guidance in most instances, they are rather unhelpful in the context of contracts obtained by corruption. There is a very simple reason for this. It 'takes two to tango.' Corruption requires the involvement of two delinquents – the bribe-giver and the bribe-taker. By definition, the bribe-taker must

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[133] *Ibid.*, para. 205 (Lords Toulson and Hodge).
[134] *Ibid.*, para. 44 (Lord Mance).
[135] *Ibid.*, para. 207 (Lords Toulson and Hodge).
[136] BGH, judgment of 13 Dec. 2012 – III ZR 298/11, WM 2013, 155, para. 19; Claudia Schubert, *Münchener Kommentar, Bürgerliches Gesetzbuch*, s. 166, para. 27 (7th ed., Beck 2015).
[137] BGH, judgment of 5 July 2011 – XI ZR 306/10, WM 2011, 2088, para. 24; Ellenberger, *supra* n. 114, s. 166, para. 4.

act in breach of his duties as director, employee or some other kind of representative for a principal. However, in the present day business world, the bribe-giver will generally also be acting as representative of another principal. So we are not talking about a triangle: bribe-giver, bribe-taker and bribe-taker's principal. The typical scenario will rather be a quadrangle: bribe-giver's principal, bribe-giver, bribe-taker and bribe-taker's principal. Therefore, the question of attribution arises in *two* dimensions. Is it appropriate to attribute the knowledge of the bribe that both bribe-taker and bribe-giver necessarily have to *each* of the two principals?

Under the rules of attribution as outlined above for the United Kingdom and Germany, in order not to attribute a representative's knowledge to its principal in the context of that principal's dealings with a third party, it is necessary that the third party act collusively in bad faith with the representative. In other words, the knowledge of a corrupt official will not be attributed to the host state if the investor was consciously involved in the corrupt practice. Where the investor is a corporate entity, this presupposes attribution of its representative's acts and state of mind to the corporate entity itself. Therein lies the problem.

Attributing to the investor the acts and state of mind of its representatives while immunizing the host state from the acts and state of mind of its officials results in an obvious asymmetry not warranted by the traditional rules of attribution. In this context, it bears remembering that attribution or non-attribution will disadvantage or benefit potentially millions of innocent third parties on either side. Just as there is the innocent populace of the host state, the corporate investor has innocent shareholders, employees, suppliers, other creditors and customers. Are there any sound reasons justifying an asymmetric attribution nonetheless? The policy that no one should benefit from his or her own wrong (*commodum ex injuria sua non habere debet*) will be of no help. Its application would be premised on attribution while attribution is yet to be proved. As mentioned, considerations of context and purpose are key to any question of attribution. Attribution is the result of an evaluative process effectively balancing policy goals in specific factual and statutory contexts. It is necessary to determine in each case whether attribution is required to promote a certain policy, or whether, if attribution is denied, that policy will be frustrated. Therefore, it is necessary to determine whether an asymmetric attribution of knowledge is conducive to the global fight against corruption. Thus far, investment tribunals dismissing corrupt investors' claims have not addressed the question. Admittedly, the *Spentex* tribunal, echoing growing concerns among commentators from across the globe,[138] noted that refusing

[138] Nassib G. Ziadé, *Curing the Illness Without Killing the Patient: Prescribing Appropriate Remedies for Findings of Illegality in Investment Arbitration*, in *International Arbitration and the Rule of Law: Contribution and Conformity* 746, 751 (Andrea Menaker ed., 2017); Lim, *supra* n. 65, at 619 and 676 et seq.; Llamzon,

protection to the investor while granting impunity to host states produces 'perverse incentives,'[139] but dismissed the investor's claims anyway. Thoroughly corrupt regimes could thus be encouraged to use the extortion of bribes purposefully as perfect insurance package with unlimited coverage for future liability triggered by acts and measures, arbitrary and unlawful by any standard, taken by that very regime against an investor.

Yet, the asymmetry has its merits in the context of assessing a contract's validity. Barring the host state (applying concepts of estoppel, acquiescence and/or waiver) from rescinding or terminating the contract would amount to the perpetuation of a condition that was procured corruptly. CoE Civil Law Convention, Article 8(2) expressly requires each signatory state to confer to a contractual party whose consent has been undermined by an act of corruption the right to avoid the contract, without prejudice to its right to claim damages. This clearly aims at protecting the party whose agent has taken a bribe. In line with this, most national laws grant the bribe-taker's principal the *option* to ratify and thereby validate a corruptly procured contract in order to safeguard the interests of *that* very party. It is for *this* particular reason that other interests must stand back. This purpose would be frustrated if one attributed to the host state the knowledge of its corrupt officials and/or the investor could rely on the non-attribution of its own agent's knowledge. The host state must be able to make a decision uninfluenced by any biased suggestions of its corrupt officials. This justifies an asymmetrical approach to the question of attribution: host State no, investor yes. Accepting that the host state has an option to avoid the contract does not create perverse incentives. One could rather say that it is neutral. The exercise of that option, in and as of itself, does not 'punish' the investor.

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supra n. 3, at 279 et seq. and 286 et seq.; Aloysius Llamzon, *On Corruption's Peremptory Treatment in International Arbitration*, in *Addressing Issues of Corruption in Commercial and Investment Arbitration* 32, 37 (D. Baizeau & R. H. Kreindler eds, 2015); A. Kulick & C. Wendler, *A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption*, 37 Legal Issues Econ. Integration 61, 68 (2010); R. Zachary Torres-Fowler, *Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration*, 52 Va. J. Int'l L. 995, 1000 (2012); Tamar Meshel, *The Use and Misuse of the Corruption Defence in International Investment Arbitration*, 30 J. Int'l Arb. 267, 281 (2013); Kreindler, *Die Internationale Investitionsschiedsgerichtsbarkeit und die Korruption: Eine alte Herausforderung mit neuen Antworten, supra* n. 72, at 13; Haugeneder & Liebscher, *supra* n. 31, at 562; R. A. Lorz & M. Busch, *Investment in Accordance with the Law – Specifically Corruption*, in *International Investment Law* 577, 586 et seqq. (Marc Bungenberg et al. eds, 2015); V. Djanic & L. E. Peterson, *Spentex Netherlands B.V. v. Uzbekistan*, 10 IA Reporter 9, 11 (2017). Rose-Ackerman, the world leading authority on corruption, noted in 1999, 'Anticorruption policy should never aim to achieve complete rectitude. Those who take an absolutist position are likely to impose rigid and cumbersome constraints that increase, rather than decrease, corrupt incentives.' (Rose-Ackerman, *supra* n. 71, Ch. 4). Reisman suggested as early as in 1989 to draft an international declaration characterizing, unequivocally, spoliations by national officials as a breach of national trust and of *international law* (*see* W. Michael Reisman, *Harnessing International Law to Restrain and Recapture Indigenous Spoliations*, Am. J. Int'l L. 56, 58 (1989)).

[139] *Spentex v. Uzbekistan*, *supra* n. 6, at 8.

In light of the above considerations, the *World Duty Free* tribunal was right in accepting Kenya's avoidance of the contract as a matter of English law. However, three caveats are in order:

- The invalidation or termination of a contract as a result of a policy-based approach to attribution is by no means prejudicial to potential claims for restitution or unjust enrichment. Those need to be considered separately. This is the context where perverse incentives potentially running counter to the objectives of the anti-corruption campaign materialize.
- In a scenario where the very officials who first solicited bribes later challenge the validity of the contract induced by the bribes, due consideration must be given to the question in whose interest they are acting *now*.[140] Is there any way to find out? Is it of any relevance whether they have surrendered the bribes to the Treasury? Who controls the Treasury? What if the bribe-takers and those in control of the Treasury are all members of the same gang of cronies? There are no ready-made answers to these difficult questions. Lacking any more convincing alternative and depending on the specific facts of each individual case, the position on the question of attribution might still not change.
- Similarly, where a culture of corruption and impunity reigns in the host state and corruption at the highest government levels represents the very 'essence of state policy,'[141] one may want to consider whether a different position on the question of attribution is warranted. If everybody in the government knows that someone *must* have taken a bribe because it is *inconceivable* that any (major) contract or investment will ever be cleared without (substantial) bribes, is there a basis for attributing to the host state the knowledge of those officials who did not take the bribe but were perfectly aware that one or more of their peers must have taken a bribe? Probably not. If the entire clique is corrupt and notoriously in continuous breach of their fiduciary duties, then there is no basis for attributing their knowledge to the host state. Yet, the question arises again in whose interest a rottenly corrupt government acts when it seeks to invalidate a contract where one or more of its members (directly or through intermediaries) have first cashed in enormous bribes. Must the relevant members of government bring themselves into some sort of *locus poenitentiae*? Must the host state prosecute them to give credibility to its (implicit)

[140] Analysing the *World Duty Free* award, Nappert, *supra* n. 127, at 176, refers to this interesting question observing that 'the bribe taker is suddenly cloaked back into his official capacity as President for the purpose of condemning the bribe giver for paying the bribe.'

[141] Starr, *supra* n. 64, at 1304–1305.

contention that the government is now acting in its own interest? A number of authors argue that a host state's failure to prosecute its corrupt officials should indeed estop it from raising the corruption defence (under certain circumstances).[142]

5 RESTITUTION/UNJUST ENRICHMENT

What are the consequences if the host state or the relevant host state entity avoids the contract? Will the investor have a claim for restitution? The law applicable to such restitutionary claim is to be determined in accordance with generally accepted principles of private international law and will normally be the law governing the invalidated contract.[143] It is interesting to note that the *World Duty Free* tribunal did *not* rule on any non-contractual restitutionary claims. Apparently, the investor had not pleaded any such claims.[144] This is all the more surprising because under English law it is a *prerequisite* for the avoidance of a contract induced by bribery that counter-restitution is possible.[145] The modern view is to accept that counter-restitution will *normally* be possible, because where *restitutio in integrum* is not (fully) possible, money for the value of the benefit received can be paid.[146] Alternatively, the 'innocent' party may opt to keep the contract alive and sue the bribing party for damages.[147] In short, according the bribing party a restitutionary claim (if the contract is avoided) or, subject to an obligation to pay damages, an entitlement to its contractual consideration (if the contract is not avoided) raises no policy concerns under English law.[148]

The situation in Germany is not as straightforward. There is no real case law on the question. Commentators are divided on it. A claim for restitution will be barred pursuant to section 817, second sentence of the German Civil Code (Bürgerliches Gesetzbuch, BGB) if the party claiming restitution acted in breach of a statutory prohibition or *contra bonos mores*. Hence, certain authors have held that the 'innocent' party to a main contract has a claim for restitution while the

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142 *See* Ziadé, *supra* n. 138, at 755; Lim, *supra* n. 65, at 624 et seq.; Llamzon, *supra* n. 3, at 276 et seq. and 280; Mohamed Abdel Raouf, *How Should International Arbitrators Tackle Corruption Issues*, 24 ICSID Rev. 116, 135 (2009).

143 *See* Rome I Regulation (593/2008/EC), Art. 12(1)(e). On the subject, please *see* Zachary Douglas, *The International Law of Investment Claims* (CUP 2009), pp. 10 et seq., 90 et seq.

