The defence of illegality in international investment arbitration : a hybrid model to address criminal conduct by the investor, at the crossroads between the culpability standard of criminal law and the separability doctrine of international commercial arbitration

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UNIVERSITÉ PARIS I PANTHÉON SORBONNE

PhD Thesis
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Résumé

Cette thèse analyse la question relative au cas où, dans l'arbitrage internationale en matière d'investissements, dont le but principal est l'application des normes visées à la protection des investisseurs, l'Etat défendeur soutient que l'investissement pour lequel la protection est demandée a été obtenu au moyen d'une forme de criminalité. La configuration classique de ce genre de criminalité pertinente en matière d'arbitrage d'investissement est celle d'un investisseur qui corrompt les fonctionnaires de l'État hôte pour obtenir une offre, ou celle d'un investisseur qui trompe l'État hôte par de fausses déclarations et par la fraude afin d'obtenir un contrat public. Dans ce contexte, la *Défense de l'Illégalité* soulevée par les État dans les contentieux d'investissement est de plus en plus courante. Cette défense fonctionne selon le schéma suivant : un État hôte enfreint les dispositions de fond que le droit international accorde aux investissements effectués dans un pays étranger, par exemple en exproprient un investisseur étranger de son investissement sans indemnité. Dans le différend qui s'ensuit devant un tribunal arbitral d'investissement l'État défendeur invoque l'illégalité commise par l'investisseur lors de la réalisation de l'investissement pour se défendre contre la procédure arbitrale intenté contre lui. Cette thèse examinera les formes de criminalité les plus susceptibles d'être perpétrées par les investisseurs étrangers et se penchera sur la question si de tels comportements illégaux ont une incidence sur la competence/jurisdiction du tribunal arbitral, ou plutôt s'il s'agit des questions qui doivent être examinées au moment de la admissibilité, ou, encore, au stade de l'examen du fond de l'affaire. Le but principal de cette étude est celui de démontrer que des considérations systématique de nature strictement juridique, aussi bien que de politique juridique, exigent que la *Défense d'Illégalité* dans l'arbitrage d'investissement soit strictement restreinte et qu'un tribunal ne puisse décliner d'exercer sa competence/jurisdiction que dans des cas exceptionnels. Cette étude aboutie à la conclusion d'après laquelle les tribunaux d'arbitrage devraient plutôt examiner au cas par cas au stade du fond l'ensemble des circonstances soumises devant lui et procéder à une mise en balance approprié entre les comportements de l'investisseur et ceux de l'État hôte. Afin de parvenir à cette conclusion, cette analyse prenne en consideration deux corpus juridiques qui, même si ils sont très importants par rapport au sujet en question, ont été largement négligés par les spécialistes de l'arbitrage d'investissement: notamment, l'arbitrage commercial international et le droit pénal.

Summary

This thesis addresses the question as to how an investment Tribunal is to react if, in the context of a case brought before it for breach of standards of protection of an investment, the respondent argues that the investment for which protection is sought has been secured by resorting to some form of criminality. The classical pattern of criminality relevant in investment arbitration is that of an investor who corrupts the public officials of a Host State to secure a bid, or of an investor who deceives the Host State by false representation and fraud, for the purposes of obtaining an investment contract. Against this background, a defence by the Host State that has become increasingly common is the so-called *Defence of Illegality*. It operates on the basis of the following scheme: a Host State breaches the substantive provisions that international law accord to investments made in a foreign Country, for instance by means of expropriating without compensation the investor's investment. In the ensuing dispute before an investment Tribunal, the defendant Host State raises the illegality committed by the investor in the making of the investment as a defence against the breach of the substantive provisions on the protection of the investment, of which it is accused, to avoid responsibility. This thesis will assess various forms of criminality that can be perpetrated by investors and will address the question as to whether such illegal conduct produces its effects on the jurisdiction of the arbitral Tribunal, or rather

whether these are issues that should be considered at the admissibility or merit phase of the arbitral proceedings. This thesis intends to demonstrate that both legal and policy considerations dictate that the *Defence of Illegality* in investment arbitration should be strictly curtailed and that a Tribunal should only decline to exercise its jurisdiction in exceptional cases. Rather, Tribunals should look at the entire set of circumstances at the merits stage and perform a proper balancing test between the conduct of the investor and the Host State. In reaching this conclusion, this thesis will take into account as point of reference two systems of law that have been for the most part neglected by scholars who have investigated the *Defence of Illegality* in investment arbitration: international commercial arbitration and criminal law.

Mots-clés
Admissibilité et Compétence Juridictionnelle – Arbitrage Commercial – Arbitrage et Crime – Arbitrage d'Investissement – Clause "Conformément à la Loi de l'État d'Accueil" – Clause de Légalité – Corruption – Défense d'Illégalité – Doctrine des Mains Propres – Droit Comparé - Droit International – Séparabilité.

Keywords
Arbitration and Crime – Admissibility and Jurisdiction – Clean Hands Doctrine – Comparative Law – Commercial Arbitration – Corruption – Defence of Illegality – "In accordance with Host State Law" Clause –International Law – Investment Arbitration – Legality Clause – Separability.

To Ambassadors Francesco Azzarello and Ettore Sequi
For their trust and friendship

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SUMMARY

According to a common view, international arbitration and criminal law are two separate and distant planets, that never cross their paths. This separation is said to be correlated to the intrinsic features of each: arbitration is a mechanism of dispute resolution that is consensual in nature, is characterised by a private procedure and leads to a final and binding determination of the rights and obligations of the parties. In its simplest formulation, arbitration is premised on the consent of the parties and is characterised by their autonomy, by the discretion of the arbitrators with respect to the arbitral procedure and by the general principle of non-interference by domestic courts. The mechanism of international arbitration was conceived, at least originally, to serve exclusively the interest of the parties, rather than the general interest. It was a means to sort out disputes in manners that would be considerate of the specific interests of commercial individuals, and that provided an opportunity to get past a dispute quickly and start doing business as soon as possible again. For these reasons, systemic interests were not, and could not, be a concern of international arbitration.

Criminal law, on the other hand, is the epitomization of State function. The ability to criminalize certain conducts and to use the force of the State to ensure the respect of norms is the manifestation of public power at its apex. The consideration that systems of criminal justice are geared, when necessary, to encroach on fundamental rights of individuals means that not only the substantive provisions, but also the criminal procedures are characterized by non-derogable prescriptions. In addition, a system of criminal justice is, by definition, aimed at preserving and enhancing the public good, and public rights, rather than private interests. And indeed, one thing appears with clarity also at a superficial level of analysis: a system of criminal justice normally pursues a multiplicity of ends, all of which have a markedly public connotation. Let us take the rationale behind inflicting a criminal sanction. Theories here vary a great deal, but most recognize that a criminal law sanction pursues a composite set of aims. The main question in the criminal law discourse is therefore one of which aim should prevail, or of how to

balance the aims, rather than one regarding the multipurpose, public-oriented, nature of criminal law sanctioning, which is taken for granted. One could take retribution, special prevention and general prevention as the most commonly referred to objectives that sanctioning pursues. These public ends have significant implications at the macro-level, and their impact goes well beyond the specific criminal case that is brought before a criminal court.

Yet, despite these differences, the separation between international arbitration and criminal law is more apparent than real. As noted by a scholar, "*qu'on le déplore ou qu'on l'approuve, l'irruption du droit pénal dans le monde feutré de l'arbitrage est une réalité qui doit être observée avec attention.*" [1] There are many instances in which intersections between investment arbitration and criminal law can occur. For example, it is a debated topic whether arbitrators should raise *ex-officio*, and possibly report to the competent criminal authorities of a forum State any suspicion of criminal conduct that appears before them; or whether criminal misconduct is only for the parties to raise in arbitral proceedings. Also, there are ever more frequent cases of abuse of the arbitral process, which is used as a mechanism to launder money coming from illicit activities. In these cases, the arbitration would be a mere simulation, and the dispute between the parties entirely fabricated: what would be the consequences in a situation like this?

Evidential matters are also a crux of the general relationship between arbitration and criminal law: what is the standard of proof required for a Tribunal to persuade itself that criminality has been committed by an investor or by a party to a contract? What *ex-officio* powers does the Tribunal possess in this regard? And what again, if a party fails to disclose certain document by invoking criminal law provision on secrecy that prevent them to do so? Another much debated question is the one concerning the parallel pending of arbitral proceedings and criminal proceedings that may affect the arbitration; also, the issue of how to address criminality that affects the conduct of arbitral proceedings (as opposed to the

[1]de Fontmichel, A. *L'Arbitre, le Juge et les Pratiques Illicites du Commerce International*. Paris: Panthéon-Assas Paris II, 2004, 14. See also the comment of Professor Fouchard, whom, already in 1988, noted that the field of international arbitration had become plagued by misconduct. Fouchard, P. «'Ou va l'Arbitrage International?» *Revue de Droit de McGill*, 1989: 436 – 453, 436.

substance of the subject matter under dispute, e.g. the investment, or the contract) is a debated matter.

This dissertation is concerned with one of the many instances in which criminal law and international arbitration cross their path: the case of investors resorting to some form of illegality, including criminal misconduct, to secure an investment in a Host State. The classical pattern of criminality that can affect an investment is constituted by the corruption, on the part of the investor, of the officials of a Host State, to secure the possibility to make business in the country; alongside corruption, fraud and violations of the laws of the Host State have become frequent occurrences in which investors engage in order to be able to make an investment in a certain country, or in order to render it more profitable. Many scenarios are reported: the one where the investor fails to disclose important features of its investment, so as to give the impression that the investment operation is compatible with the domestic legislation of the Host State; the one in which the investor exaggerates certain aspects of its organisation, structure and financial capabilities, so as to secure a bid which it would otherwise be impossible to obtain; the one in which the investor fails to comply generally with the legislation of the Host Country, to its own advantage.

In tandem with the increase of investor's misconduct, a significant phenomenon has started to present itself with some frequency: the reliance by Host States on a *Defence of Illegality* based specifically on investor's misconduct. In general terms, a *Defence of Illegality* consists in invoking the claimant's illegal conduct to bar, or otherwise defeat, its claim related to a transaction affected by such illegality. In investment arbitration, the *Defence of Illegality* means in particular that the Host State invokes the misconduct committed by the investor in securing an investment in the country as a defence in the context of proceedings brought by the investor against the Host State, for breach of the standards of protection of investments owned under BITs or general international law. By way of example, a *Defence of Illegality* based on investor's corruption could be raised in an investment dispute brought by the investor for violation of the standard of fair and equitable treatment,

or for expropriation without due compensation, or again for any other form of illegal tampering by the Host State with the investor's investment.