144 *World Duty Free v. Kenya*, *supra* n. 4, para. 179.

145 *Panama & South Pacific v. India Rubber*, *supra* n. 104, at 532–533; *Wilson v. Hurstanger*, *supra* n. 104, para. 38; *Honeywell v. Meydan*, *supra* n. 72, para. 183. Very aptly, Ziadé, *supra* n. 138, at 757, marvels at this blatant deficiency of the *World Duty Free* award.

146 Andrew Burrows, *The Law of Restitution* 250 (3d ed., OUP 2011); Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* 128 et seqq. (OUP 2012); Graham Virgo, *The Principles of the Law of Restitution* 25 et seqq. (3d ed., OUP 2015).

147 *Wilson v. Hurstanger*, *supra* n. 104, para. 38; *Honeywell v. Meydan*, *supra* n. 72, para. 183.

148 *See also* Partasides, *supra* n. 91, at 745.

bribe-giving party has none.[149] BGB, section 817, second sentence, would thus have a decidedly punitive character.[150]

This interpretation rests on two premises. First, the provision calls for an asymmetrical attribution of acts and states of minds of representatives acting on each side of the equation.[151] Second, the provision is indeed supposed to have punitive character. These premises do not stand up to scrutiny.

As mentioned above, the key to the question of attribution is to be found in purpose and context. Policy goals must be balanced in specific factual and statutory contexts. Barring the investor from any restitutionary claim can lead to massively disproportionate results. It bears remembering that these can hit a potentially huge number of innocent parties: shareholders, employees, suppliers, debt providers, customers and other business partners of the investor. On the other hand, the host state would benefit from a huge windfall gain for which there is no sound justification. With corruption requiring a breach of duty, it is clandestine in nature. Whether and at what point in time corruption underlying a major contract is unearthed depends, inter alia, on the existence and effectiveness of compliance policies, chance, and the degree of bad faith on the host state's side. Cronies moving in a kleptocratic environment could stand by and wait with the hideous intent to secure yet another corrupt source of income for themselves by 'denouncing' corruption only once the investor has fully performed. Moreover, barring an investor from raising restitutionary claims might disincentivize (further) improvement of the host state's governance structures to marginalize corruption amongst its officials.[152] Finally, being placed at the grace of corrupt host state officials erects an almost unsurmountable hurdle for the investor to take remedial action and self-report once corruption is discovered at its end. All these effects run counter to the very goals of the anti-corruption campaign.[153] A policy based approach to the question of attribution would thus erode the first premise on which the punitive reading of BGB, section 817, second sentence, rests.[154]

With respect to the second premise, the provision aims at *preventing* situations conflicting with policy goals rather than punishing past behaviour.[155] The German

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149 J. Kappel & F. Kienle, *Punitive Damage? Finanzielle Risiken für Schmiergeld zahlende Unternehmen*, WM 2007, 1441, 1443 et seq.; J. Kappel & W. Acker, *Korruption und Zivilrecht – Teil 2 – Ansprüche des geschädigten Unternehmens gegen die schmiergeldzahlende Partei*, ZRFG 2007, 216; Ulrike Unger, *Mehrfache Zahlungspflichten des, schmierenden' Unternehmens als Korruptionsfolge*, CCZ 2008, 201, 205. Sceptical: Matthias Weller, *supra* n. 116, at 31.

150 Kappel & Kienle, *supra* n. 149.

151 *See* the references, *supra* n. 149.

152 Lim, *supra* n. 65, at 619 and 676 et seq.

153 *See* the multiple references to scholarly articles, *supra* n. 138.

154 Matthias Weller, *supra* n. 116, at 31 (fn. 21).

155 Martin Schwab, in *Münchener Kommentar, Bürgerliches Gesetzbuch*, s. 817, para. 10 (7th ed., Beck 2017); Meyer, *supra* n. 50, at 228.

Federal Court of Justice has ruled on various occasions that BGB, section 817, second sentence, is a norm extraneous to the very nature of civil law. Therefore, it cannot be generalized[156] and must be interpreted restrictively in order to avoid unreasonable results.[157] Over time, the Court developed guiding principles for its restrictive interpretation. These criteria ground predominantly on policy considerations. Will upholding restitutionary claims frustrate the relevant policy goals?[158] Alternatively, will the *exclusion* of restitutionary claims run counter to the policy goals?[159] Notably, would the exclusion of restitutionary claims *incentivize* the party benefiting therefrom to continue its egregious behaviour?[160]

Absent any conflicting policy goal, the Court will not grant restitutionary claims in relation to contracts that are invalid *ab initio* and cannot be ratified or otherwise upheld under any circumstances because their *performance* is in direct conflict with a statutory prohibition.[161] The situation with contracts induced by corruption is clearly distinct from these scenarios. The corruptly procured contract is neutral. Unless there are additional incriminating elements (e.g. arms trafficking, embargo breaches), its performance does not violate a statutory prohibition. The performance of the corruptly procured contract is also not *contra bonos mores*. This holds true even where the contract's terms are to the 'innocent' party's disadvantage (as they will normally be). The verdict of the corruptly procured contract being contra *bonos mores* relates to the circumstances of its formation only, not to its *performance*.[162] The fact that the 'innocent' party has the option to ratify the contract and accept its performance supports this finding.[163] Given that the corruptly procured contract's performance conflicts with neither a statutory prohibition nor *bonos mores*, it is arguable that BGB, section 817, second sentence, does *not* apply to restitutionary claims triggered by the invalidation of the contract. Even if, for the sake of argument, one were to assume that the performance of the corruptly procured contract is *contra bonos mores*, relevant policy goals underlying the global fight against corruption would still militate in favour of upholding an investor's restitutionary claims.

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156 BGH, judgment of 8 Jan. 1975 – VIII ZR 126/73, BGHZ 63, 365, 369; BGH, judgment of 9 June 1969 – VII ZR 52/67, WM 1969, 1083.

157 BGH, judgment of 8 Nov. 1979 – VII ZR 337/78, BGHZ 75, 299–306, para. 25.

158 BGH, judgment of 10 Apr. 2014 – VII ZR 241/13, NJW 2014, 1805, para. 21.

159 *Ibid.*, para. 22; BGH, judgment of 13 Mar. 2008 – III ZR 282/07, NJW 2008, 1942, para. 8 et seq.; BGH, judgment of 10 Nov. 2005 – III ZR 72/05, NJW 2006, 45, para. 11 et seq.

160 BGH, judgment of 13 Mar. 2008, *supra* n. 159, para. 9; BGH, judgment of 10 Nov. 2005, *supra* n. 159, para. 12.

161 BGH, judgment of 10 Apr. 2014, *supra* n. 158 (dismissing claims in connection with a construction contract in breach of the statutory prohibition of black labour).

162 Meyer, *supra* n. 50, at 229.

163 This clearly distinguishes the situation from the case decided in BGH, judgment of 10 Apr. 2014, *supra* n. 158, para. 28.

An obiter dictum in a 1999 decision suggests that the Federal Court of Justice accepts this position. The Court maintained that the bribe-giving party could offset the value of its services, works or deliveries against the restitutionary claim brought by the 'innocent' party. The Court reversed a judgment of the Upper Regional Court (Oberlandesgericht) Hamburg. It observed that the Upper Regional Court would have to analyse in an overall settlement (*Gesamtabrechnung*) whether the value of the bribe-giving party's construction works (also taking into account potential defects) fell short of the total amount of the 'innocent' party's payments to the bribe-giving party.[164] This had been the view of some scholars for quite some time.[165] It thus seems that German law achieves results similar to those at English law. At least by way of set-off, the bribe-giver can bring a restitutionary claim against the 'innocent' party.

Precedents in international (commercial and investment) arbitration suggest that the positions under several other jurisdictions are similar. In an ICC case decided under South African law, the tribunal held that the 'innocent' party wishing to avoid the tainted contract needed to make counter-restitution[166] in an amount equal to the fair value to the 'innocent' party of the services performed by the bribing party.[167] This would have resulted in the bribing party even realizing some profit from the corrupt transaction. On procedural grounds, the High Court of Justice later remitted the matter to the tribunal for reconsideration on the issue of quantification of the services' value, noting that the outcome might differ, but without questioning in principle the necessity to make counter-restitution.[168] In an ICC case subject to New York law, the tribunal awarded the bribe-giving party a restitutionary claim in the amount of the costs sustained by it.[169] In a fraud case presenting serious conflicts of interest contrasting with the *ordre public* of the host state, the *SIREXM* tribunal adopted a similar approach under French law and granted the investor, after having found the contracts to be void *ab initio*, a restitutionary claim for the recovery of its capital contributions to a

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164 BGH, judgment of 4 Nov. 1999, *supra* n. 113, para. 30.

165 Matthias Weller, *Who Gets the Bribe? – The German Perspective on Civil Law Consequences of Corruption in International Contracts*, in *The Impact of Corruption on International Commercial Contracts* 171, at 181 (fn. 34) (M. J. Bonell & O. Meyer eds, 2015).

166 ICC Case No. 11307 (Final Award) 2003, XXXIII YBCA 24 et seq. (2008), para. 123.

167 *Ibid.*, para. 161.

168 *Cameroon Airlines v. Transnet Ltd.*, High Court of Justice [2004] EWHC 1829 (Comm), para. 113.

169 ICC Case No. 10518 (Partial Award 2001, Final Award 2002), in Tackling Corruption in Arbitration, International Court of Arbitration Bulletin Supplement, ICC Product No. BUL24SUP, 2014 Edition, 39 et seq.

gold mining project.[170] It dismissed further-reaching claims for a share of the investor in the value of the project.[171]

In sum, the municipal laws of many countries accord the bribing party restitutionary claims. The UNIDROIT Principles 2016 also reflect this position.[172] While the mechanisms, dogmatic underpinnings and quantum of such claims may vary from jurisdiction to jurisdiction, it follows that there is *no* transnational public policy barring an investor's claims for restitution. On the contrary, it is imperative to analyse on a case-by-case basis the exact position under the respectively applicable law. Typically, restitutionary claims will be limited to the *value to the host state* of the services provided, work done and/or materials supplied by the investor. Where this amount is *lower*, some jurisdictions may cap claims at the *cost to the investor.* Hence, in these jurisdictions restitutionary claims will amount to the lower of (1) value to the host state, and (2) cost to the investor.

Measuring these principles against the goals of anti-corruption policy, they seem to make a lot of sense. Notably, a corrupt investor runs the risk of not even recovering its cost. That should work as a sensible disincentive on the supply side. In variation of a dictum in ICC Case No. 10518, businesses do not strive on loss-making contracts.[173] Matters are less clear on the demand side of the equation, because the host state and not its corrupt official(s) will have to satisfy the investor's claim. But then, the host state will be liable only for actual value to it.