In concrete terms, the *Defence of Illegality* could be raised by the Host State in three ways in an investment case. First, by reference to certain clauses that can at times be found in BITs, according to which the protection of BITs and of international law in general is reserved only to investments made *in accordance with the laws of the Host State*. In this case, the *Defence of Illegality* would operate on the basis of a direct and textual connection with the BIT, to exclude from protection investments that are criminal and illegal, and hence contrary to the laws of the Host State; second, by reference to a general principle whereby, even in the absence of an explicit *in accordance with Host State law* clause, the system of investment protection should be reserved to those investments that are legal. This position, that is referred to as the *Legality Doctrine*, postulates that an interpretation of the system of BITs that is in line with the principles of the Vienna Convention, including the cardinal notion of good faith, mandates that the protection of international law cannot be granted to investments that are illegal. Third, by reference to the so-called *Clean Hands Doctrine*. The *Clean Hands Doctrine*, in its proper formulation, is a doctrine of judicial abstention which originates from the Latin maxim that *nemo auditur turpitudinem suam allegans*, and according to which a court should not lend its service to a claimant when this has committed an illegality with respect to the transaction (including the investment) for which it seeks protection. According to its proponents, the *Clean Hands Doctrine* would operate as a general principle of law under the rubric of Article 38 of the Statute of the International Court of Justice.

If, as seen, the *Defence of Illegality* could be invoked following the three routes identified above, there are also three effects that a defence based on claimant's misconduct could determine on its claim. First, the arbitral Tribunal may decide to treat investor's misconduct as a jurisdictional issue. In this event, an investment procured by corruption, or by fraud, or by violations of the laws of the Host State would mandate the Tribunal to simply decide not to entertain the case, and dismiss it at the jurisdictional level. In the alternative, the Tribunal could decide that the

misconduct by the investor determines the inadmissibility of the claimant's claim, but does not bar the Tribunal's jurisdiction. Both the jurisdictional and the admissibility approach to investor's misconduct constitue a *broad Defence of Illegality,* in the sense that they determine far reaching effects such as the failure of the investor's claim at the preliminary level, before the merits. Lastly, the Tribunal could decide that the misconduct by the investor does not have an impact on either the jurisdiction of the Tribunal, nor on the admissibility of the claim, but that it is an issue reserved for the merits of the proceedings, where the protection normally owned to the investment can be denied - wholly or partly - due to criminality.

How is an investment Tribunal in concrete to treat a *Defence of Illegality*? What alternative should it choose, between the jurisdictional, admissibility and merits one? This is the research question that this dissertation investigates. The importance of the research question is strictly correlated to the importance of distinguishing between jurisdiction, admissibility and merits. In international investment arbitration, a declaratory of lack of jurisdiction is the most serious sanction that can be inflicted on an illegal claim: a declaratory of lack of jurisdiction is not curable and the Tribunal can declare itself without jurisdiction without engaging at all with the merits of the parties' claim. A declaration that the claim is inadmissible, while still operating at a preliminary level, is a less serious consequence for the investor than a declaratory of lack of jurisdiction. For example, inadmissibility is curable and, in addition, issues concerning admissibility are oftentimes closely related to issue concerning the merits, so that a Tribunal assessing issues as a matter of admissibility can carry out an analysis, and become cognizant of certain issues, in a manner not dissimilar from the kind of analysis that is carried out at the merits stage. Yet, dismissing a claim as inadmissible still prevents the Tribunal from passing an award that may somehow take into account of the conduct of both parties, and of the substance of their respective positions. Lastly, assessing the illegality of the investor's conduct at the merits stage is what allows the Tribunal to take into account the conduct of both parties in a thorough and complete manner, and balance the respective behaviours of the parties appropriately. Also for this, an investor's claim that is allowed to proceed to the merits presents a certain incentive for the parties to reach a mutually agreed

settlement before a judicial decision is rendered - something that could not happen, logically, with a dismissal of the claim at the preliminary level.

Several Tribunals and scholars have proposed an answer to the research question indicated above that is based on a *broad Defence of Illegality*, which in essence tends to consider investor's misconduct as a preliminary matter that always prevents the Tribunal from entertaining a claim in the merits. These theories have been based on certain extensive interpretations of the three routes through which, as mentioned earlier, the *Defence of Illegality* is said to operate: a) *in accordance with Host State law clauses*; b) *Legality Doctrine*; c) *Clean Hands Doctrine*.

For example, some tribunal and scholars believe that *in accordance with Host State law clauses* are legality clauses whose purpose is always, and invariably, to tie the protection of an investment with its overall legality, in the sense of its compliance with *all* the laws and regulations in force in the Host State. The argument proceeds that investments that are not made *in accordance with Host State law* are not to be considered investments. Therefore, an arbitral Tribunals' jurisdiction, that only encompasses investments, could not extend *ratione materiae* to these kinds of transactions. In sum, according to this theory, an arbitral Tribunal faced with an illegal investment should always decline its jurisdiction if the applicable BIT contains an *in accordance with Host State law* clause.

This approach was adopted by the arbitral Tribunal, for example, in the case *Inceysa v El Salvador*. The claimant brought a claim against El Salvador lamenting breach of contract and expropriation with respect to a contract awarded to the claimant by the Republic of El Salvador. Amongst the defences that it raised, the Respondent argued that the transaction in question was not one of those that deserved protection under the BIT, in consideration of the fact that it was not made in compliance with the laws and regulations of the Host State. In particular, El Salvador explained that Inceysa had secured its investment through fraud, having submitted false financial statements, having misrepresented the experience of Inceysa's sole administrator, having misrepresented Inceysa's experience in the field of vehicle inspections and its relationship with its supposed strategic partner and having submitted forged documents to support the existence of multi-million

dollar contracts concluded by Inceysa in the Philippines and in Panama. The Tribunal referred to Article III of the Spain – El Salvador BIT, that regulated the the relationship between the investor and the Host State, according to which: e*ach Contracting Party shall protect in its territory the investments made, in accordance with its legislation.* It concluded that the investment made by Inceysa was not a protected investment, not having being made in accordance with the legislation of El Salvador. It therefore decided to decline its jurisdiction to entertain the case.

With regard to the *Legality Doctrine*, some scholars and tribunals believe that any kind of illegality determines the inadmissibility of the claimant's claim, and that this is the case because the system of investments protection cannot be seen as advancing illegal investments, of any nature. The *Legality Doctrine* operates also in the absence of an in accordance with Host State law clause. A first authoritative affirmation of the *Legality Doctrine* in investment law can be found in the decision of the arbitral Tribunal in the case *Phoenix v Czech Republic*. In that case, even though a specific *in accordance with Host State law* clause existed in the BIT, the Tribunal commented more generally that: *"It is the view of the Tribunal that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT."*[2]

The Phoenix Tribunal, in conceptualising the implied legality requirement, had in turn referred to a decision rendered by an arbitral Tribunal in the case of *Plama v Bulgaria*. In that case, the claim was based on the Energy Charter Treaty, that does not contain a specific legality requirement. The Tribunal held that: *"Unlike a number of Bilateral Investment Treaties, the ETC [Energy Charter Treaty] does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law (...) The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to*

[2]Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Decision of 15 April 2009, para 101.

law".[3] For the proponents of a *broad Defence of Illegality* through the *Legality Doctrine*, limiting protection to legal investments only essentially means that a Tribunal should always decline to entertain the case at the jurisdictional level, or at the admissibility level, when faced with an illegal investment.

Lastly, some scholars advocate a *broad Defence of Illegality* by resorting to the so called *Clean Hands Doctrine.* As indicated previously, in essence, the doctrine requires that a Court should deny putting the machinery of justice at the service of a claimant who has engaged in illegal or morally reprehensible conduct. The impact of the *Clean Hands Doctrine* is on the jurisdiction of a court or tribunal. Its effect is to deny the claimant the *right of entry* into the judicial proceedings. In other words, a Tribunal should deny a claimant *locus standi* if it turns to the Tribunal to seek protection against any breach of its rights, when that claimant has been involved in illegal conduct that is connected to the right they seek to protect. In the words of Sir Gerald Fitzmaurice: *"He who comes to equity for relief must come with clean hands". Thus a State which is guilty of illegal conduct may be deprived of the necessary locus standi in judicio for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it"*[4]

Proponents of a *broad Defence of Illegality* based on the *Clean Hands Doctrine* believe that the *Doctrine* is a general principle of law under Article 38 of the Statute of the International Court of Justice and that therefore international law prescribes that any time a Tribunal is presented with an investment affected by criminal conduct by the investor, it has no alternative but to decline jurisdiction, and abstain to lend its services to a claimant that approaches the court with unclean hands.

[3] Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24 (Energy Charter Treaty), Award of 27 August 2008, paras 138-139. See also Railroad Development v Guatemala, Second Objection to Jurisdiciton, 18 May 2010, para 140.

[4] Fitzmaurice, G. «The General Principles of International Law considered from the Standpoint of the Rule of Law» 92 *Recueil des Cours*, 1957-II: 1 -227,119.

Proponents of a *broad Defence of Illegality* also believe that a zero tolerance approach to investor's criminality, such as the one that mandates sanction at the level of jurisdiction or admissibility, is appropriate from the policy perspective. It is said for example that sanctioning an investor harshly for corruption, with a declaratory by the Tribunal of lack of jurisdiction, and leaving the claimant to bear all the consequences of a crime to which the Host State has participated as well would be a strong deterrent to investors' illegality and criminal misconduct. According to these scholars, the broad application of the *Defence of Illegality* is especially necessary in the case of developing countries, which are in a comparatively more difficult situation than investors in preventing and fighting criminal conduct, particularly of a corruptive nature. The argument proceeds as follows: corporations that invest in foreign countries are sophisticated investors, already spending large sums of money in enforcing within their business structures the anti-corruption standards and the compliance programs that are required by domestic and international legislation.[5] Host States, on the other hand, are often deficient in the implementation phase of anti-corruption legislation. In this regard, being held entirely accountable for corruption is, and should be, another sanction for corporations and businesses that have not been diligent in enforcing the anti-corruption provisions applicable to them.

According to the same scholars, in addition, certain systemic considerations would have to be made, that militate in favour of placing the responsibility for the bribery (or other criminality) only on the investor. This approach, for those who sustain it: *"[A]dmittedly lets state actors get away with accepting bribes. But the alternative — allowing tribunals to weigh and balance state and investor fault in a particular corrupt transaction — risks placing tribunals in a dangerous position. Domestic political regimes, especially after political transitions, may depend for their domestic political support in part on their efforts to "clean house," that is, to expose and remedy the malfeasance of the prior regime. Those efforts should be supported to the extent that they may help to start a virtuous circle of self-reinforcing anti-bribery norms within the political system. For an ICSID tribunal*

[5] Brewster, R. «The Domestic and International Enforcement of the OECD Anti-bribery Convention» *Duke Journal of International Law*, 2014: 84 – 109.

to hold that a prior regime's involvement in corruption means that a corruptly-obtained concession can still benefit from BIT protections risks interfering with those efforts to move to a political equilibrium characterized by less frequent corruption".[6]

Supporters of this idea often rely on certain domestic laws that sanction corruption only at the supply side (namely at the level of the bribe giver, the investor for these purposes) and not also at the demand side (the bribe taker, or the Host State). In the United States, for example, the U.S. Foreign Corrupt Practices Act only sanctions the supply-side of corruption, by outlawing the bribing of foreign officials.[7] It says nothing, however, with regard to the person receiving or soliciting the bribe, namely the demand side of the crime.

Contrary to the idea that investor's misconduct should be sanctioned at the jurisdictional or admissibility level as would be required by the application of a *broad Defence of Illegality*, this thesis advocates a *narrow Defence of Illegality*, according to which investor's misconduct should be, save for exceptional circumstances, a matter reserved for the merits stage of the proceedings, where the conduct of the investor and the Host State can be balanced, contrasted and sanctioned. In reaching this conclusion, this thesis a) first assesses critically the three roads through which the *Defence of Illegality* usually operates; and b) then, building on this assessment, creates a hybrid model based on criminal law and international commercial arbitration considerations to address criminality by the investor in a manner that is more in line with the current *lex lata*, and with broader policy considerations on the advancement of the fight against illegal investments.

From the first perspective, the thesis demonstrates a number of points.

First, that *in accordance with Host State law* clauses are not always legality requirements, that tie the definition of what constitutes an investment with its

[6] Yackee, J. http://opiniojuris.org/2012/05/31/vjil-symposium-jason-webb-yackee-responds-to-bjorklundlitwin-and-wong/

[7] On policy considerations related to the US Act see, for instance, Ackerman, S. R. «International Anti-Corruption Policies and the U.S. National Interest» *Proceedings of the Annual Meeting (American Society of International Law) Vol. 107, International Law in a Multipolar World*, 2013: 252-255.

general compliance with all the laws of the Host State; but that they can also be clauses that simply operate a *renvoi* to domestic legislation for purposes of the definition and identification of what kinds of material assets can constitute an investment under domestic law. In this sense, an in *accordance with Host State law* clause would simply indicate what assets, and what property rights can be legitimately constituted into an investment, and would therefore not always mandate a Tribunal to decline its jurisdiction *ratione materiae* when faced with an investment which does not comply generally with the laws of the Host State. The actual meaning of *in accordance with Host State law* clause, out of the two that are possible, is a matter for interpretation to be carried out under the principles of the Vienna Convention, on an *ad hoc* basis and having regard to the actual text of the applicable BIT and its context. On an approach that is consistent with the Vienna Rules on interpretation, there will be certain cases when the *in accordance with Host State law* clause is a legality clause; and others, in which it is not. Precisely because an *ad-hoc* interpretation of in accordance with domestic law clauses is necessary, it would also be wrong to automatically conclude that an *in accordance with Host State law* clause can never be a legality clause regarding the general compliance of the investment with the laws of the Host State.

Second, as regards the *Legality Doctrine,* that while it is undeniably true that the system of investment law should only aim to protect investments that are legal, the denial of protection must not necessarily occur at the jurisdictional or admissibility stage of a case. The scenario that presents itself under the *Legality Doctrine* is in fact different from the case of an *in accordance with Host State law clause* that operates as a legality clause: in such a situation, an investment that is illegal would not qualify as an investment, and the Tribunal would be *obliged* to decline jurisdiction *ratione materiae*. Similarly, the *Clean Hands Doctrine*, which is another route through which the *Defence of Illegality* operates, connects directly the illegality of an investment with a declaratory of lack of jurisdiction by a Tribunal. This is because, as mentioned, one of the rationales of the *Clean Hands Doctrine* is to preserve court's integrity from the exploitation of those who seek redress, despite having committed some wrong; and *the only way* for a court to

preserve its integrity when faced with illegal conduct is to decline jurisdiction and not entertain the case at all.

This jurisdictional exitus, however, is not mandatory under the *Legality Doctrine*. Rather, it is only optional. Denying the protection of the system of BITs to illegal investments does not mean that the Tribunal *must do so by unavoidably declining its jurisdiction, but rather that it can also do so by denying it jurisdiction*. The position of the Tribunal in the case of *Yukos v Russia* is significant in this regard. In that case, the Tribunal agreed that there exists a general legality rule which is implicit in the system of investment protection. But also, it argued that: *"[…] the Tribunal does not need to decide here whether the legality requirement it reads into the ECT operates as a bar to jurisdiction or, (…) to deprive claimants of the substantive protections of the ECT.*[8] By adopting this position the Tribunal acknowledged that under the *Legality Doctrine,* more than one response is possible to address an illegal investment; one, is to decline jurisdiction. But another alternative is available: that the claimant is prevented from having access to the *substantive protection* of the Treaty. There is support in arbitral practice that the denial of protection, also in the context of the *Legality Doctrine*, could well occur at the merits stage of the proceedings and that that sanctioning misconduct at the preliminary level under the *Legality Doctrine* should occur only with respect to the most serious violations that an investor may commit.

Third, that the basis on which the *Clean Hands Doctrine* is said to operate, namely under the guise of a general principle of law under Article 38 of the Statute of the International Court of Justice, rests on a fallacy. A comparative analysis shows that the doctrine is, at best, only present in certain common law systems, in particular, the United Kingdom and the United States. Even here, however, the limits and the real scope of application of the doctrine are unclear, but it is certain that the application of the rule *is not unconditional or uncontested*. The Law Commission of England and Wales has spoken of the *Doctrine of Clean Hands* as of a *complex*

[8] Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 226, Final Award of 18 July 2014, para 1353.

body of case law with technical distinctions that are difficult.[9] The doubts that surround the application of the *Doctrine of Clean Hands* in common law make it unfit to be raised to the standard of general principle according to Article 38 of the Statute of the International Court of Justice. At the same time, even if it could be proven that the *Doctrine of Clean Hands* constitutes an uncontroversial principle in common law systems, it would be difficult to imagine that a doctrine that is unknown to civil law jurisdictions could attain the level of generality that is required under Article 38 of the Statute of the International Court of Justice.

In this regard, the International Court of Justice has never recognised that a binding *Clean Hands Doctrine* exists in international law. Most recently, the International Tribunal in the case of *Yukos v The Russian Federation* had to assess the question of the existence of a *Doctrine of Clean Hands* as a general principle of international law. In particular, after establishing that an implied legality requirement could not be read into the Energy Charter Treaty, the Tribunal turned its attention to determining whether the *Doctrine of Clean Hands* could be applied as a general principle of law instead. It held: *"The Tribunal must consider Respondent's more general proposition that a claimant who comes before an international tribunal with "unclean hands" is barred from claiming on the basis of a "general principle of law." The Tribunal is not persuaded that there exists a "general principle of law recognized by civilized nations" within the meaning of Article 38(1)(c) of the ICJ Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called "unclean hands." General principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an "unclean hands" principle in international law."*[10]

Building on this assessment of the three roads through which a *Defence of Illegality* operates, that indicate how a broad *Defence of Illegality* is not mandated

[9] Law Commission of England and Wales, The Illegality Defence: A Consultative Report, 2009, para 3.55.
[10] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Award of 18 July 2014, para 1358. According to others, clean hands doctrine can indeed be recognised as a general priciple of international law, as per the definition of Article 38 of the Statute of the International Court of Justice. See for instance Dumberry, P. (2013) *op. cit*.

under either one of them, the thesis moves on to developing a new and principled model on how to address criminal conduct committed by the investor in the making of the investment. The model's originality relies on the fact that, unlike the vast majority of models, it is premised on both principles of criminal law and principles of international commercial arbitration: this seems necessary in consideration of the fact that criminality in investment arbitration cannot be addressed only from the perspective of public international law, as most models developed thus far do, but needs to consider both the fact that criminality cannot escape a criminal law analysis and the fact that investment arbitration rests for the most part on the procedural framework of international commercial arbitration. And that, therefore, answering a procedural question such as the stage at which an arbitral Tribunal needs to address investor's misconduct cannot do without looking at international commercial arbitration as a source for solutions.

The international commercial arbitration matrix of the model is constituted by a principle that has since long been used in international commercial arbitration: the *Doctrine of Separability*. The *Doctrine of Separability* postulates that the agreement to submit a certain dispute related to a contract to international arbitration is separate from the contract to which it refers. This means, essentially, that the invalidity that may affect the substantive contract, including the invalidity that derives from criminal conduct of one of the parties, does not reverberate on the dispute resolution clause, and hence on the jurisdiction of the arbitral Tribunal. For instance, in the case of a contract that is invalid because it has been procured through corruption, the *Doctrine of Separability* determines that the arbitral Tribunal before which any dispute related to that contract is brought will still be able to exercise jurisdiction on the claimant's case.

The *Doctrine of Separability* is applied consistently both at the domestic level and at the international level. The employment of the doctrine is so wide, general and uncontested that the *Doctrine of Separability* corresponds to a general principle of law under Article 38 of the Statute of the International Court of Justice and to a principle of *Transnational Public Policy*.

There is scholarship in support of the first proposition. According to Luzzato, today the principle of autonomy is so widely recognised that it can be characterised as a general principle of international arbitration law.[11] Similarly, Dimolitsas held that separability is a general principle of international arbitration.[12] According to Fouchard, Gaillard and Goldman, separability is a genuinely transnational rule of international commercial arbitration". [13] Henry Motuslky indicated that the Doctrine of Separability is symptomatic of the emergence of an international legal order. And, other scholars, like Professor Douglas, maintain that the Doctrine of Separability is incorporated in the transnational principles that sustain international arbitration.[14]

As regards the public policy behind separability, this is aimed at preserving international arbitration as a viable mechanism of dispute resolution, and at preventing that the jurisdiction of an arbitral Tribunal may be frustrated simply by the invocation of the claimant's illegal conduct.

The thesis further demonstrates that the *Doctrine of Separability* originally developed in the laboratory of international commercial arbitration, also applies to international investment arbitration: either as a principle directly incorporated in the procedural rules that govern international investment arbitration, or by virtue of its status as a general principle of law under Article 38 of the Statute of the International Court of Justice, and the normative power that derives therein. Despite some scholars denouncing a structural incompatibility between international investment arbitration and the *Doctrine of Separability*, there is case law to support that there is no structural hindrance to the application of the *Doctrine of Separability* to investment arbitration.

[11] Draetta, U. et Al. *The Chamber of Arbitration of Milan Rules: A Commentary*. Milan: Jurispub, 2012: 185
[12] Dimolitsa, A. (1988), *op cit.*, 223.
[13] Sanders, P. (1978), *op. cit*., 31.
[14] Douglas, Z. (2014), *op. cit*., 158. See also Solimene, F. «The Doctrines of Kompetenz-Kompetenz and Separability and their Contribution to the Development of International Commercial Arbitration.» *The International Journal of Arbitration, Mediation and Dispute Management*, 2014: 249 – 255, 253, according to whom: "*Today, the principle of the separability is widely applied and recognised as a general principle included in leading institutional arbitration and in arbitration statutes evidenced in practice and by leading writers on the topic*."