6 TREATY CLAIMS

Do any teachings emanate from these findings that could be of relevance in the context of treaty-based investment arbitration? The question calls for a *decidedly* affirmative answer. Unfortunately, *World Duty Free* seems to have obfuscated the vision of tribunals and scholars alike. It did not decide *at all* on non-contractual restitutionary claims. Yet, to this present day, the *World Duty Free* tribunal's excruciating and, considering the logic of its reasoning, entirely unwarranted reference to the *ex turpi causa* maxim prompts even the most learned and distinguished scholars to maintain 'that … corruption inducing an investment transaction invalidates it, and that in such cases the loss lies where it falls.'[174] As demonstrated above, this is clearly

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[170] *Société d'Investigation de Recherche et d'Exploitation Minière (SIREXM) v. Burkina Faso*, ICSID Case No. ARB/97/1, Award, 19 Jan. 2000, para. 6.24.

[171] *Ibid.*, para. 6.33.

[172] Pursuant to UNIDROIT Principles 2016, Art. 3.3.2, restitution may be granted even in relation to a performed contract which itself infringes a mandatory rule where this would be reasonable in the circumstances.

[173] ICC Case No. 10518, *supra* n. 169, at 49.

[174] J. Crawford & P. Mertenskötter, *The Use of the ILC's Attribution Rules in Investment Arbitration*, in *Building International Investment Law: The First 50 Years of ICSID* 27, 37 (M. Kinnear, G. R. Fischer et al. eds, 2015).

not the case in contract-based investment arbitration. Constantine Partasides, counsel for Kenya in the *World Duty Free* case, recently acknowledged that corrupt investors could bring restitutionary claims under the respectively applicable law.[175] What is more, he rightly observed that answers in the contractual context 'can translate into investment treaty arbitration.'[176] Within the scope of this article, three themes merit attention: (1) the gateway issue of jurisdiction and admissibility; (2) the question of attribution once again; and (3) the role of legitimate expectations and due process in the application of substantive treaty protections.

6.1 Gateway issue of jurisdiction and admissibility

In commercial arbitration, an agreement to arbitrate is an autonomous agreement separable from the commercial contract in which it is embedded. As a result of this well-established doctrine of separability, the invalidity of the commercial contract will not normally affect the validity of the agreement to arbitrate.[177] For the arbitration agreement to fall away, the doctrine of separability 'requires direct impeachment of the arbitration agreement.'[178] Typical examples are threats or duress, forgery or impersonation, *non est factum* (i.e. agreement void for mistake). Many tribunals confronted in commercial arbitration with contracts *providing* for corruption have applied the doctrine of separability. Rather than declining their jurisdiction, they have dismissed the respectively relevant claims on the merits.[179] Investment tribunals seized of disputes relating to *contract* claims have also relied on the doctrine of separability. *World Duty Free* is just one very prominent example.[180] *SIREXM v. Burkina Faso* is another one.[181]

Investment treaty arbitration is a different animal. Many investment treaties feature wording to the effect that an investment must be implemented in accordance with the laws of the host state ('legality clause' or 'legality requirement'). Frequently, a legality clause will be included in a treaty's definition of investment.[182]

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175 Partasides, *supra* n. 91, at 745.

176 *Ibid.*, at 745.

177 Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* 104 et seqq. (6th ed., OUP 2015); Gary B. Born, *International Commercial Arbitration Vol. I* 349 et seq. and 401 et seq. (2d ed., Wolters Kluwer 2014); Sayed, *supra* n. 72, at 87 et seq.

178 *Premium Nafta Products Ltd. v. Fili Shipping Co. Ltd.* [2007] UKHL 40, para. 35.

179 Exception: The famous decision by Judge Lagergren in ICC Case No. 1110 (reproduced as an annex to J. Gillis Wetter, *Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's. 1963 Award in ICC Case no. 1110*, 10 Arb. Int'l 277, 382 et seqq. (1994)).

180 *World Duty Free v. Kenya*, *supra* n. 4, para. 187.

181 *SIREXM v. Burkina Faso*, *supra* n. 170, para. 3.04.

182 *See* e.g. Israel-Uzbekistan BIT, Art. 1(1): 'The term "investments" shall comprise any kind of assets, implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made, including, but not limited to: …'.

Alternatively, it may feature in the precepts related to 'Protection,' 'Promotion and Admission'[183] or 'Scope of Application.'[184] The tribunal in *Salini v. Morocco* maintained, albeit in an obiter dictum, that the legality requirement embedded in the definition of 'investment' in Article 1(1) of the Italy-Morocco Bilateral Investment Treaty (BIT) referred to the validity of the investment and *not* to its definition; it sought to prevent illegal investments from benefiting from treaty protection.[185] Yet, several other tribunals addressed the legality requirement as a jurisdictional issue on grounds that host state consent to arbitrate could be absent if non-compliance with the host state's law caused an investment to not qualify as an 'investment' under the pertinent treaty or to be outside the treaty's scope of application.[186] In reality, however, the reference to the host state's laws in many investment treaties is 'nothing more and nothing less than the recognition of the *lex situs* rule for the acquisition of … tangible and intangible property rights.'[187] For an asset to qualify as a protected investment it must be cognizable under, and acquired in accordance with, host state laws. Some tribunals seem to have endorsed this latter position, holding that a tribunal lacks jurisdiction only if the investment 'as such' or '*per se*' is

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[183] *See* e.g. El Salvador-Spain BIT, Arts 2 and 3.

[184] *See* e.g. Netherlands-Turkey BIT, Art. 2(2).

[185] *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, para. 46.

[186] *Metal-Tech v. Uzbekistan*, *supra* n. 5, paras 373 and 379; *Alasdair Ross Anderson et al. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, paras 55 et seq.; *Ambiente Ufficio S.p.A. et al. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 Feb. 2013, para. 516; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 Nov. 2005, para. 110; *Fraport A.G. Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 Aug. 2007 ('*Fraport I*'), paras 396 et seq.; *Hamester v. Ghana*, *supra* n. 72, paras 123 et seq.; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 Aug. 2006, paras 144, 167, 184 et seq.; *Inmaris Perestroika Sailing Maritime Services GmbH v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 Mar. 2010, para. 145; *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 174 et seq.; *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction, 24 Sept. 2008, para. 127; *L.E.S.I. S.p.A. et al. v. Republique algerienne démocratique et populaire*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para. 83; *Phoenix Action v. Czech Republic*, *supra* n. 72, para. 100 et seq.; *Quiborax S.A. et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 Sept. 2012, para. 255 et seq.; *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Jurisdiction, 18 May 2010, para. 140 et seq.; *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case ARB/05/16, Award, 29 July 2008, para. 319; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 115; *Saur Int'l S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Responsibility, 6 June 2012, para. 308; *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 Apr. 2004, para. 83 et seq.; *Mytilineos Holdings S.A. v. State Union of Serbia and Montenegro et al.*, UNCITRAL, Partial Award on Jurisdiction, 8 Sept. 2006, para. 137 et seq.; *Ampal-American Israel Corp. et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 Feb. 2016, para. 301.

[187] Douglas, *supra* n. 72, at 173 et seq.

illegal[188] or the illegality relates 'to the very nature of investment regulation.'[189] Zachary Douglas has elucidated rather comprehensively the reasons militating in its support.[190] There is little to add to his brilliant analysis. However, three observations seem to be apposite:

First, investment treaties typically define an investment as 'every kind of asset' or 'any kind of asset.' Where they contain a legality requirement,[191] it qualifies the *asset* itself or the verb (establish, implement, or any similar verb) relating to the asset (being the subject of the sentence) and *not* the investor and/or the investor's behaviour. The *asset* must be established or implemented in accordance with the laws of the host state. The same holds true where the legality clause features as part of treaty provisions on 'Promotion and Admission' or 'Scope of Application.' In no case is there any suggestion in the typical sentence structure that 'in accordance with law' could relate to the general compliance of the *investor's* behaviour with the host state's laws. For it to be implemented or established in accordance with host state's laws, an *asset* must be cognizable and acquired observing the formalities under these laws. In light of punctuation and syntax,[192] the 'ordinary meaning' of the relevant clauses seems unambiguous. Considering that VCLT, Article 31(1) calls for a textual approach to treaty interpretation,[193] there should be no room for further interpretation if the ordinary meaning of a treaty provision is clear in its context. Put differently, 'If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.' [194]

Second, if *any* (alleged) breach by an investor of the host state's laws worked as a jurisdictional hurdle in cases where the relevant BIT contains a legality clause, a host state could impose draconian consequences plainly illegal under its *own* laws,

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188 *Inmaris v. Ukraine*, *supra* n. 186, para. 145; *Tokios Tokelės v. Ukraine*, *supra* n. 186, para. 86 (quoted with approval in *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 Nov. 2010, para. 297).

189 *Saba Fakes v. Turkey*, *supra* n. 186, para. 119.

190 Douglas, *supra* n. 72, at 173 et seq.; in the same vein: dissenting opinion of Cremades in *Fraport I*, *supra* n. 186, para. 11 et seq.; cautiously approving also Llamzon & Sinclair, *supra* n. 72, at 498: 'These views, whilst worthy of further consideration, are not widely accepted.'

191 *See* e.g. Israel-Uzbekistan BIT, Art. 1(1); Lithuania-Ukraine BIT, Art. 1(1); Netherlands-Turkey BIT, Art. 2(2); El Salvador-Spain BIT, Arts 2 and 3; Kazakhstan-Uzbekistan BIT, Art. 2.

192 On the relevance of punctuation and syntax, *see* Oliver Dörr, in *Vienna Convention on the Law of Treaties* (O. Dörr & K. Schmalenbach eds, 2018), Art. 31 para. 46; Aug. Reinisch, *The Interpretation of International Investment Agreements*, in *International Investment Law* 372, 383 (Marc Bungenberg et al. eds, 2015); Richard K. Gardiner, *Treaty Interpretation* 187 et seqq. (OUP 2008).

193 Draft Articles on the Law of Treaties with Commentaries, II Yearbook of the International Law Commission 220 et seq. (1966); *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, [1952] I.C.J. Reports 196; Dörr, *supra* n. 192, Art. 31, para. 37; Reinisch, *supra* n. 192, at 377 et seq.

194 *Competence of the General Assembly for the Admission of a State to the United Nation*, Advisory Opinion, [1950] I.C.J. Reports 1950 8. *See also Saba Fakes v. Turkey*, *supra* n. 186, paras 76 (rejecting an implicit 'effective nationality' principle for claimants under the ICSID Convention) and 112 (rejecting to read a good faith or legality requirement into the definition of investment in ICSID Convention, Art. 25).

let alone international law, without the investor being able to resort to investment arbitration. For example, an investor's failure to obtain just one particular permit out of hundreds of permits required in the context of a multibillion-dollar project would leave the investor without treaty protection. In an action illegal by any standard, the host state could take possession of the project without having to pay any compensation. It is flatly unreasonable to assume that any contracting state could consider, let alone accept, so putting its investors at the total mercy of the other contracting state(s), thereby exposing them to duress, extortion, robbery and other arbitrary acts under the excuse of the investor's failings – as petty as they may be. This would not only run counter to the very purpose of investment treaties[195] but also eventually undermine investment arbitration altogether.[196] Object and purpose thus corroborate the ordinary meaning of the typical legality clause as ascertained on a literal and contextual interpretation. Even if one accepted, as many investment tribunals suggest, that the object and purpose of investment treaties are limited to according protection to *bona fide* investments made in full respect of the host state's entire legal order, the outcome of the interpretative exercise would not be any different. In their ordinary meaning, the various legality clauses still relate to the asset and *not* to investor behaviour. Considerations of object and purpose do not provide a licence to establish a reading of a treaty that cannot be expressed with the words used in its text.[197]

Third, in light of the draconian consequences of a denial of jurisdiction, investment tribunals treating the illegality plea as a jurisdictional bar have introduced – one way or another – differing materiality tests.[198] They have also

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[195] *Saba Fakes v. Turkey*, *supra* n. 186, para. 119; Cremades, *supra* n. 190, para. 36; Douglas, *supra* n. 72, at 172 et seq.; Raouf, *supra* n. 142, at 135; Kulick & Wendler, *supra* n. 138, at 73 et seq.; Alexis Mourre, *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, 22 Arb. Int'l 95, 99 (2006); Alexis Mourre, *Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal*, in *Arbitrability: International and Comparative Perspectives* 207, 214 et seq. (L. A. Mistelis & S. L. Brekoulakis eds, 2009); Raeschke-Kessler, *supra* n. 114, at 494; Jason Webb Yackee, *Investment Treaties & Investor Corruption: An Emerging Defense for Host States*, 52 Va. J. Int'l L. 723, 740 et seq. (2012); Llamzon, *supra* n. 138, at 35 et seq.; Llamzon, *supra* n. 3, at 240 et seq.