In *Plama v Bulgaria*, the Tribunal was faced with a claim brought under the Energy Chater Treaty concerning breach by Bulgaria of the standards of protection of an investment made under the Treaty. The investor, however, had committed some illegality in the making of the investment (misrepresentation and fraud), and the Respondent State attempted to raise a *Defence of Illegality* to the effect of disabling the jurisdiction of the Tribunal. The Tribunal, in rejecting the defence, made the following analysis: *"[t]he alleged misrepresentation relates to the transaction involving the sale of the shares of Nova Plama by EEH to PCL and the approval thereof given by Bulgaria in the Privatization Agreement and elsewhere. It is not in these documents that the agreement to arbitrate is found. Bulgaria's agreement to arbitrate is found in the ECT, a multilateral treaty, a completely separate document. The Respondent has not alleged that the Claimant's purported misrepresentation nullified the ECT or its consent to arbitrate contained in the ECT. Thus not only are the dispute settlement provisions of the ECT, including Article 26, autonomous and separable from Part III of that Treaty but they are independent of the entire Nova Plama transaction; so even if the parties' agreement regarding the purchase of Nova Plama is arguably invalid because of misrepresentation by the Claimant, the agreement to arbitrate remains effective."*[15]

Even more recently, on 30 August 2018, the arbitral Tribunal in Chevron v Ecuador framed the relationship between the agreement to arbitrate and the BIT in terms of separability. It held: *"The Parties' consent is contained in the separate Arbitration Agreement subject to international law between the Claimants and the Respondent, that was formed upon the Claimants' written acceptance (by their Notice of Arbitration) of the Respondent's standing, general offer to arbitrate contained in Article VI of the Treaty. Under international law, the Parties' Arbitration Agreement, made pursuant to Article VI(2) of the Treaty, is legally autonomous, or "separable", from other provisions of the Treaty.*[16]"

[15] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jusridiction of 8 February 2005, para 130.

[16] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23, Second Partial Award of 30 August 2018, para 785. The footnote to the passage quotes, in turn: "*S. Schwebel, International Arbitration: Three Salient Problems (1987), "Part 1: The Severability of the Arbitration Agreement", p. 60ss. See also Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para 212, CLA-67, RLA-350; Concurring and Dissenting Opinions of Howard M. Holtzmann with respect to Interlocutory Awards on Jurisdiction in Nine Cases Containing Various Forum Selection*

In terms that are even more explicit for the purposes of the present thesis, the Tribunal in *Malincorp v Egypt* recognised the full applicability of the principle of the autonomy of the arbitral clause of commercial arbitration, also to investment arbitration, and used this basis to rule out that the investor's illegality could deprive the Tribunal of its jurisdiction. It held: *"The solution derives, first, from the principle of autonomy of the arbitration agreement, a principle so fundamental that it also has its place in investment arbitration. According to that principle, defects undermining the validity of the substantive legal relationship, which is the subject of the dispute on the merits, do not automatically undermine the validity of the arbitration agreement. Thus, an arbitral tribunal is competent to decide on the merits even if the main contract was entered into as a result of misrepresentation or corruption. Only defects that go to the consent to arbitrate itself can deprive the tribunal of jurisdiction. In the present case, there is nothing to indicate that the consent to arbitrate, as distinct from the consent to the substantive guarantees in the bilateral Agreement, was obtained by misrepresentation or corruption or even by mistake. The allegations of the Respondent relate to the granting of the Concession. However, it is not the Contract that provides the basis for the right to arbitrate, but the State's offer to arbitrate contained in the Agreement and the investor's acceptance of that offer. The offer to arbitrate thereby covers all disputes that might arise in relation to that investment, including its validity."*[17]

This thesis also shows that the transposition of the *Doctrine of Separability* from international commercial arbitration to international investment arbitration is not hindered by certain differences that characterise the relationship between the two forms of dispute resolution, in particular the privity model that is proper to international commercial arbitration, and the more public character that is a feature of international investment arbitration. While some scholars posit that the private/public divide constitutes a barrier to cross fertilization, this thesis demonstrates that this devide is not as deep as it is said to be, since elements of privity and publicity feature in both commercial and investment arbitration and that,

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Clauses (Cases Nos. 6, 51, 68, 121, 140, 159, 254, 293 and 466), 5 November 1982, 1 Iran-US Claims Tribunal Reports 284, p. 292"

[17] Malicorp Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/08/18, Award of 7 February 2011, para 119.

in any event, the divide is of scarce relevance with regard in particular to the question as to whether the *Doctrine of Separability* can be applied to international investment arbitration.

On the first aspect, in sum it can be said that international commercial arbitration was born as a private method of dispute resolution, with a defining role for party autonomy and a certain limit as to its usage to disputes that are characterised by an evident public component. The will of the parties is fundamental both as regards the decision to arbitrate, and as regards the modalities of conduct of the arbitral proceedings. However, overtime, a strictly contractual nature of international commercial arbitration has given way to a conceptualisation of this method of dispute resolution to which considerations of public law and collective interests are not alien. This is not only reflected in the evolution of the theory of international commercial arbitration, but also at a more practical level. Public laws, and public interest considerations, slowly, have crept into this mechanism of dispute resolution. The correct characterisation of the public/private discourse in international investment and commercial arbitration is therefore one of preponderance, rather than one of structural incompatibility of international commercial arbitration to deal with disputes that are characterised by some public interest. At most, what can be said is that: *"The level of public interest in arbitration proceedings is normally higher in investment arbitration than in ordinary commercial arbitration."*[18] At the same time, whereas investment arbitration has a public component, as described above, it has not lost its connection with international commercial arbitration, of which it retains several *private* features, not only in terms of procedure. Ultimately, in this blurring of private and public, the entire clash of paradigm approach should not be extremised, to the point of rendering it an automatic hindrance to cross-fertilisation between international commercial, and investment arbitration, since:*"The public/private [regime] problematic is really a microcosm of a fundamental problem running throughout all areas of the law. To ponder whether the international investment regime is transnational public governance regime or a private dispute settlement system is to ask the wrong question. International in- vestment law is at once*

[18] Feliciano, F. (2012) *op.cit*., 10.

neither and both of these things. They are two sides of the same coin, and each shapes and defines the other".[19]

On the second aspect, the dissertation explains that while the public/private divide may be relevant in many aspects of the relationship between international commercial arbitration and international investment arbitration, that is not the case with regard to the question as to whether cross-fertilization, from the perspective of the *Doctrine of Separability*, can occur.

Based on these findings, in this thesis the *Doctrine of Separability* has been applied to the *Defence of Illegality*, in the three articulations in which it can present itself. In all three cases, the effect of the *Doctrine of Separability* has been that of limiting the operation of the *Defence of Illegality* and the most drastic effects that its broad conceptualization determine on the jurisdiction of an arbitral Tribunal and on the admissibility of the claim. Indeed, the *Doctrine of Separability* is what determines that the *Defence of Illegality* must be applied *narrowly*, as opposed to *broadly*. And that investor's misconduct must be assessed at the merits, as opposed as at the preliminary level.

In particular, with regard to the *Defence of Illegality* that operates through an *in accordance with Host State law* clause, the *Doctrine of Separability* constitutes a hermeneutical guidance in the exercise of interpretation of the clauses under the principle of the Vienna Convention. This is so because the *Doctrine of Separability*, as a general principle of law, operates not only as a source of norms, but also as an interpretive tool under international law. This is particularly so in the context of investment arbitration, in which general principles play a significant role: And, as noted by one scholar,*"[W]hile general principles of law are a source of law that plays a marginal role in most areas of public international law, however, such principles could be expected to play a significant role in international investment law. One reason is that there is a close substantive relationship between public international law, private international law, and domestic law in relation to international investments. Moreover, ICSID tribunals often have competence to*

[19] Maupin, J. (2014) *op. cit.*, 66.

make decisions in accordance with international law, domestic law, and contractual obligations simultaneously".[20]

The consequence is that, unless it can be established unequivocally that the *in accordance to Host State law* clause is aimed at disabling the jurisdiction of the Tribunal (or at determining the inadmissibility of the claim in), the *Doctrine of Separability* points towards an interpretation of *in accordance with Host State law* clauses that do not make them general legality requirements, but only clauses that operate a *renvoi* to domestic law as regards the definition of what assets can legally constitute investments under the domestic principles of the forum State; and that, as such, they do not normally mandate a Tribunal to decline its jurisdiction if the investor has procured its investment illegally.

The application of the *Doctrine of Separability* to a *Defence of Illegality* that operates through the door of the *Legality Doctrine* requires a somewhat more complex analysis, based on the category of *Transnational Public Policy*. The first issue to establish in particular is what crimes result in the violation of a norm of *Transnational Public Policy* and what crimes do not result in such a breach.

A *Transnational Public Policy* against bribery certainly can be said to exist. There is in fact a convergence of national laws, international criminal conventions, arbitral decisions and scholarly articles that bribery, in its manifestation as the use of public resources for a private gain, constitutes an affront to morality that displays its effects on the economy, society and also democratic dimension of the countries that are involved. This is because, as lamented by Professor Edmundo Bruti Liberati: *"[C]orruption is a serious criminal offence, which threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society."*[21] The

[20] Fauchald O. K. (2008), *op.cit*., 312; See also Gazzini, T. «General Principles of Law in the Field of Foreign Investment.» *The Journal of World Investment & Trade*, 2011: 103 – 119.

[21] Bruti Liberati, E. «Inquires, Prosecutions and Penalties in Corruption Cases.» *5th European Conference of Specialised Services in the Fight Against Corruption*. Istanbul, 2000. See also Kofi Annan. In his foreword to the 2003 United Nations (UN) Convention against Corruption, he described corruption as "*an insidious plague that*

positions of those who have engaged in an accurate analysis of the subject is that: *"[I]nternational interests and the general interest in a normal functioning of international trade appear to coincide and to justify the conclusion that there does exist a principle of truly international or Transnational Public Policy which sanctions corruption and bribery in contracts."*[22]

The degree of convergence in the criminalization of bribery that allows to distill a norm of *Transnational Public Policy* against it does not appear to exist with regard to norms that prohibit fraud in international business relations.[23] While provisions exist that indicate that fraud is contrary to the public policy of several countries, other pieces of legislation cast doubt as to whether fraud is a behaviour that should be addressed under the rubric of public policy. For instance, the Belgian Judicial Code provides that an arbitral award can be set aside if it was obtained by fraud *or* if it is contrary to public policy.[24] The provision, on its face, seems to indicate that fraud is not one of those conducts that fall squarely into the category of behaviour banned under public policy.

If one moves the focus of the attention to the international conventions, the sheer number of instruments that have been adopted to criminalise bribery demonstrates the higher level of condemnation that this conduct has attracted, if compared to fraud. In addition to this, it is difficult to identify international instruments that criminalise fraud in a direct manner – most often, fraud is sanctioned indirectly, in the context of provisions that are aimed at deterring corruptive conduct. For example, the OECD Convention against bribery contains norms that require

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(…)undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish".