[196] *See* Torres-Fowler, *supra* n. 138, at 1017 et seq., who describes hypothetical scenarios explaining how the gateway approach taken by investment tribunals could produce this result.

[197] Dörr, *supra* n. 192, Art. 31 para. 57; Gardiner, *supra* n. 192, at 197 et seq.

[198] The picture is anything but consistent. Most tribunals have tried to come up with a positive definition, but have set many different materiality thresholds. Here is, in no particular order, a non-conclusive list of what has been proposed as appropriate delimitations: violations of the local *ordre public* (*Ambiente Ufficio S.p.A. et al. v. Argentine Republic*, *supra* n. 186, para. 516); violations of fundamental principles (*L.E.S.I. v. Algeria*, *supra* n. 186, para. 83; *Rumeli v. Kazakhstan*, *supra* n. 186, para. 319; *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 Feb. 2008, para. 104); violations of international public policy (*Rumeli v. Kazakhstan*, *supra* n. 186, para. 323; *Inceysa v. El Salvador*, *supra* n. 186, para. 245); serious violations of the legal order (*violation grave de l'ordre juridique*) (*SAUR v. Algeria*, *supra* n. 186, para. 308); violations of national or international principles of good faith (*Hamester v. Ghana*, *supra* n. 72, para. 123); *Rumeli v. Kazakhstan*, *supra* n. 186, para. 323; *Inceysa. v. El Salvador*, *supra* n. 186, para. 230 et seq.); corruption, fraud, or deceitful conduct (*Hamester*

considered corruption as being a sufficiently material violation of the host state's law and indeed against national and transnational public policy – no matter how weak or even non-existent enforcement of domestic anti-corruption laws may be.[199] However, none of the materiality tests is moored to the standard wording of investment treaties. Investment tribunals have failed to provide any convincing explanation for the application of materiality tests even though there is no trace of them in the terms of any investment treaty. There are simply no words remotely resembling 'material,' 'fundamental,' 'serious,' 'non-trivial,' 'manifest,' or the like that qualify the typical legality clause. The absence of such qualifying words is significant.[200] It indicates that contracting states parties did not sense any need to qualify the legality clause. This further supports the interpretation of the legality clause as simple recognition of the *lex situs* rule.

Hence, one would think that the legality requirement in many investment treaties does *not* constitute a jurisdictional bar, unless the investment is in an asset not cognizable under the host state's law or lacking necessary elements for the acquisition of valid title to a cognizable asset. The standard provisions on dispute resolution in the majority of modern investment treaties seem to corroborate the conclusion.[201] Without subjecting it to any explicit condition of legality, they contain a unilateral offer to arbitrate by each of the contracting states to an unknown and unlimited number of investors of the respective other contracting

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v. Ghana, *supra* n. 72, para. 123; *Metal-Tech v. Uzbekistan*, *supra* n. 5, para. 165; *Quiborax v. Bolivia*, *supra* n. 186, para. 266; *Inceysa v. El Salvador*, *supra* n. 186, paras 236–238; *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 Aug. 2008, para. 143 et seq.); manifest violations of the host state's law (*Phoenix Action v. Czech Republic*, *supra* n. 72, para. 102 et seq.; *Hamester v. Ghana*, *supra* n. 72, para. 123); non-trivial violations of the host state's legal order (*Quiborax v. Bolivia*, *supra* n. 186, para. 266; *Metal-Tech v. Uzbekistan*, *supra* n. 5, para. 165; *Infinito Gold v. Costa Rica*, *supra* n. 72, para. 139). Other tribunals, rather than providing a positive delimitation, suggested that the legality requirement did not extend to good faith errors of the investor relative to the host state's law (*Fraport I*, *supra* n. 186, para. 396). The tribunal in *Kim v. Uzbekistan*, *supra* n. 56, para. 396, adopted yet another, a balancing approach based on the principle of proportionality. It held: 'The Tribunal must balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the BIT in total when the investment is not made in compliance with legislation. The denial of the protections of the BIT is a harsh consequence that is a proportional response only when its application is triggered by *noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State*.' (emphasis original).

199 *Hamester v. Ghana*, *supra* n. 72, para. 123; *Metal-Tech v. Uzbekistan*, *supra* n. 5, para. 165; *Quiborax v. Bolivia*, *supra* n. 186, para. 266; *Inceysa v. El Salvador*, *supra* n. 186, paras 236–238; *Plama v. Bulgaria*, *supra* n. 198, para. 142 (citing *World Duty Free*).

200 Gardiner, *supra* n. 192, at 147.

201 For a discussion of investment treaties with (much) narrower dispute resolution clauses, *see* Mara Valenti, *The Scope of an Investment Treaty Dispute Resolution Clause: It is Not Just a Question of Interpretation*, 29 Arb. Int'l 243 (2013); Christoph Schreuer, *ICSID Convention: A Commentary* (2d ed., CUP 2009), Art. 25 paras 436 et seqq.; R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2d ed., OUP 2012), at 258. The broader impact on investment treaty arbitration of the CJEU's judgment of 6 Mar. 2018 in *Achmea* (C-284/16) remains to be seen.

state(s). An investor accepts such offer by serving a notice of arbitration upon the host state, and an arbitration agreement thus comes into existence.[202] This should pave the way to the application of the doctrine of separability in investment treaty arbitration in the sense that the consent to arbitrate is distinct from the consent to grant protection under the substantive guarantees of a treaty. The (purported) illegality of an investment does not affect the validity of the host state's consent to arbitrate. There is indeed support for this view in scholarly writings and case law. The 'pragmatic considerations that thwart pleas of illegality from depriving the tribunal of jurisdiction in the commercial context apply also to investment treaty arbitration.'[203]

Yet, several investment tribunals have maintained that, irrespective of the text of the relevant treaty, there is an implicit requirement under *any* investment treaty for the investor to comply with the host state's laws and the principle of good faith.[204] States could not be deemed to have offered access to arbitration to investments not made in good faith, so the argument runs.[205] The far-reaching legality requirement, be it explicit or implicit, is considered nothing but an expression of principles such as *nemo auditur propiam turpitudinem allegans* and *ex turpi causa non oritur actio*.[206]

Whether the purported implicit legality clause goes to a tribunal's jurisdiction or to the admissibility of an investor's claims is subject to debate. Following the logic of some tribunals, one would think that the plea of illegality is again supposed to strip a tribunal of its jurisdiction. If, as the reasoning of certain decisions suggests,

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[202] Michael Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, in *International Investment Law* 1212, 1226 (Marc Bungenberg et al. eds, 2015); Valenti, *supra* n. 201, at 244; Yulia Andreeva, *Interpreting Consent to Arbitration as a Unilateral Act of State: A Case Against Conventions*, 27 Arb. Int'l 129, 138 et seq. (2011); Christoph Schreuer, *supra* n. 201, Art. 25 paras 447 et seq.; Dolzer & Schreuer, *supra* n. 201, at 257; Douglas, *supra* n. 143, at 35.

[203] Douglas, *supra* n. 72, at 163. *See also Malicorp Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 Feb. 2011, para. 119; *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 Feb. 2005, para. 130. It is true that the applicable investment treaties in these two cases, ECT (*Plama*) and the United Kingdom-Egypt BIT (*Malicorp*) respectively, do not contain an express legality requirement. They are of interest and relevance nonetheless, because they rightly spell out the principle that where the agreement to arbitrate is not explicitly made subject to the condition of the investor's (full) compliance with (all) laws of the host state, the doctrine of separability will militate against dismissing a claim on jurisdictional grounds. *Contra* (without, however, stating any reasons): Edoardo Marcenaro, Ch. 9: Arbitrators' Investigative and Reporting Rights and Duties on Corruption, *Addressing Issues of Corruption in Commercial and Investment Arbitration*, in *Dossiers of the ICC Institute of World Business Law* vol. 13, 141–157, at 148 (Domitille Baizeau & Richard H. Kreindler eds, Kluwer Law International, International Chamber of Commerce (ICC) 2015).

[204] *Hamester v. Ghana*, *supra* n. 72, para. 123 et seq.; *Plama v. Bulgaria*, Award, *supra* n. 198, para. 143 et seq.; *Hulley Enterprises Ltd. v. Russian Federation* ('*Yukos*'), PCA Case No. 226, Final Award, 18 July 2014, para. 1352; *Inceysa v. El Salvador*, *supra* n. 186, para. 242; *Phoenix Action v. Czech Republic*, *supra* n. 72, para. 101; *Saur Int'l v. Argentina*, *supra* n. 186, para. 308.

[205] *Phoenix Action v. Czech Republic*, *supra* n. 72, para. 101; *Hamester v. Ghana*, *supra* n. 72, para. 123.