[22] Lalive, P. (1986), *op.cit*, 275-276. See also, LLamzon, A. and Sinclair, A. «Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct in Legitimacy: Myths, Realities, Challenges.» ICCA Congress Series 451 – 530, 519 - 520. "*Corruption of state officials is generally considered as incompatible with fundamental moral and social values and thus constitutes both a clear violation of 'international public policy' or 'transnational public policy' and also of the national public policy of most states. This has been recognized by a large number of judicial decisions and by international arbitrators alike in commercial arbitrations, applying numerous different national laws.*"

[23] Despite this, respondents in the context of illegality defences have attempted to portray fraud as prohibited by a principle of transnational public policy. For instance, in its memorial on jurisdiction and admissibility in Kim et Al v Uzbekistan, the Host State argued as follows: *"[i]n addition to violating numerous provisions of Uzbek law, Claimants' fraud on the market violated transnational public policy" as "the securities laws and regulations of other countries are for the most part universal in requiring truthful and accurate disclosures and prohibiting concealment, fraud of manipulation".*

[24] Belgian Judicial Code, Art. 1704(2)(a) & (3) (a)-(c).

keeping *complete and accurate financial records to avoid off the book or secret accounts or transactions, non existent or deceptive descriptions of expenditures, and the use of false documentation.*[25] Whereas the conduct describes typically fraudulent behaviours, these are addressed in the context of the wider criminalisation of corruption in international business transactions.[26]

As regards the violation of the laws of the Host State, while normally these do not result in a violation of a norm of *Transnational Public Policy*, when the norm that is transgressed constitutes a gross human rights violation, or a violation of *jus cogens*, it is certain that the breach also engages a violation of *Transnational Public Policy*.

The analysis above provides the methodology to define when the *Defence of Illegality* that operates through a *Defence of Illegality* should result in a declaratory of lack of jurisdiction, and when it should not. In contrasting the *Separability Doctrine* (which corresponds to a norm of *Transnational Public Policy*), with a *Defence of Illegality* based on conducts that do not breach it, the preservation of the *Transnational Public Policy* on separability means that the *Defence of Illegality* cannot have effects on either the jurisdiction of the Tribunal, nor the admissibility of the claim, but rather requires that misconduct not in breach of *Transnational Public Policy* be addressed at the merits stage of the proceedings. Things are different in the case of conducts that constitute a breach of *Transnational Public Policy,* such as corruption and certain serious violations of the laws of the Host State. The *Transnational Public Policy* against these violations must be contrasted with the *Transnational Public Policy* at the basis of the *Doctrine of Separability.* The thesis demonstates that the *Transnational Public Policy* against criminality should not always, and automatically, prevail over the *Transnational Public Policy* at the basis of the *Doctrine of Separability*. In particular, even among violations of

[25] Lamm, C. (2010), *op. cit*, 717.

[26] Cremades, B. and Cairns, D. «Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud.» Arbitration - Money Laundering, Corruption and Fraud, Dossier of the ICC Institute of World Business Law, Karsten, A. and Berkeley, K. Paris: ICC Publishing, 2003, 65 – 77, 68 "*There is no doubt today that corruption and money laundering are not to be tolerated or condoned in international commerce or that the suppression of corruption and money laundering is an established part of international public policy to which international arbitrators must have regard. The place of fraud in international public policy is complicated by difficulties in definition, but certainly some manifestations of fraud, particularly those that might conceal illegal activities such as corruption and money laundering, are without doubt pr[o]scribed by international public policy."*

Transnational Public Policy it is possible to establish a hierarchy, and distinguish between more serious, and less serious breaches. Only conduct corresponding to the most serious violations of *Transnational Public Policy* should determine the displacement of the *Doctrine of Separability*, and hence prevent a Tribunal from entertaining a case in the merits. These violations are essentially limited to breaches of human rights and violations of *jus cogens* norms. Corruption, on the other hand, while certainly being a conduct in breach of *Transnational Public Policy*, does not reach the threshold of offensiveness of the breach that is necessary to displace the *Transnational Public Policy* on separability. This finding, although somewhat controversial, is supported by case law of domestic courts that have deal both with contracts aimed at corruption, and with contracts that procured by corruption.

The question was addressed in two recent cases brought before English Courts: in 2014, in the case *Honeywell International Middle East Ltd v Meydan Group Llc* and in 2016 in the case of *National Iranian Oil Company v Crescent Petroleum.*[27]

In the first case, Honeywell, a company incorporated in Bermuda, sued Meydan, a company incorporated in Dubai who was the owner of the Ned al Sheba racecourse, a venue where exhibitions and concerts are hosted.

On 7 June 2009, an agreement was signed between Meydan and Honeywell for the execution of certain works at the Ned al Sheba. Honeywell had secured the contract through a public tender process. After a first phase in which payments were regularly made by Meydan to Honeywell, these ceased in February 2010. On 15 July 2010 Honeywell commenced arbitration proceedings against Meydan by submitting a Request for Arbitration to DIAC. On 19 January 2012 Meydan Group LLC commenced arbitration proceedings against Honeywell.

On 1 March 2012 the Tribunal in the first arbitration found for the claimant and awarded Honeywell the amount due to it under the contract. The Tribunal in the

[27] National Iranian Oil Company v Crescent Petroleum Company International, Crescent Gas Corporation Ltd [2016] EWHC 510 (Comm).

second arbitration refused to reconsider the subject of that award on the grounds of res judicata.

On 12 November 2012, Honeywell made an application to the English courts under s.101 (2) of the Arbitration Act 1996 for leave to enforce the Award in the same manner as a judgment or order of the court. By an order made on 12 November 2012 Mr Justice Akenhead gave leave to enforce the Award in the same manner as a judgment or order of the court to the same effect, but ordered that the award should not be enforced for 21 days if Meydan applied within those 21 days to set aside the award, until after such application had been finally decided.

The application to set aside the award was submitted by Honeywell within the 21-day limit. It was based, among other things, on the claim that enforcement of the Award *would be contrary to the public policy of the United Kingdom because the Award was allegedly based upon a contract procured by bribing public officials*.[28] The affirmation that the contract had been procured through bribery was substantiated by a series of documents, including a copy of a bribery complaint dated 8 October 2013 made to the Public Prosecutor of the Government of Dubai against Honeywell and a copy of a letter dated 11 November 2013 from the head of the Dubai Public Funds Prosecution Department to the Head of Bur Dubai Police Station requesting that investigations be conducted.

In ordering the enforcement of the award, the judge held that even if the contract had been induced by bribery, *the arbitration provision was severable and therefore there was still a valid arbitration agreement between the parties*. It also held that whilst bribery is clearly contrary to English public policy and contracts to bribe are unenforceable, as a matter of English public policy, *contracts which have been procured by bribes are not unenforceable.*[29]

[28] Honeywell International Middle East v Meydan Group [2014] 2 Lloyd's Rep, para 173.
[29] Honeywell International Middle East v Meydan Group [2014] 2 Lloyd's Rep, para 133.

A similar outcome was endorsed by English Courts in 2016 in *National Iranian Oil Company*.[30] In April 2011, the claimant, National Iranian Oil Company, had entered into a gas supply and purchase contract with Crescent Petroleum, an upstream oil and gas company from the Middle East. The contract was governed by Iranian law and included a provision whereby all disputes relating to the validity of the contract were to be referred to arbitration. In 2003, Crescent Petroleum decided to assign the contract to Crescent Gas, one of its controlled companies. In 2009, Crescent Petroleum and Crescent Gas commenced arbitration in the UK, claiming breach of contract as a result of National Iranian Oil Company's failure to deliver the amounts of gas agreed under the 2001 contract. National Iranian Oil Company raised objections to the jurisdiction of the arbitrators arguing that the contract had been secured through the payment of bribes by Crescent Petroleum, which also affected the legality of the contract assigned to the Crescent Gas. The Arbitral Tribunal dismissed the respondent's *Defence of Illegality* and found that National Iranian Oil Company was actually in breach of its contract for failing to provide gas as stipulated under the applicable agreement. On the question of its jurisdiction, the Tribunal denied that the contract had been procured through corrupt payments – despite being satisfied that there was evidence of an attempted bribery.

National Iranian Oil Company challenged the award in the UK High Court under section 68 of the Arbitration Act 1996, on grounds of serious irregularity, by repeating the argument that the contract was unenforceable owing to its having being procured through bribery and corruption. National Iranian Oil Company argued that that the tribunal had erred in not finding evidence of bribery since the proven discussions and attempts to corruption were enough for the invocation of a *Defence of Illegality*. According National Iranian Oil Company, these discussions and attempts were sufficient for the contract to have been *tainted* by illegality,[31] which tainting made it unenforceable on grounds of public policy. Both defendants resisted the argument, claiming that even if the contract were to be found as

[30] National Iranian Oil Company v Crescent Petroleum International Ltd & Anor, 4 March 2016, [2016] EWHC 510 (Comm).
[31] National Iranian Oil Company v Crescent Petroleum International Ltd & Anor, 4 March 2016, [2016] EWHC 510 (Comm), para 41.

procured through bribery, this would not render it unenforceable on public policy grounds.

The central issue for the Court to determine was whether the arbitral award would have been unenforceable due to its contrariness to public policy, had it been possible to establish that the contract had been procured by corruption. Judge Burton J, sitting on the court, held that public policy considerations did not, in this case, preclude the enforcement of a contract procured or *tainted* by bribery or corruption. Expanding on a distinction outlined in the case Honeywell International Middle East Ltd v Meydan Group LLC, Burton J signalled the difference between enforcing *a contract aimed at pursuing an illegal act* such as corruption and *a contract which is illegally procured*. He went on to explain that contracts procured by corruption could be rendered voidable at the election of the innocent party.[32] Consistent with the line of authority established in *Honeywell and Westacre*, Burton J considered that there is no *public policy requiring an English court to set aside a contract procured by illegality*. *A fortiori*, he explained that there is no English public policy rule requiring a court to refuse to enforce a contract which has been preceded, and is unaffected, by a botched attempt to bribe.[33] Despite acknowledging the growing international condemnation of bribery and the international movement against corruption, Judge Burton J was cautious to introduce the concept of *tainting* an otherwise legal arrangement.[34] Ultimately, therefore, the position of the Judge was that enforcing a legal contract that may have been procured by bribery (but that is otherwise legal as regards its scope and purpose) is *not contrary to public policy.*

In conclusion, while bribery, *per se* and in general terms, is contrary to *Transnational Public Policy*, there are many nuances to the way in which such a *Transnational Public Policy* breach may present itself. The *National Iranian Oil Company* case demonstrates that these can concern, for instance, the way in which

[32] National Iranian Oil Company v Crescent Petroleum International Ltd & Anor, 4 March 2016, [2016] EWHC 510 (Comm), paras 43 ff.
[33] National Iranian Oil Company v Crescent Petroleum International Ltd & Anor, 4 March 2016, [2016] EWHC 510 (Comm), para 49(3).
[34] National Iranian Oil Company v Crescent Petroleum International Ltd & Anor, 4 March 2016, [2016] EWHC 510 (Comm), para 49(3).

the bribery manifests itself (as a way to secure a contract, or as the object of the contract) and that these modalities can actually have an impact on the very question of the contrariety to public policy of bribery; the *Westacre* case signals the different levels of intensity in the contrariety to public policy of certain conducts and seems to conclude that bribery positions itself at a low level of offensiveness, when compared to other violations. The *Defence of Illegality* in the context of an investor-State relationship is not alien to these nuances and complexities. The complexities are even greater due to the need to balance the public policy against bribery (and the dismissal of a claim at the preliminary level that it would entail) with the public policy in favour of separability (that would require on the contrary the claim to be entertained on its merits). A Tribunal that failed to address a claim on its merits on the basis of the general statement that bribery violates *Transnational Public Policy* would fail to interface itself with these complexities. A Tribunal that automatically assumed that the public policy against bribery trumps the public policy against separability, would not engage in the exercise of balancing competing values that is central to the reasoning and the decision making process of investment arbitral Tribunals.

Lastly, the thesis will apply the *Doctrine of Separability* to a *Defence of Illegality* based on the *Clean Hands Doctrine*. This is the simplest of the scenarios addressed in this thesis. In fact, since the *Doctrine of Separability* is a general principle of law which corresponds to a norm of *Transnational Public Policy*, and the *Clean Hands Doctrine* does not have this status, and is not recognised as a general principle in international law, the latter must prevail in the conflict between the two. Therefore, also the last way in which the *Defence of Illegality* can operate does not authorise a Tribunal to decline to exercise its jurisdiction, or declare the inadmissibility of an investor's claim.

The outcome of the application of the *Doctrine of Separability* to the *Defence of Illegality*, as explained in the paragraphs above, is that in the vast majority of cases, an arbitral Tribunal will have to address investor's misconduct at the merits phase of the proceedings. How is an arbitral Tribunal to sanction investor's misconduct at

that stage? The answer to this question is provided by an analysis based on criminal law categories, and in particular on the notions of reciprocal responsibility and culpability of the parties to a crime. This constitutes the criminal law dimension of the hybrid model proposed in this dissertation.

In particular, unlike the models proposed by scholars who have investigated criminality in investment arbitration, the model proposed here moves from the consideration that not all criminality is the same, and that investor's criminal conduct therefore cannot be treated with a unitary response, but rather requires an approach that takes into account the specific, and defining features of the crime committed by the investor. For these purposes, the thesis proposes a basic taxonomy of investor misconduct, by distinguishing crimes that are unilateral in nature, in the sense that they can be committed by the investor alone, without any cooperation on the part of the Host State; and crimes that are bilateral in nature, in the sense that they cannot be completed except with the contribution of both the investor and the Host State (as is the case, typically, in corruption). The thesis elaborates further this basic taxonomy to identify the respective levels of culpability of both the Host State and the investor, in relation to each category of crimes. For example, in the case in which the investor has committed fraud to the detriment of the Host State, the investor will normally retain the full culpability for the crime, since, structurally, fraud is a unilateral crime. However, it may be possible that the Host State has condoned that crime committed against it, for example by exploiting the investment to its advantage, despite being aware of its illegal nature. In this case the level of respective culpabilities of the parties may shift, and a unilateral crime like fraud may nevertheless determine the apportionment of part of the culpability also on the Host State.

Also, in the event the investor has unilaterally violated the laws of the Host State to secure an investment, it will normally retain the full culpability for its conduct. However, it is possible to identify circumstances in which, also in the case of a unilateral violation of law, the Host State may have to be allocated a part of the culpability for the violation. For instance, when the investor has committed a inculpable mistake due to the lack of clarity of the law of the Host State, and

therefore has not acted with the full intent of violating the law; or when the Host State had represented formally to the investor that its conduct was in line with the laws and regulations of the forum, only to change its mind at a later stage.

Despite being a viable method also with regard to unilateral crimes, it is with respect to bilateral crimes that the balancing of the conduct of both the investor and the Host State becomes crucial. In the case of corruption, a structurally bilateral crime, normally both the investor and the Host State retain a measure of mutual responsibility and culpability. Criteria can also be developed to apportion this shared culpability in more specific terms to each of the parties to the crime. For example, bribe solicitation and bribe extortion correspond to a higher level of culpability on the part of the Host State, and to a lower level of culpability on the part of the investor, when compared to situations in which it is the investor who takes the initiative of offering the bribe. Similarly, failure to prosecute the crime of corruption by the Host State at the domestic level can also signal a marked level of culpability on the part of the State, in a similar manner to failure to implement at the level of domestic legislation the provisions of the international regulatory regime against bribery, to which States are bound. From the perspective of assessing the culpability of the investor, in a similar manner, investors who commit corruption in furtherance of a company culture, or policy, retain a higher level of culpability when compared to investors who have engaged in corruption only occasionally, and due to the *ultra vires* acts of one or more of their employees. Indeed, in this case, the corrupt employee does not act in furtherance of a corruption-prone culture of the investor, but rather against the business culture of the investor.

The thesis proposes that the graduation of culpabilities between the investor and the Host State, and the balancing of their respective conducts, should inform the analysis of the Tribunal at the merits stage, and should be the basis for the determination of the appropriate sanction to the misconduct committed by the investor. In particular, that such sanction should be proportionate and adequate to the investor's level of culpability in the commission of the crime, but that also the Host State, when it has engaged in criminal conduct, and when it retains in any

event a degree of culpability with respect to the investor's misconduct, should be equally sanctioned. After all, even those Tribunals that have concluded that investor's misconduct should be sanctioned at the jurisdictional level of proceedings, have demonstrated a certain uneasiness with this approach, for its intrinsic unfairness. By way of example, the Arbitral Tribunal in World Duty Free v Kenya, in denying its jurisdiction over a case in which the investor had paid a bribe specifically solicited by the President of Kenya, noted as follows: *"It remains nonetheless a highly disturbing feature in this case that the corrupt recipient of the Claimant's bribe was more than an officer of the State but its most senior officer, the Kenyan President; and that it is Kenya which is here advancing as a complete defence to the Claimant's [World Duty Free's] claims the illegalities of its own former President. Moreover, on the evidence before this Tribunal, the bribe was apparently solicited by the Kenyan President and not wholly initiated by the Claimant. Although the Kenyan President has now left office and is no longer immune from suit under the Kenyan Constitution, it appears that no attempt has been made by Kenya to prosecute him for corruption or to recover the bribe in civil proceedings".*[35]

Similarly, some Tribunals have timidly started to recognise the importance of balancing the behaviours of both the investor and the Host State in the context of an assessment of investor's misconduct. In the case *Hesham Talaat v Republic of Indonesia*, the Tribunal seemed to recognise the importance of addressing illegality, especially illegality of a bilateral nature, at the merit phase of the proceedings, so as to allow a holistic assessment of the respective conducts of the parties. In the words of the Tribunal: *The Tribunal considers that, […] the Tribunal must look closely at the Parties' claims concerning the allegations of criminal conduct, which include the corruption and money laundering allegations against the Claimant on the one hand, and the solicitation of bribes allegations against the Respondent on the other hand. This is not a question of jurisdiction but of the merits, to be dealt with at the merits phase of this arbitration.*[36]

[35] World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award of 4 October 2006, para. 180.
[36] Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims of 21 June 2012, at 99.

The balancing of the conduct of the parties on the basis of a mutual standard of culpabilities can occur at the merits stage essentially in three ways: a) through an apportionment of damages; b) though the provision of restitutionary remedies; c) through an apportionment of costs. From the first perspective, this thesis proposes that the sanction to the criminal misconduct in which the investor has engaged should consist in a reduction of the amount of damages that are awarded to it as a consequence of the Host State having breached the standard of protection owned to the investment under international law. For instance, in the typical situation in which the investor has corrupted the Host State to secure a certain investment that is then expropriated illegally by the Host State, and has therefore found on the other side of the corruptive scheme a willing official of the Host State ready to accept the bribe, the consequence of criminality should not be the outright dismissal of the investor's claim, but rather a substantive reduction of the amount of damages that would have been owned to it, had corruption not occurred. For instance, if 100 is the amount that should have been paid to the investor, had corruption not occurred, the fact that corruption has occurred means that such amount is halved, indicatively, to around 50. In addition, the fact that the investor has taken the initiative of proposing the bribe should account for an additional apportioning of culpability to it, *vis à vis* the culpability of the Host State. The model proposes that this should account for an additional decrease of the damages to which the investor is entitled owing to the conduct of the Host State, for example by another 10%. In this way, the amount of damages owned to the investor becomes only 40, out of the 100 that it would have been entitled to, had it not engaged in corruption. Now, let us imagine that the act of corruption committed by the investor has not been accidental, and contrary to the investor's policies against corruption; but rather that the act of corruption is the consequence of the lack of an internal anti-corruption system, or, even more seriously, an act that stems from a policy of the investor to bribe foreign officials, in order to secure investments in foreign countries. In this case, the amount of damages recognised to the investor should be diminished further, due to the high level of culpability and the disvalue of its conduct.

The reverse situation is constituted by the case in which again, both parties have engaged in the corrupt conduct, but, for example, the investor has adopted an internal system to deter the commission of corruption, and the initiative to bribe has not been the investor's, but rather has derived from a specific request in this sense by the Host State, which has therefore solicited the bribe. In this case, the investor is also not entitled full damages, but the culpability of the Host State in the bribery scheme is greater than that of the investor. So, once again, the following calculation is proposed: 100 is the amount of damages that the investor would have been entitled to, had corruption not occurred. The bilateral crimes of corruption determines that the damages owned to the investor are reduced to 50, due to its culpability in the crime, but not totally annulled, due to the culpability that also the Host States retains in the criminal conduct. Now, if the Host State has solicited the bribe, an extra layer of fault is apportioned to it, so that the investor is entitled not to 50, but to 60. If the Host State has not limited itself to soliciting the bribe, but it has extorted it by threat, then this circumstance may mean that the investor has paid the bribe under duress, and hence is entitled to the payment of full damages, despite having engaged formally in the payment of a bribe. The examples presented above give an idea of how the model based on mutual reparation of culpabilities would work in practice.

At the level of remedies, this thesis will show that cases exist in which, also in respect of contracts procured by corruption, the parties can be restituted in *integrum*, except as regards the payment of the bribe, which it would be contrary to *Transnational Public Policy* to reimburse to the bribe payor.

Also restitutionary remedies are a way to apportion more equitably the respective culpabilities of the parties in the commission of a certain crime. In addition to a modulation of the damages based on the respective culpability of the parties, the role that the investor and the Host State have respectively played in a certain crime can be considered in the context of restitutionary remedies. The Tribunal in World Duty Free noted that: *Illegal contract's non-contractual legal effects are significant under English law in regard to possible restitutionary and proprietary*

consequences.[37] The Tribunal thus recognized at least the possibility of some kind of restitutionary redress for a claimant who has engaged in some form of illegality. Later in the Award, the Tribunal concluded its analysis by leaving open the possibility "*of legal consequences following the avoidance of the Agreement*", implying that some form of restitution is possible – although this was qualified by stating that "*restitutio in integrum cannot include the return of the bribe to the Claimant*."