[206] *Inceysa v. El Salvador*, *supra* n. 186, para. 240 et seq.; *Plama v. Bulgaria*, Award, *supra* n. 198, para. 140 et seq.; *World Duty Free v. Kenya*, *supra* n. 4, para. 161 et seq. and 179.

a state's offer to arbitrate in an investment treaty is made subject to the condition that an investment be implemented in full compliance with its municipal laws, then failure to satisfy that condition removes consent. Absent a valid arbitration agreement, a tribunal would lack jurisdiction. The undisclosed dissenter in *Spentex* seems to have endorsed this position.[207] The majority in *Spentex* dismissed the investor's claims as inadmissible.[208] The *Yukos* tribunal left the question unanswered.[209] By contrast, the tribunal in *Plama* decided in application of the doctrine of separability that it had jurisdiction and joined the discussion of alleged investor illegality (i.e. misrepresentation) to the merits.[210]

Either way, the final award in *Yukos* is paradigmatic of the multifarious problems triggered by the doctrine that treats (purported) investor illegality as a bar to jurisdiction or admissibility. In some regards, the award provokes outright perplexity. The tribunal first considered whether 'in the absence of any specific textual hook … the ECT as a whole may be understood as conditioning the protection of investments on their legality, or on the good faith of the investor'.[211] It concluded that, as a general principle, an investor who has obtained an investment in the host state only by acting in bad faith or in violation of the host state's law has brought itself within a treaty's scope of application through wrongful acts and should not be allowed to benefit from it.[212] However, it further held that the right to invoke a treaty must be denied to an investor *only* in case of illegality in the *making* of the investment but not also in its *performance*.[213] The *Yukos* tribunal thus endorsed dicta of other tribunals in cases decided under investment treaties containing an explicit legality requirement.[214] It observed that the host state could address illegal investor behaviour during an investment's lifespan by applying the instruments available to it under its municipal law – requesting remedial action and imposing sanctions.[215] In light of the reference in Energy Charter Treaty (ECT), Article 26(6) to applicable rules and principles of international law, the tribunal then went on to elaborate further on purported illegalities during an investment's operation and analysed whether, as a general principle of international law recognized by civilized nations (ICJ Statute, Article 38(1)(c)), a claimant could not come

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[207] *Spentex v. Uzbekistan*, *supra* n. 6, at 8.
[208] *Ibid.*, at 8.
[209] *Yukos*, *supra* n. 204, para. 1353.
[210] *Plama v. Bulgaria*, Decision on Jurisdiction, *supra* n. 203, paras 130 and 230.
[211] *Yukos*, *supra* n. 204, para. 1346.
[212] *Ibid.*, para. 1352.
[213] *Ibid.*, paras 1354 et seq.
[214] *Metal-Tech v. Uzbekistan*, *supra* n. 5, para. 193; *Fraport I*, *supra* n. 186, para. 345; *Hamester v. Ghana*, *supra* n. 72, para. 127; *Quiborax v. Bolivia*, *supra* n. 186, para. 266; *Kim v. Uzbekistan*, *supra* n. 56, para. 373 et seq.; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 Jan. 2013, para. 165.
[215] *Yukos*, *supra* n. 204, para. 1355.

before an international tribunal with 'unclean hands.' In this context, it noted that general principles of law required a certain level of recognition and consensus.[216] Following a review of the PCIJ's and the ICJ's case law, the *Yukos* tribunal concluded that 'unclean hands' did *not* exist as a general principle of international law.[217] This finding sharply contrasts with the contention that there be an implicit legality requirement in any investment treaty irrespective of its specific wording. In fact, reading an implicit legality clause into any investment treaty does amount to the application of the 'clean hands' doctrine. To wit, investment tribunals arguing in favour of an implicit legality requirement have typically referred to the above Latin maxims,[218] and these maxims are considered nothing but articulations of the 'clean hands' doctrine.[219] In short, while the *Yukos* tribunal denied the existence of the 'clean hands' doctrine to address investor shortcomings during the *lifespan* of an investment, it applied this very doctrine as expression of a purported general principle in holding that the ECT does not accord protection to an investor that committed illegalities in the *making* of the investment.[220] The position prompts the following comments.

First, in the absence of any *express* legality requirement, it is unclear on which basis tribunals read an *implied* condition of legality into the unilateral offer to arbitrate made by contracting states in investment treaties. The standard dispute resolution provisions in most modern investment treaties do *not* contain any such condition. The absence of any textual hook means simply that there is no (implied) condition of legality. As with the various materiality tests, there are plainly no

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[216] *Ibid.*, para. 1359. *See also* Hugh Thirlway, The Sources of International Law 93 et seq. (OUP 2014); James Crawford, *Brownlie's Principles of Public International Law* 34 et seq. (8th ed., OUP 2012).

[217] *Yukos*, *supra* n. 204, para. 1363. *See also Niko Resources v. Bangladesh*, *supra* n. 72, para. 477: 'The question whether the principle [of clean hands] forms part of international law remains controversial and its precise content is ill defined.' In the same vein, the tribunal in *Guyana v. Suriname* held: 'No generally accepted definition of the clean hands doctrine has been elaborated in international law. Indeed, the Commentaries to the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely and, when it has been invoked, its expression has come in many forms. The ICJ has on numerous occasions declined to consider the application of the doctrine, and has never relied on it to bar admissibility of a claim or recovery.' (*Guyana v. Suriname*, PCA Case No. 2004-04, Award, 17 Sept. 2007, Permanent Court of Arbitration Award Series, vol. 8 (Permanent Court of Arbitration 2012) 23 and A-1-A-6, para. 418).

[218] *Inceysa v. El Salvador*, *supra* n. 186, para. 240 et seq.; *Plama v. Bulgaria*, Award, *supra* n. 198, para. 140 et seq.; *World Duty Free v. Kenya*, *supra* n. 4, paras 161 et seq. and 179.

[219] Patrick Dumberry, *State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the Yukos Award*, 17 J. Inv. & Trade 229, 253 (2016); Llamzon, *supra* n. 138, at 37 et seqq.; Kreindler, *Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine*, *supra* n. 72, at 316 et seq.; R. Moloo & A. Khachaturian, *The Compliance with the Law Requirement in International Investment Law*, 34 Fordham Int'l L.J. 1473, 1485 et seq. (20111); Lamm, Pham & Moloo, *supra* n. 72, at 720 et seq.; James Crawford (in his capacity as Special Rapporteur on State responsibility), *Second report on State responsibility*, UN Doc. A/CN.4/498 and Add. 1–4, para. 335.

[220] For a detailed analysis of this part of the *Yukos* award, *see* Aloysius Llamzon, *Yukos Universal Limited (Isle of Man) v. The Russian Federation: The State of the 'Unclean Hands' Doctrine in International Investment Law: Yukos as both Omega and Alpha*, 30 ICSID Rev. 315 (2015). *See also* Dumberry, *supra* n. 219.

words that could be read as expressing a condition. No clear intention of states parties to subject their consent to arbitrate to a legality condition is discernible.[221] This cannot be overcome by resorting to general principles of law or considerations of object and purpose,[222] particularly where views on object and purpose may differ. As mentioned, various authorities strongly hold that conditioning an investor's treaty protection on its full compliance with host state law runs counter to the very purpose of investment agreements and eventually undermines the entire system of investment arbitration.[223] What is more, the contours of any such condition are shrouded in darkness. Tribunals endorsing the notion of an *implicit* legality condition apply various materiality tests, just as the tribunals extending explicit legality clauses to the entire legal system of the host state. Case law on these materiality tests is far from being consistent. The range of different approaches is overwhelmingly broad.[224] What kind of condition is this if its specific terms are completely unclear?

Second, even if one accepted the notion of an implicit legality condition, a host state could likely not invoke its failed satisfaction where corruption is involved. Under the laws of many countries, a party cannot invoke failed satisfaction of a condition precedent if it has itself caused the failure in bad faith.[225] Now, corruption perforce requires the host state's complicity. The actions of its corrupt officials are attributable to the host state pursuant to ARSIWA, Articles 2, 3, 4 and 7.[226] Hence, it is arguable that the host state cannot question its consent to arbitrate: objectively, it has itself frustrated the condition purportedly implied in its unilateral offer to arbitrate.[227] Whether the investor may *rely* on acts or

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[221] The same would hold true if one interpreted, as Andreeva, *supra* n. 202, proposes, a host state's consent to arbitration contained in an investment treaty as a unilateral act of state.

[222] *Supra* n. 197. National courts would also be unlikely to construe a term of an agreement as a condition, unless there is a 'clear intention of the parties.' Notably, English courts are very reluctant in this respect. *See* e.g. *Heritage and Heritage v. Tullow Uganda* [2014] EWCA Civ 1048, paras 33 et seq.

[223] *Supra* n. 195.

[224] Cremades addressed the question of an implicit condition as early as in 2005 and concluded that the host state's open offer to arbitrate survives any corruption. On the other hand, he expressed the view that the investor would be estopped from accepting the offer. *See* Bernardo Cremades, *Corruption and Investment Arbitration*, in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner* 203, 215 (G. Aksen & R. Briner eds, 2005).

[225] *See* Dutch Civil Code, Art. 6:23; French Civil Code, Art. 1304-3; German Civil Code, s. 162; Italian Civil Code, Art. 1359; Swiss Code of Obligations, Art. 156; Spanish Civil Code, Art. 1119.

[226] Crawford & Mertenskötter, *supra* n. 174, at 37 and 40 et seq.; *contra*: Tim Wood, *State Responsibility for the Acts of Corrupt Officials: Applying the 'Reasonable Foreign Investor' Standard*, 35 J. Int'l Arb. 103 (2018).

[227] One might, of course, consider arguing that the investor has contributed to the failed satisfaction of the condition just as well. The question is whether any concurrent causation of the condition's frustration is relevant where it is established that the host state's illegality has caused it. Different jurisdictions might take different views on this. Moreover, an objective responsibility of the host state requires that its official has acted, at least apparently, as authorized official (Crawford, *supra* n. 216, at 549 et seq.). This then again raises the question of attribution on the investor's side.

declarations of the corrupt official in the context of substantive treaty protections is an entirely different matter that section 6.2 below will address.

Third, where corrupt host state officials condition the admission of an investment on the payment of (substantial) bribes, the foreign investor has no viable option to redress this blatant breach of the (prospective) host state's treaty obligation to admit foreign investments.[228] It can, of course, refrain from doing business in that particular state. This will then be the end of the matter. Absent an investment as defined in the relevant investment treaty, the investor does not have standing to bring a claim against the (prospective) host state. Treaties typically protect the investment, not the investor.[229] Theoretically, the investor could submit the matter to the domestic courts of the host state or ask its home country to exercise diplomatic protection on its behalf. However, these are not realistic alternatives for enterprises with principal target markets in countries ranked in the bottom half of Transparency International's CPI. They will be out of business before anything comes to fruition either way. Considering the high correlation among indexes measuring corruption, rule of law and government effectiveness, there will likely be shadows on the independence and impartiality of the domestic courts. As regards diplomatic protection, it is entirely within the discretion of the investor's home country whether to bring a claim against the (prospective) host state at all. If it does, the claim will be under its sole control and the investor will not be entitled to a share in the damages (if any) awarded to its home country.[230]

Fourth, without any reasoned underpinning, tribunals enrol corruption in the list of breaches of law sufficiently material to trigger the frustration of the implicit legality condition. This is probably grounded on the belief that (1) corruption is against transnational public policy; and (2) *investments* induced by corruption cannot be upheld as a matter of that very policy. As demonstrated above, it is actually *not* contrary to transnational public policy to uphold a *contract* induced by corruption or to afford restitutionary claims to an investor. By the same token, one would need to engage in a comparative analysis of how major legal systems respond to corruption outside the contractual context. Without any such analysis, the contention that protecting a corruptly induced investment is against transnational public policy is nothing but a *petitio principii*. Indeed, non-compensable

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[228] Such breach will be independent of the approach to admission adopted in the relevant investment treaty. Many treaties subject admission to the laws of the host state. *See* e.g. Germany 2008 Model BIT, Art. 2(1) and France 2006 Model BIT, Art. 2. Other treaties adopt more liberal approaches. On the various approaches, *see* Anna Joubin-Bret, *Admission and Establishment in the Context of Investment Protection*, in *Standards of Investment Protection* 9 (August Reinisch ed., 2008).