There have indeed been cases in which the bribe-payer is allowed to seek the restitution of what has been performed in pursuance of the contract, minus the bribe that has been paid.[38] These can be found both in domestic jurisdictions, and at the international level. ICC Case No. 11307, for example, concerned a situation in which the Parties had entered into a contract, governed by South African law, regarding the maintenance of airplanes. The claimant avoided the contract after discovering that bribes had been paid to secure it and demanded the repayment of the sums already paid, in excess of 50 million dollars. The arbitral Tribunal permitted the claim on these grounds, but gave compensation to the respondent in respect of the services that had been performed. The amount was calculated by deducting from the total price of the contract the bribe-commission paid by the Respondent to an external advisor to secure the contract. This solution is not an isolated one. In *Logicrose Ltd v Southend United Football Club Ltd (No.2),* the English Court recognised that the claimant was entitled to restitution (again, deducting the amount of the bribe) and therefore stated the general principle that a contract that is tainted by illegality is not necessarily a contract that leaves the bribe-giver empty handed. Oftentimes, this outcome is justified on the basis of the doctrine of unjust enrichment, as an equitable doctrine existent in civil law systems and common law systems alike, and autonomously under international law as a general principle.[39] Back in 1957, Schwatzemberger already wrote that: *"On the*

[37] World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award of 4 October 2006, para. 162
[38] *Logicrose Ltd v Southend United Football Club Ltd (No.2)*, [1988] 1 WLR 1256.
[39] Friedman, W. *The Changing Structure of International Law*, New York, Columbia University Press 1964, 313. Vohryzek-Griest, A. T. T., «Unjust Enrichment Unjustly Ignored: Opportunities and Pitfalls in Bringing Unjust Enrichment Claims Under ICSID» . *Student Scholarship Papers.* 2008, 1 – 89. https://digitalcommons.law.yale.edu/student_papers/72.

fringes of international law, the principle [of unjust enrichment] tends already to be accepted as a general principle of law, recognised by civilised nations"[40]

The principle of unjust enrichment has been invoked *even* to justify the enforcement of illegal contracts (as opposed to the granting of restitutionary remedies), when not to do so would have determined extremely unfair consequences. The Court of Appeal of California held for instance that enforcing an illegal contract would be the only solution "*when to do otherwise would unjustly enrich the defendant*".[41] Referring to the same principle, another Californian court had ruled previously that: *"The rule that the courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound. The rule was conceived for the purposes of protecting the public and the courts from imposition. It is a rule predicated upon sound public policy. But the courts should not be so enamored with the Latin phrase 'in pari delicto' that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered."*[42]

Actually, the possibility for an arbitral tribunal to resort to restitutionary remedies based on unjust enrichment other than contractual remedies finds significant support in the UNIDROIT Principles 2010, which suggest recognizing restitutionary remedies when reasonable under the circumstances.[43] According to Comment 1 to Article 3.3.2 UNIDROIT Principles 2010: *"Even where as a consequence of the infringement of a mandatory rule the parties are denied any remedies under the contract, it remains to be seen whether they may at least claim*

[40] Schwarzenberger, G. *International Law*: Stevens & Sons:1957, 580. "*It may be asked: What are these 'general principles of law recognized by civilized nations'? Where are they to be found? It is not possible to point to any code or book containing them. Much of the content of public international law proper has been developed by tribunals and by writers out of these general principles, and my view is that the same source will prove equally fruitful in the application and interpretation of thosecontracts which, though not interstate contracts and therefore not governed by public international law stricto sensu, can more effectively be regulated by general principles of law than by special rules of any single territorial system. They will be developed both by contracting parties who realize the suitability of general principles of law and by tribunals which are called upon to adjudicate upon contracts of this type. I do not propose to prepare a list of the rules of law likely to be recognized as 'general principles'. 'Unjust enrichment' has been referred to above in the Lena Goldfields Award, and I shall mention only one other likely candidate, among many, for recognition [Respect for Acquired Rights]".*

[41] Johson v Johnson, Court of Appeal California, 1987, 3d 551 at 556.

[42] Denning v Taber, Court of Appeal of California, 1954, 2d 253, at 280.

[43] Elgueta J. R, (2016), *op.cit*.

restitution of what they have rendered in performing the contract." According to Article 3.3.2 (1) UNIDROIT Principles 2010: *"Where there has been performance under a contract infringing a mandatory rule under Article 3.3.1, restitution may be granted where this would be reasonable in the circumstances."* And indeed, the merit phase of proceedings is the stage at which these circumstances would be best addressed. At this point, as noted by Olef and others: *"the exclusion of restitution can at most be justified as an instrument that punishes the corrupt bribe-giver and deters others from choosing this illegal path. Such a punishment would certainly have to be taken seriously in light of the conceivable financial consequences. However, what renders this concept unconvincing is its lack of link to the principle of proportionality. The permanent loss of the bribe under the contract providing for corruption can be justified, as the extent of the sum at issue directly correlates to the illegality of the act. Generally, the higher the amount of the bribe, the more criminal energy is invested by the wrongdoer and the more extensive are the losses caused by the act. The performance of the main contract does, however, lack such a relationship. It is merely a matter of coincidence whether the bribery is discovered at the start of the performance of the main contract and the bribe-giver's loss is limited, or whether the bribe is discovered once the contract has already been performed in full. If the extent of the sanction no longer relates to the illegality of the act, then the result can be over-deterrence. In contracts of considerable commercial value, e.g. construction projects or in the armaments industry, the total loss of performance can lead to disastrous consequences for a business. This would, under some circumstances, require extreme avoidance through implementation of extensive, internal compliance measures. Malfunctions (in the sense of over-deterrence) arise when there is no longer a reasonable ratio between the costs and the benefits of deterring of corruption."*[44]

Not only commercial Tribunals, but also investment Tribunals have resorted to arguments based on unjust enrichment and restitution, even if they have shun away from using this exact expression, to avoid its abuse. As noted by Vohryzek: *"International lawyers undermine unjust enrichment standards by using it indiscriminately, which in turn ensures that tribunals view the concept as a weak*

[44] Bonell, M. J. and Meyer, O. (2015) *op.cit.*, 28 – 29.

ploy, long depreciated by casual use. Despite this degradation, unjust enrichment remains a useful tool if used precisely and sparingly. Indeed, it is so useful that tribunals such as ADC v. Hungary employ it, even if they call it something else".[45] ADC had entered into a contract to build airport facilities in Budapest. The contract did not only concern the construction of the terminals, but also the management of a series of land services, such as the management of shops in the airport area, the handling of baggage and other connected services, and the training of personnel. The price that the Hungarian Government was required to pay for the provision of these services amount to a fixed fee every year. However, after the investor completed the construction of the terminal, the Hungarian government reneged on its contractual obligations and passed a law preventing ADC from operating the terminal in an effective and profitable manner. After a few years, when the value of the company's investment appreciated, the Hungarian government sold the airport to a British company (BAA) for $1.2 billion dollars. At that point, the investor brought suit against the Hungarian Government before an ICSID Tribunal, lamenting the expropriation of its investment. The Tribunal found that an illegal expropriation had occurred. As a consequence, it did not apply the remedy provided for under the BIT for legal expropriations (namely, the payment of the value of the investment at the time of the taking by the Government, but it awarded restitution of the value of the property at the time of the award.

Also in the light of the case law mentioned above, in the case of bribery, but also in cases of other forms of illegality in which somehow the State has cooperated or contributed restitutio in *integrum* (minus the amount of the bribe that has been paid, where applicable) appears to be a fairer and more viable solution than simply dismissing the investor's claim at the preliminary level.

At the level of cost reparation, also, the fact that both the investor and the Host State bear a degree of culpability with regard to certain instances of investor's misconduct means that Tribunals should move away from the criteria according to which the losing party has to bear also the expenses of the winning party. Indeed, an apportionment of culpability and damages as explained in the previous pages

[45] Vohryzek-Griest, Ana T (2008), *op.cit*., 3.

means that it might not be possible to decide in each case who exactly the winning party is, and who is the losing party. Especially in cases when both parties share equal or similar levels of culpability with regard to the misconduct by the investor that is invoked as a defence by the Host State, so that damages owned to the investor are actually reduced to about 50% of what it would have been entitled to, but for corruption, the assessment about who is the winner and who is the loser may be difficult. In the circumstances, it seems more appropriate that each party is left to bear its own costs.

The model proposed in this thesis, that rests on the international commercial arbitration principle of separability, and on the criminal law category of culpability in the commission of a crime, is not only based on what seems to be the correct understanding of the *lex lata* that regulates investor's misconduct in international arbitration, but also on policy considerations. Indeed, this thesis shows that sanctioning investor's criminality, including bilateral crimes, by placing all the consequences of the misconduct on the investor and by dismissing its claim at the preliminary level (jurisdiction or admissibility), does not produce the effect of drying up criminality in foreign investments, but rather only determines more criminality. The case of corruption, as the archetypical bilateral crime in which an investor can engage, is significant. Empirical studies demonstrate that when States are aware that they will face no consequence for engaging in this crime, they will have no incentive in fighting corrupt practices domestically; indeed, knowing that corruption may constitute a full defence in the context of investment proceedings brought by an investor, States may have an incentive in fostering corrupt practices, and in not complying with the international regulatory regime to fight bribery. And, once a Host State engages in corruption, and hence lays the foundations for a full defence in a possible investment claim, it may even have an incentive in engaging in illegal conduct *vis à vis* the investor's investment (such as expropriation, denial of fair and equitable treatment, etc.), in the knowledge that its conduct will go completely unsanctioned, and the illegal enrichment that derives from it will never be addressed by an arbitral Tribunal.

Overall, the thesis concludes that the hybrid model proposed in this work should be preferred to models that treat investor's misconduct at the jurisdictional or admissibility level. This is because the model developed in this thesis incorporates aspects of criminal law and international commercial arbitration that cannot be neglected when dealing with criminality in investment law and that allow a better interpretation of the *lex lata*; and because it brings about solutions that, also from the policy perspective, are to the benefit of both the investor, the Host State, and international community at large: fighting criminality in foreign investments, while advancing the system of international arbitration and the flow of foreign investments in Host States.

INTRODUCTION TO THE THESIS

1. Criminal Law as the Last Bastion of Inarbitrability

1. This dissertation is titled "*The Defence of Illegality in International Investment Arbitration: A Hybrid Model to Address Criminal Conduct by the Investor, at the Crossroads between the Culpability Standard of Criminal Law and the Separability Doctrine of International Commercial Arbitration*."[46] A work that aims at ascertaining in which way arbitration and criminal law cross their paths may at first sight seem destined to a bleak fate. All the more so, if it investigates in which way criminal law can positively cross-fertilise the field of international arbitration for the purposes of developing a hybrid model that contains features of both these fields of law.