[229] Douglas, *supra* n. 143, at 187 et seq.; A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* 136 (Kluwer Law International 2009).

[230] On diplomatic protection, *see* Douglas, *supra* n. 143, at 17 et seq.

forfeiture for crime typically relates to the *proceeds* of crime.[231] However, the investment itself does not constitute the proceeds of underlying corruption. Rather, the excess of the investment's value over and above the investor's costs associated therewith (other than the bribe paid) reflects the proceeds.[232] So, criminal law will not normally justify a non-compensable taking of the entire investment. Often, municipal administrative law will not support draconian measures either. Outright direct expropriation with no compensation of the assets to which they relate will not normally be a viable response at municipal administrative law to permits, licences and/or approvals obtained by corruption.[233] In all likelihood, municipal law will rather consider an investor less worthy of protection if authorities intend to revoke an unlawful permit, licence or approval induced by corruption. Moreover, authorities may be entitled to demand corrective action if proportionate, i.e. fit and necessary to safeguard relevant public interests (safety, public health, environmental protection, zoning law, etc.).[234] Where an approval for the acquisition of an asset or business falls away, the appointment of a trustee to overlook the unwinding of the transaction or an onward sale to a third party will

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231 *See* e.g. Directive 2014/42/EU of the European Parliament and of the Council of 3 Apr. 2014, Art. 4 (1).

232 *See* e.g. German Criminal Code (Strafgesetzbuch, StGB), s. 73d. For further details, *see* BGH, judgment of 2 Dec. 2005 – 5 StR 119/05, BGHSt 50, 299 para. 51 et seq.; Thomas Fischer, *Strafgesetzbuch*, s. 73d, paras 7 et seqq. (65th ed., Beck 2018).

233 For a comparative analysis, *see* Kim Talus, *Revocation and Cancellation of Concessions, Operating Licenses and Other Beneficial Administrative Acts*, in *International Investment Law and Comparative Public Law* 453 (Stephan W. Schill ed., 2010).

234 The fundamental principle of proportionality permeates (with differing detailed characteristics) administrative law in a wide variety of jurisdictions across the globe: France: René Chapus, *Droit administratif general, Tome 1* 1074 et seqq. (15th ed., LGDJ 2001); Yves Gaudemet, *Traité de droit administratif, Tome 1* 584 et seq. (16th ed., LGDJ 2001); Germany: Reinhold Zippelius & Thomas Würtenberger, *Deutsches Staatsrecht* 123 et seqq. (33rd ed., Beck 2018); Winfried Kluth, *Wolff/Bachof/Stober/Kluth, Verwaltungsrecht I* 331 et seq. (13th ed., Beck 2017); Michael Sachs, *Stelkens/Bonk/Sachs, Verwaltungsverfahrensgesetz*, s. 40, para. 83 (9th ed., Beck 2018); Italy: R. Chieppa & R. Giovagnoli, *Manuale di Diritto Amministrativo* 429 et seqq. (3d ed., Giuffré 2017); Spain: José Ignacio López González, *El principio de proporcionalidad en Derecho Administrativo*, 5 Cuadernos de Derecho Publico 143–158 (1998). In the United Kingdom, the courts had been reluctant to embrace the principle. However, on the heels of developments driven by the European Convention on Human Rights (ECHR), they have eventually been open to considering proportionality as a relevant principle irrespective of whether rights affected by administrative action arise under the ECHR or common law. *See* e.g. *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, paras 55 et seq. In the United States, the balancing doctrine performs a function similar to the one performed by the principle of proportionality. *See* M. Cohen-Eliya & I. Porat, *American balancing and German proportionality: The historical origins*, 8 I-Con: Int'l J. Const. L. 263–286 (2010). On the relevance of the principle of proportionality at international law, i.e. in the context of the fair and equitable treatment standard, *see* Newcombe & Paradell, *supra* n. 229, at 250 and 294; Stephan W. Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, in *International Investment Law and Comparative Public Law* 151, 181 et seq. (Stephan W. Schill ed., 2010); M. Jacob & S. W. Schill, *Fair and Equitable Treatment: Content, Practice, Method*, in *International Investment Law* 700, 735 et seq. (Marc Bungenberg et al. eds, 2015); *Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Final Award, 20 Aug. 2007, para. 7.4.26.

be the appropriate remedy. Where a permit, licence or approval induced by corruption is otherwise perfectly legal, authorities might not have any grounds *at all* for their revocation, withdrawal or annulment. In sum, the responses to investments tainted by corruption that municipal laws offer are quite nuanced and do not entail a total loss of the investment as a matter of course. According fair and equitable treatment to an investor and protection against direct or indirect expropriation even in case of corruption is thus *not* against transnational public policy.

Fifth, simply adducing *ex turpi causa* and similar Latin maxims as expressions of a purported general principle (of law) is unhelpful. Again, a rigorous comparative analysis of how the maxims have evolved over time and play out in practice across different legal systems would be imperative. There is indeed no one-size-fits-all. As the UK Supreme Court noted in *Patel v. Mirza*,[235] different situations call for different solutions. In this recent decision, Lord Toulson first provided an excellent analysis of over 250 years of case law on the application of the illegality defence in both the Commonwealth and the United States[236] and then concluded (for the majority of the Court):

> I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality.[237]

Harsh black-or-white solutions are hardly compatible with the need for a nuanced balancing exercise that this dictum suggests.

Sixth, a host state can address illegal investor behaviour in the making of an investment by applying the instruments available to it under its municipal law just as it can cope with investor wrongdoing during the lifespan of an investment. There are no sound reasons for a temporal dividing line between investor illegality affecting jurisdiction or admissibility and illegality that goes to the merits.[238] On the contrary, this temporal dividing line is bound to lead to artificial results: Without in any way altering its quality from the underlying policies' perspective, one and the same investor's illegality could receive different treatment depending on its timing.[239]

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235 *Patel v. Mirza*, *supra* n. 100.
236 *Ibid.*, paras 1–81.
237 *Ibid.*, para. 101.
238 Douglas, *supra* n. 72, at 175.
239 For a brilliant analysis of this particular aspect, *see* Douglas, *supra* n. 72, at 175. *See also* Llamzon, *supra* n. 220, at 322.

In conclusion, in investment treaty arbitration just as in contract based investment arbitration, findings that corruption has procured an investment neither deprive a tribunal of its jurisdiction nor render an investor's claims inadmissible. Extending some protection to an investment induced by corruption is *not* contrary to international (transnational) public policy. If an investment qualifies as an asset cognizable under the host state's law and no element for its valid acquisition is lacking, the investment will thus enjoy in principle treaty protection and the impact of corruption on the investment will be a merits issue.

6.2 Question of attribution

As expressions of the overarching principle of good faith, the concepts of estoppel, acquiescence, and waiver apply in administrative law as much as they do in contract law. One must hence determine whether certain host state behaviour (including silence or inaction) precludes it from revoking a permit, license or other approval tainted by corruption. To this end, it would be necessary to attribute the bribe-taker's acts and/or state of mind to the host state. In this context, any reference to the ARSIWA misses the mark.[240] The ARSIWA deal with attribution for purposes of holding the host state *responsible* for breach of some obligation under public international law.[241] Whether or not the solicitation or acceptance of a bribe by a corrupt official is attributable to a host state for purposes of triggering *responsibility* towards the investor for breach of an obligation under international law is not normally at issue in investment disputes. The question may be of relevance, for example under the fair and equitable treatment standard, *only* in cases where host state officials extort bribes in relation to an already *existing* investment. Investment treaties protect the investment, not the investor.[242] Investors benefit from treaty protection only upon implementation of an investment. Therefore, officials taking bribes to 'facilitate' an investment *prior* to its implementation cannot trigger any responsibility of the host state towards the investor for breach of an obligation under international law. What really matters is whether the host state is barred from raising the defence of corruption *predating* the investment in response to investor claims brought in relation to host state actions (e.g. revocation of a license, direct or indirect expropriation) taken *after* the

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[240] For expressions of the contrary view, *see* Cremades, *supra* n. 224, at 216 et seq.; Haugeneder & Liebscher, *supra* n. 31, at 559; Kulick & Wendler, *supra* n. 138, at 73; H. Raeschke-Kessler & D. Gottwald, *Corruption*, in *The Oxford Handbook of International Investment Law* 584, 596 et seq. (P. Muchlinski, F. Ortino & C. Schreuer eds, 2008); Llamzon, *supra* n. 3, at 254 et seq.; Llamzon, *supra* n. 138, at 35 et seq.

[241] Crawford & Mertenskötter, *supra* n. 174, at 38 et seq.; Simon Olleson, *Attribution in Investment Treaty Arbitration*, 31 ICSID Rev. 457, 464 (2016); Lim, *supra* n. 65, at 616.

[242] Douglas, *supra* n. 143, at 187 et seq.; Newcombe & Paradell, *supra* n. 229, at 136.

implementation of the investment. The concepts of estoppel, acquiescence, and waiver could potentially work as a bar. As stated, they also apply in an administrative law context. For purposes of estoppel, acquiescence and/or waiver, one needs to attribute the corrupt official's acts and/or state of mind so that the duly represented host state's behaviour constitutes a valid expression of its will.[243] Here we are within the realm of the ILC's Guiding Principles applicable to unilateral declarations of states capable of creating legal obligations ('Guiding Principles').[244] The black letter of the Guiding Principles applies only to unilateral acts *stricto sensu*, i.e. those taking the form of formal declarations (whether orally or in writing).[245] However, one may consider applying the Guiding Principles *mutatis mutandis* as customary public international law to informal conduct including, in certain situations, silence.[246] Whether they apply directly or by way of analogy, the Guiding Principles cover unilateral declarations and conduct irrespective of their characterization in legal categories such as estoppel, acquiescence or waiver.[247] But the Guiding Principles set up a number of hurdles that one must overcome in order to (1) attribute a corrupt official's knowledge to the host state; and (2) otherwise ascertain a formation and expression of the host state's will that is devoid of defects.

First, Guiding Principle 4 provides:

> A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence.

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[243] Lim, *supra* n. 65, at 616; Lorz & Busch, *supra* n. 138, at 587 (fn. 51); Nuno Sérgio Marques Antunes, *Acquiescence*, in MPEPIL, para. 21: 'Acquiescence only emerges where it refers to facts that are (or ought to be) known by the acquiescing State'; T. Cottier & J. P. Müller, *Estoppel*, in MPEPIL, para. 3: 'Successful invocation of estoppel in public international law … the requirements of damage or prejudice incurred by reliance on conduct or statements made by *competent* authorities can be demonstrated' (emphasis added). On acquiescence and estoppel, *see also* Crawford, *supra* n. 216, at 419 et seq. He caveats, at 422, that estoppel 'is precisely *not* a unilateral act; it is a representation the truth of which the entity on whose behalf it is made is precluded from denying in certain circumstances, notably reliance and detriment' (emphasis original).

[244] *See* http://legal.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf.

[245] *See* Preamble to the Guiding Principles.

[246] *See* Preamble to the Guiding Principles; Víctor Rodríguez Cedeño, Special Rapporteur, *Ninth Report on Unilateral Acts of States*, U.N. Doc. A/CN.4/569 and Add. 1, at 174 (para. 132); Lim, *supra* n. 65, at 652.

[247] Rodríguez Cedeño, *supra* n. 246, at 174 (para. 133). On unilateral governmental statements as basis for estoppel, *see* W. M. Reisman & M. H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, 19 ICSID Rev. 328, 340 et seq. (2004), and the awards of various investment tribunals referenced therein.

Put differently, the investor may place reliance on declarations and conduct of highest government officials only. Declarations and conduct of lower ranking officials are not attributable to the host state in any case.[248]

Second, for any unilateral declaration to be binding on the host state, it must have been formulated on behalf of the host state with the *intent* to produce obligations under international law.[249] Now, it is questionable whether a corrupt official – be it the President, Prime Minister or other high-ranking official of the host state – wishes to make *any* commitment at all on behalf of the host state in exchange for the bribe. This may be the investor's expectation, but not necessarily the intention of the corrupt official. Even where the corrupt official actually implements the desired official act (i.e. clears the investment) following the payment of the bribe, this does not amount to a '"clear and specific" … *recognition* of the investment as being validly established and entitled to fair treatment.'[250] It simply means that the desired official act is now in existence, nothing more and nothing less. It has been noted that a state *must* act through its government so that, if all relevant and competent officials act corruptly, there is no one for the investor to turn to for a true expression of the host state's will.[251] While this observation is certainly fair, it is difficult to see why it should call for a different analysis. Moreover, a declaration or conduct *cannot* qualify as a binding unilateral act within the meaning of the Guiding Principles, if 'the State does not *understand* that it assumes a legal commitment in formulating it' (emphasis added).[252] Corrupt host state officials will hardly understand that accepting an investment following the payment of bribes could imply a binding statement of recognition under applicable law notwithstanding their desire not to commit to anything. In all likelihood, the relevant officials do not have a training in international investment law. Where they exceptionally have such training, the analysis will not change. On the contrary, any corrupt official so educated may take it for granted that the host state will *not* be bound, because that is what investment tribunals have been reiterating for over a decade.

Third, this finding is corroborated by the fact that the principle of good faith enshrined in Guiding Principle 1[253] plays an important role in establishing the

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248 Lim, *supra* n. 65, at 664.
249 *See* Preamble to the Guiding Principles.
250 Lim, *supra* n. 65, at 659.
251 *Ibid.*, at 662.
252 Victor Rodríguez Cedeño, Special Rapporteur, *Third Report on Unilateral Acts of States*, U.N. Doc. A/CN.4/505, at 252 (para. 35).
253 Guiding Principle 1 states: 'Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith.'

binding nature of a unilateral declaration. The ICJ was articulate on this in *Nuclear Tests (New Zealand v. France)*:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.[254]

Notably, context is key in establishing whether a unilateral declaration expresses a willingness to be bound. The following dictum of the ICJ, again in *Nuclear Tests (New Zealand v. France)*, is to the point:

> [I]n whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the *circumstances in which they were made*.[255] (emphasis added)

Conscious investor involvement in a criminal act is not the sort of context in which to expect a legally binding expression of host state will. On the contrary, asking for, or accepting, bribes is a manifest abuse of an official's power no matter whether corruption is deeply embedded in the host state's regime or the corrupt official is a black sheep in a generally incorrupt environment. Where the investor knows (or is deemed to know) about the corruption, there is no objective good faith basis for placing reliance on any (explicit or implicit) declarations of the corrupt officials. Hence, as in the contractual context, the question of real interest is whether one must attribute to the investor the knowledge of the investor's representative involved in the bribery. On balance, the question must be answered in the affirmative for the very reasons stated above.[256]

Fourth, as a reflection of the affinity between unilateral acts and international treaties, there seems to be broad consensus that a unilateral act must not be affected by defects or invalidating factors.[257] Inspiration can be drawn from the VCLT. Under VCLT, Article 50, a state may invoke corruption as ground for invalidating its consent to a treaty. By the same token, a host state could invalidate any unilateral declaration, action or non-action of a corrupt official if it constituted, contrary to the above, a binding expression of host state will vis-à-vis the investor.[258]

In sum, there is no basis for attributing to the host state the acts and state of mind of its corrupt official(s). Even if there were, the host state could invalidate any declarations made by the corrupt officials on its behalf. Thus, concepts of estoppel,

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254 *Nuclear Tests (New Zealand v. France)*, Judgment, [1974] I.C.J. Reports 457, para. 49.
255 *Ibid.*, para. 49.
256 *See* s. 4 *supra*. *See also* Crawford & Mertenskötter, *supra* n. 174, at 38.
257 Michael Akehurst, *The hierarchy of the sources of international law*, 47 Brit. Y.B. Int'l L. 273, 280 et seq. (1976); Krzysztof Skubiszewski, *Unilateral acts of States*, in *International Law: Achievements and Prospects* 221, 230 (Mohammed Bedjaoui ed., 1991).
258 Skubiszewski, *supra* n. 257, at 230.

acquiescence or waiver come into play only once competent host state officials other than the bribe-taker(s) have obtained knowledge of the corruption underlying an investment.

6.3 Legitimate expectations and due process

It is now opportune to sketch out very briefly the contours of the limited protection compatible with international (transnational) public policy from which a tainted investment may benefit. The measures that a host state can adopt to the potential detriment of a foreign investor are virtually countless. The spectrum covers non-compensable forfeiture for crime or other actions commonly considered as within the police powers of states, non-compensable, reasonable and non-discriminatory *bona fide* taxation or regulation, and compensable direct or indirect expropriation. Direct expropriation affects an investor's legal title to specific property rights. Indirect expropriation leaves legal title with the investor, but the measures adopted by the state result in a substantial, non-ephemeral deprivation of the investment.[259] Title will be 'no more than a hollow shell.'[260] Modern investment treaties contain specific standards protecting a foreign investor against direct and indirect expropriation.[261] In relation to measures falling short of expropriation, the fair and equitable treatment standard has developed to become the most important standard of substantive treaty protection.[262] It may be seen as a 'tempting fallback'[263] where a tribunal cannot establish a finding of indirect expropriation. Indeed, investment tribunals have applied rules for the calculation of damages upon a breach of the fair and equitable treatment standard similar or identical to those governing the assessment of compensation in case of indirect expropriation.[264]

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[259] W. M. Reisman & R. D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 Brit. Y.B. Int'l L. 115, 119 et seq. (2004); Newcombe & Paradell, *supra* n. 229, at 344.

[260] Alfred Siwy, *Investment Arbitration – Indirect Expropriation and the Legitimate Expectations of the Investor*, in *Austrian Arbitration Yearbook 2007* 355, 356 (C. Klausegger et al. eds, 2007). For a succinct summary of the approaches taken by investment tribunals to the definition of 'indirect expropriation', *see* L. Y. Fortier & S. L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or* Caveat Investor, 19 ICSID Rev. 293, 305 (2004).

[261] Newcombe & Paradell, *supra* n. 229, at 328 et seq.; Dolzer & Schreuer, *supra* n. 201, at 102; Markus Perkams, *The Concept of Indirect Expropriation in Comparative Public Law–Searching for Light in the Dark*, in *International Investment Law and Comparative Public Law* 107, 109 et seq. (Stephan W. Schill ed., 2010).

[262] Newcombe & Paradell, *supra* n. 229, at 255; Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 Santa Clara J. Int'l L. 7, 10 (2014); Dolzer & Schreuer, *supra* n. 201, at 130.

[263] L. Reed & D. Bray, *Fair and Equitable Treatment: Fairly and Equitably Applied in Lieu of Unlawful Indirect Expropriation?*, in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2007* 13, 25 (Arthur W. Rovine ed., 2008).

[264] Douglas, *supra* n. 143, at 103 et seq.; Reed & Bray, *supra* n. 263, at 14.

In *World Duty Free* and *Metal-Tech*, the host states had, through a series of different measures, assumed control over the investor's business, bankrupted it and taken hold of the bankrupted business' assets. In *Spentex*, the investor claimed that the withdrawal by the host state's government of certain incentives had caused the bankruptcy of its investment. Now, in determining whether expropriation or some less trenchant measures constitute a breach of the host state's duties under an investment treaty, great importance attaches to the legitimate expectations of the foreign investor.[265] Due process in the sense of a fair, transparent and non-discriminatory administration of municipal host state laws is also key. In fact, it is an articulation of the objective minimum standard at customary public international law.[266] Modern BITs make due process an explicit legality requirement for any expropriation.[267] In the context of investments procured by corruption, legitimate expectations and due process are the most relevant aspects to determine whether there has been a violation of a substantive treaty standard. Hence, these will now be addressed very succinctly.

A number of objective elements spawn legitimate expectations independent of any specific host state conduct relative to an individual investment. Notably, an investor may assume stability and predictability of the host state legal system.[268] This does not amount to imposing a regulatory freeze upon the host state. Unless the host state affords the investor additional comfort (e.g. through a stabilization clause), it remains at liberty to regulate within certain limits.[269] By contrast, a

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[265] *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 Oct. 2006, para. 127 et seq.; *Int'l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, 26 Jan. 2006, para. 145 et seq., *National Grid PLC v. Argentine Republic*, UNCITRAL, Award, 3 Nov. 2008, para. 173; *Suez v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 222 et seq.; *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB 03/15, Award, 31 Oct. 2011, para. 348; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 Mar. 2006, para. 301 et seq.; *Waste Management, Inc. v. United Mexican States (No. 2)*, ICSID Case No. ARB(AF)/00/3, Award, 30 Apr. 2004, para. 98; Schill, *supra* n. 234, at 163 et seq.; Ursula Kriebaum, *Expropriation*, in *International Investment Law* 959, 1006 et seqq. (M. Bungenberg et al. eds, 2015); Dolzer & Schreuer, *supra* n. 201, at 115 et seq. (indirect expropriation) and 145 et seq. (fair and equitable treatment); Dolzer, *supra* n. 262, at 16 et seq.; Newcombe & Paradell, *supra* n. 229, at 279 and 350 et seq.

[266] Newcombe & Paradell, *supra* n. 229, at 238 and 244 et seq.

[267] *See* Canada 2004 Model BIT, Art. 13(1); Germany 2008 Model BIT, Art. 4(2); India 2003 Model BIT, Art. 5(2); Italy 2003 Model BIT, Art. V(5); United States 2012 Model BIT, Art. 6(1)(d).

[268] *Saluka v. Czech Republic*, *supra* n. 265, para. 301 et seq.; Dolzer, *supra* n. 262, at 17; Newcombe & Paradell, *supra* n. 229, at 286; Schill, *supra* n. 265, at 165.

[269] Determining the tipping point as of which *bona fide* regulation will become too cumbersome and trigger an obligation to compensate foreign investors is one of the big challenges in the application of investment treaties. While investment tribunals and scholars are divided on the relevance of objective (sole effect) and/or subjective (purpose, intent) elements for this test, it seems that common sense will be able in most cases to tell right from wrong. Pursuant to Dolzer, *supra* n. 262, at 11, 'Anecdotal experience in the classroom suggests that the answers in most cases are more uniform than may be anticipated.' This seems to corroborate the reliability of the 'I know it when I see it'-test (Fortier &

political history of instability and/or hostility towards foreign investments will not erode the basis for legitimate expectations.[270] Put more bluntly, a host state's track record of treating investors badly does not insulate it from liability for future breaches of its treaty obligations. Even if a host state scores very poorly on the World Bank's Rule of Law Index, an investor may place reliance on the non-arbitrary and impartial administration of host state law and justice.

State conduct directed at the investor in the context of the making of an investment also informs legitimate expectations if the investor can *reasonably* rely on it. Relevant conduct can take the form of oral or written unilateral representations, contractual commitments, or administrative acts such as permits, licenses and approvals.[271] Even official promotional material about domestic law and government policy may be of relevance.[272]

As shown above,[273] the acts and state of mind of its agents and representatives are imputed to the investor. Hence, the investor cannot *reasonably* rely on host state conduct induced by corruption.[274] By withdrawing, revoking or annulling a tainted permit, license or approval, the host state will thus not normally incur any state responsibility. However, in so doing, the host state must adhere to standards of due process and act on a non-discriminatory basis. The investor's malfeasance does not provide a license for the host state to act illegally in its turn.[275] The principle that the investor may rely on the unbiased, non-discriminatory administration of the host state's laws and regulations remains intact. It is only the corruptly procured element of its expectations that the investor cannot place any reliance on. Moreover, the application of host state

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Drymer, *supra* n. 260, at 327, citing Justice Potter Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)).

270 Dolzer, *supra* n. 262, at 27, criticizing the opposite view maintained by the tribunal in *Duke Energy Electroquil v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 Aug. 2008, para. 340: 'The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.' *See also* Peter Muchlinski, *'Caveat investor?' The relevance of the conduct of the investor under the fair and equitable treatment standard*, 55 Int'l & Comp. L.Q. 527, 546 (2006).

271 Newcombe & Paradell, *supra* n. 229, at 280; Dolzer, *supra* n. 262, at 24; Dolzer & Schreuer, *supra* n. 201, at 145; Hector A. Mairal, *Legitimate Expectations and Informal Administrative Representations*, in *International Investment Law and Comparative Public Law* 413, 413 et seq. (Stephan W. Schill ed., 2010).

272 *See* Reisman & Arsanjani, *supra* n. 247, at 329 and 343. For a comparative analysis, *see* Mairal, *supra* n. 271. Other scholars maintain that the state conduct must be specific, unambiguous, and *individualized*. *See* e.g. Elizabeth Snodgrass, *Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle*, 21 ICSID Rev. 1, 53 and 56 (2006); Newcombe & Paradell, *supra* n. 229, at 296.

273 *See* s. 4 *supra*.

274 *Thunderbird v. Mexico*, *supra* n. 265, paras 151–55, 164–66; Muchlinski, *supra* n. 270, at 536 et seq.; Newcombe & Paradell, *supra* n. 229, at 282 and 297; Snodgrass, *supra* n. 272, at 53; Mairal, *supra* n. 271, at 440; Wood, *supra* n. 226, at 14 et seq.

275 Muchlinski, *supra* n. 270, at 535 et seq.; Newcombe & Paradell, *supra* n. 229, at 297.

law is subject to the minimum standards at international law setting the low water mark.[276] This has a number of corollaries:

- Where the investor made a facilitation payment to procure an otherwise legal permit, license or approval, there may be no basis at all for any withdrawal, revocation or annulment.
- The revocation or annulment of an unlawful permit, license or approval induced by corruption will be possible except in circumstances where the revocation or annulment is discriminatory because the host state failed to revoke equally tainted unlawful permits, licenses or approvals of third parties.[277]
- In application of the concepts of estoppel, acquiescence and/or waiver, the host state may be barred from invalidating a tainted permit, license or approval if competent officials (other than the bribe-taker(s)) fail to take action after becoming aware of its unlawfulness and the underlying corruption.
- If, following the proper revocation or annulment of a corruptly procured unlawful permit, host state law allows the ordering of corrective action, the non-discriminatory *bona fide* exercise of that power in pursuit of the relevant public interest does not trigger any obligation to compensate.[278]
- The exercise of the host state's police powers must withstand a test of proportionality and reasonableness.[279] The host state cannot order demolition if (much) less trenchant measures achieve the public purpose. Again, the non-discriminatory *bona fide* ordering of any such less trenchant remedial action will not entail any state responsibility.
- If at all, direct expropriation of the investment without compensation will be possible in exceptional cases only if and to the extent expressly covered by municipal law.

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[276] On the relationship between domestic law and international law, *see* Schreuer, *supra* n. 201, Art. 42 para. 214 et seq.; Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law* 45 et seqq. (2d ed., Kluwer Law International 2017); Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. Int'l L. & Pol'y 953, 955 (2006); Newcombe & Paradell, *supra* n. 229, at 97 et seq.

[277] Newcombe & Paradell, *supra* n. 229, at 297; Schill, *supra* n. 265, at 172.

[278] *Emanuel Too v. Greater Modesto Insurance Associates*, Award, 29 Dec. 1989, 23 Iran–U.S. C.T.R. 378 (1991); Newcombe & Paradell, *supra* n. 229, at 325 and 358 et seq.; George H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 Am. J. Int'l L. 585, 609 (1994); George C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 Brit. Y.B. Int'l L. 307, 338 (1962) 38.

[279] Dolzer & Schreuer, *supra* n. 201, at 123; Newcombe & Paradell, *supra* n. 229, at 325 and 358 et seq.; Schill, *supra* n. 265, at 169 et seq.; Jacob & Schill, *supra* n. 234, at 735 et seq.

It follows from the above that a careful analysis of the domestic law response to corruption will be imperative in each individual case. It is upon any tribunal to establish, interpret and apply the parochial laws of the host state as part of the legal rules relevant to the case before it (*iura novit curia*).[280] If it concludes that a measure adopted by the host state breaches neither its municipal laws nor any of the minimum standards at international law, the investor's claims will be dismissed on the merits. Conversely, where the host state fails to live up to its own or international minimum standards, it will incur liability vis-à-vis the investor. It is beyond the scope of this article to expand on the modalities of determining the compensation or damages payable to a corrupt investor upon a host state breaching its international obligations. Just two high-level thoughts. In reflection of the policy that no one should benefit from his or her own wrong (*commodum ex injuria sua non habere debet*),[281] it seems fair to cap any compensation or damages payable to the investor at the lower of (1) the investment's fair market value, and (2) the investor's overall costs (other than any bribes paid). Moreover, the fair market value must be determined net of any cost associated with future remedial action that the host state could have legally ordered in relation to the corruptly induced investment.[282]

7 CONCLUSION

The past decades have seen states agreeing on a regional and global scale to binding conventions, international institutions structuring multifaceted programmes, and international business organizations adopting codes of conduct – all aimed at combating corruption. This notwithstanding, the global anti-corruption campaign has failed to gain traction on the ground in many countries. Levels of perceived corruption continue to be startlingly high. Widespread implementation and enforcement deficiencies reflect a lack of *real* political will and discredit pious lip service paid by politicians, senior government officials and business leaders alike. Notably, agreeing on a universal definition of corruption remains a challenge for the anti-corruption campaign. This prevents the emergence of an all-encompassing transnational public policy condemning all sorts of corruption. In relation to the public sector, it is arguable that there is general condemnation of active and passive bribery only, whereas influence peddling is not against transnational public policy. Investment tribunals must thus exercise caution in establishing *relevant* corruption.

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[280] Newcombe & Paradell, *supra* n. 229, at 95.
[281] The question of attribution being settled (*see* s. 4 *supra*).
[282] *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 Aug. 2000, para. 127; Newcombe & Paradell, *supra* n. 229, at 392.

Moreover, national legal systems across the globe articulate nuanced responses to contracts and investments induced by corruption. Hence, there is no case for a transnational public policy that prohibits such contracts and investments from being upheld. Rather than dismissing an investor's claims *tout court* as inadmissible, investment tribunals need to analyse carefully the relevant laws and regulations on a case by case basis and apply them with reason. In most cases, applicable laws will not support a non-compensable total loss of the investment. Finally yet importantly, the doctrine of separability militates against a dismissal of an investor's claims on jurisdictional grounds. This holds true in both a contractual and a treaty context. Notably, the investor's overall compliance with the host state's laws is no explicit or implicit condition on the applicability of an investment treaty or the host state's consent to arbitrate expressed therein. Where investment treaties contain a legality clause as part of the definition of investment or elsewhere, this simply expresses the recognition of the *lex situs* rule that an investment must be in an asset cognizable under the laws of the host state, but does not limit the scope of a treaty's application or condition the host state's consent to arbitrate.

These findings sit well with the goals of the global anti-corruption campaign. Any investor engaging in corrupt activities will face potentially dramatic risks, both in a contractual and a treaty context. This constitutes a strong disincentive on the supply side. It is thus neither necessary nor appropriate to dismiss an investor's claims on jurisdictional grounds or as inadmissible. On the contrary, jurisdiction and admissibility are tools not really suited where there is misconduct on both sides. Accepting this position does by no means entail a balancing of the investor's and the host state's 'venality' or 'turpitude.'[283] It rather amounts to a transparent and reasoned balancing of objectively conflicting policy goals: prevention of corruption on both the supply and the demand side of the equation. As a result, attribution of the corruptive acts is and remains asymmetric. The investor will have to bear the consequences of offering, or acceding to solicitations for, the payment of bribes to one or more host state officials no matter how endemic corruption may be in the host state. It cannot not rely on the validity of corruptly procured contracts, permits, licences or approvals. Unless competent and uncorrupted officials have ratified the acts in some shape or form, the host state may invalidate them without incurring any liability. Restitutionary claims of the investor upon the avoidance of a contract may or may not be of any value. Following the invalidation of a corruptly procured unlawful permit, licence or approval, the host state may order further remedial action. However, the host state's response to the investor's illegality must be a *lawful* response in full respect of the minimum standards at

[283] Partasides, *supra* n. 91, at 744.

international law. *This* will promote the rule of law.[284] It is true that the investor must comply with municipal law. There is no questioning this. However, the corrupt investor must be held accountable in accordance with applicable *laws* rather than by a general reference to a purported, but actually non-existent, international (transnational) public policy categorically stripping tainted investments of any protection. This necessarily entails that the host state must not respond with a tit for tat to any investor shortcomings by taking actions blatantly violating the rule of law. Peremptory dismissal of an investor's claims on jurisdictional or absolutist policy grounds provides the host state with a licence to do exactly this. Tribunals following this binary approach examine the speck in the eye of the investor without ever addressing the beam in the eye of the host state[285] and actually foster what they claim to fight: contempt for the rule of law and, through the creation of perverse incentives, spiralling corruption.

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[284] On the fair and equitable treatment standard as embodiment of the rule of law, *see* Schill, *supra* n. 265, at 181 et seq.

[285] Cremades, *supra* n. 186, para. 37. *See also* Andrew Newcombe, *Investor misconduct: Jurisdiction, admissibility or merits?*, in *Evolution in Investment Treaty Law and Arbitration* 187, 198 et seq. (C. Brown & K. Miles eds, 2011).