2. This is the case because, traditionally, international arbitration and criminal law have been considered as two distant planets.[47] One scholar has described the relationship between criminal law and international arbitration with an imaginative metaphor: pompous insignia of State authority, on the one hand, and just a group of people sitting around a row of tables, on the other.[48]

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[46] This thesis assumes that the reader will be generally familiar with the functioning of the system of investment law and investment arbitration. In its simplest formulation, foreign investment law is the body of law that regulates the investments made by foreign nationals in the territory of Host States. In particular, as the purpose of investment law is that of fostering foreign investments in Host States, investment law sets certain standards of protection of foreign investments made abroad, that Host States must respect. These standards are normally encapsulated in Treaties concluded between two or more countries (BITs), and that apply to the investors who are nationals of one country, and that make investments in the other country that is a signatory to the Treaty. In general terms, the standards of protections provided under investment law are that of fair and equitable treatment of investments, ban on expropriation when this is not accompanied by just compensation, protection of legitimate expectations, non-discrimination between domestic and foreign investments, ban on denial of justice, full protection and security. The early days of international investment arbitration are closely tied to the evolution of the law on international protection of foreign investments and the early formation of the modern principles of State responsibility. Before international investment arbitration became the standard method to address investor-State disputes, an investor that sought to obtain redress due to breach of the duty to protect its investment by the Host State could either turn to the domestic courts of such a State, or hope that its home State would act in diplomatic protection. However, both these systems were not able to guarantee to the investor any sure prospect of redress. Turning to the courts of the Host State oftentimes proved to be ineffective, due to the bias that affected their proceedings. In turn, seeking diplomatic protection from the home State did not constitute a right of the investor, but rather something that the home State could decide at its own discretion, taking a number of considerations into account. Hence the need to create a compulsory and unbiased mechanism to protect the interests of investors investing in foreign countries and, at the same time, fostering the flows of capitals into those countries: this was the birth of international investment arbitration.

[47] Mourre, A. «Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator» *Arbitration International*, 2006: 95 - 118, 95.

[48] Hiber, G. and Pavic, K. «Arbitration and Crime» *Journal of International Arbitration*, 2008: 461 - 478, 461.

3. This apparent[49] separation is said to be correlated to the intrinsic features of international arbitration and criminal law, respectively:[50] arbitration is a mechanism of dispute resolution that is consensual in nature, is characterised by a private procedure and leads to a final and binding determination of the rights and obligations of the parties. In its simplest formulation, arbitration is premised on the consent of the parties and is characterised by their autonomy,[51] by the discretion of the arbitrators with respect to the arbitral procedure and by the general principle of non-interference by domestic courts.[52] The mechanism of international arbitration was conceived, at least originally, to serve exclusively the interest of the parties, rather than the general interest.[53] It was a means to sort out disputes in manners that would be considerate of the specific interests of commercial individuals, and that provided an opportunity to get past a dispute quickly and to start doing business as soon as possible again.[54] For these reasons, systemic interests were not, and could not, be a concern of international arbitration. Arbitrators were aware of the need to be extremely deferential towards parties' autonomy, especially when an agreement between them on their dispute was in sight. The interest of those concerned by the dispute was therefore the only polar star.

[49]See generally, Chilstein, D. «Arbitrage et Droit Pénal.» *Revue de l'Arbitrage*, 2009: 3-70, 4.

[50]Things are different in the case of inter-State arbitration, which is not addressed in this dissertation, save in exceptional cases where reference to inter-State arbitration is necessary to illuminate issues that pertain to investment or commercial arbitration. The entirely private nature of investment arbitration is also disputed. The notion that arbitration is the domain of the autonomy of the parties and essentially a private matter, requires indeed a qualification. Whether this consideration may hold true in the context of international commercial arbitration, and even here not in any absolute terms, it is certainly difficult to sustain with respect to the arbitration of investment treaty disputes. Some scholarship has also argued in this regard that investment arbitration replaces courts justice with a private model of adjudication in matters of public law. Whereas these are issues that are considered further on in the course of the dissertation, the basic idea that this work attempts to develop is that the differences between international commercial and investment arbitration, including the private/public divide, are for the most part immaterial for purposes of deciding how an investment tribunal should address issues of criminality that appear before it.

[51]Kaufmann-Kohler, G. «Qui Contrôle l'Arbitrage?: Autonomie des Parties, Pouvoirs des Arbitres et Principe d'Efficacité, » Bernardini, P. et Al. *Liber Amicorum Claude Reymond*. Paris: Lexis Nexis, 2004: 153-165.

[52]Bernardini, P. *L'Arbitrato nel Commercio e negli Investimenti Internazionali*. Padova: Giuffrè, 2008: 12; Béguin, J. et Al. *Traité du Droit du Commerce International*. Paris: Litec, 2005: 915. See also, generally, Gaillard, E. *Aspects Philosophiques du Droit de l'Arbitrage International*. Leiden: Martinus Nijhoff, 2008.

[53]Redfern, A. and Hunter, M. *Law and Practice of International Commercial Arbitration*. London: Sweet & Maxwell, 2004: 315.

[54]Carbonneau, T. E. *Arbitration in a Nutshell*. 3rd ed., St. Paul: West, 2012: 24.

4. Criminal law, on the other hand, is the epitomization of State function.[55] The ability to criminalize certain conducts and to use the force of the State to ensure the respect of norms is the manifestation of public power at its apex. The consideration that systems of criminal justice are geared, when necessary, to encroach on fundamental rights of individuals means that not only the substantive provisions, but also the criminal procedures are characterized by non-derogable prescriptions. In addition, a system of criminal justice is, by definition, aimed at preserving and enhancing the public good, and public rights, rather than private interests.[56] And indeed, even if this dissertation is not the appropriate avenue to discuss the ends of systems of criminal justice, one thing appears with clarity also at a superficial level of analysis: a system of criminal justice normally pursues a multiplicity of ends, all of which have a markedly public connotation. Let us take the rationale behind inflicting a criminal sanction. Theories here vary a great deal, but most recognize that a criminal law sanction pursues a composite set of aims.[57] The main question in the criminal law discourse is therefore one of which aim should prevail, or of how to balance the aims, rather than one regarding the multipurpose, public-oriented, nature of criminal law sanctioning, which is taken for granted. One could take retribution, special prevention and general prevention as the most commonly referred to objectives that sanctioning pursues. These public ends have significant implications at the macro-level, and their impact goes well beyond the specific criminal case that is brought before a criminal court.

5. In addition to the public nature of the interests pursued by systems of criminal justice, and to add to the difference between international arbitration and criminal justice, there is the consideration that also the role of the parties involved in a criminal law *dispute* and of their autonomy has traditionally been limited in this field of the law. The times when the pursuit of a criminal action (and the modalities of this pursuit) was also dependent on the attitude of the victims, or

[55]Baratta, A. «Les Fonctions Instrumentales et les Fonctions Symboliques du Droit Pénal» *Déviance et Société*, 1991: 1-25; Fiandaca, E. and Musco, G. *Diritto Penale, Parte Generale*. Vol. 1. Bologna : Zanichelli, 2014: 20; Merle, R. and Vitu, A. *Traité de Droit Criminel, Problèmes Généraux de la Science Criminelle.* Vol. 1. Paris: Cujas, 1997.

[56]Ligeti, A. «Approximation of Substantive Criminal Law and the Establishment of the European Public Prosecutor's Offic.» Weyembergh, A. *Approximation of Substantive Criminal Law in the EU: The Way Forward*. Bruxelles: Editions de l'Université de Bruxelles, 2013: 815 – 836.

[57] Sanders, A. and Young R. *Criminal Justice*. London: Butterworths, 1994; Packer, H. L. *The Limits of the Criminal Sanction*, Stanford: Stanford University Press, 1994; Zdenkowki, G., Ronalds, C. and Richardson, O. *The Criminal Injustice System*. Sydney: Pluto, 1987.

their relatives, towards those accused of the crime, belong to different historical eras and are far gone in Western legal systems.[58]

6. Some of the past examples are recorded by the historian Trevor Dean, in his book on crime in Medieval Europe between 1200 and 1550. The author recalls for example that in England, arbitration in criminal matters, including homicides, was not unknown, and that this constituted a way to "*exchange bloody strokes with hard cash.*"[59] Also, it is reported that in Zaragoza, Spain, arbitration was very commonly used in the criminal context, because in a society where crime rates were very high and justice was slow and ineffective, noblemen could promote the limitation of violence through arbitration, with victims and relatives formally releasing offenders from responsibility for injuries and deaths.[60]In France, the recourse to arbitration to address criminal matters and dispense justice was also a common occurrence, especially in certain regions of the country. In Gascoigne, arbitration and alternative dispute resolution was primarily a reaction to the inquisitorial model that had been used until that moment, and that had started to be encountered by increasing opposition of large sections of society. According to the legal historian Prétou:

> "*[a] procédure d'arbitrage s'opposait aux pouvoirs et semble consubstantielle d'un discours politique des communautés qui cherchaient à restreindre la trop grande force des justices inquisitoires et du modèle de pouvoir qui lui était associé.*"[61]

[58] This is so with regard to serious crimes. In other cases, a residual role for private autonomy, *latu sensu*, still exists. See for instance Banketas, I. «The Foundations of Arbitrability in International Commercial Arbitration» *Australian Yearbook of International Law*, 2008: 193 - 223, 197: "*[t]he administration of criminal justice (…), although generally within the authority of the executive branch, is not under the absolute authority and function of the state. Thus, in western criminal justice systems, a particular facet of the principle of respect for individual autonomy suggests that with respect to some* offences, *it is the prerogative of the victim to pursue the infliction of criminal penalties for the wrongdoer. This is certainly true with regard to assault and battery, and the matter is hotly debated with regard to sexual offences and domestic violence. The rationale for this approach is that criminal prosecution by the state, without the victim's approval, would potentially stigmatise the victim or render him or her more vulnerable".*

[59]Dean, T. *Crime in Medieval* Europe, 1200-1550. New York: Routledge, 2001, 100.

[60]Dean, T. (2001) *op. cit*., 101. See also Roebock, D. «Sources for the History of Arbitration: A Bibliographical Introduction.» *Arbitration International*, 1998: 237-244, at 241 mentioning that *"[e]ven up to moderntimes the Common Law courts in England can be shown to have regularly suggested to the accused that they should make, and to the victims of crime that they should accept, some form of settlement which the court would then take into account in reducing or dropping the charge. There are examples even in felony—rape—in the King'sBench in the late eighteenth century. And, if the parties could not agree, the courts often suggested and sometimes ordered the referral of the dispute to a mediator or arbitrator.*"

[61]Prétou, P. *Crime et Justice en Gascogne à la fin du Moyen Âge*. Rennes: Presses Universitaires de Rennes, 2010: 60.

7. However, as mentioned, these were isolated cases dating back to different eras, and do not detract from the general consideration that criminal matters remain today *non arbitrable.*[62]

8. And, in fact, in modern legal terminology, the question of whether an arbitral Tribunal can take cognizance of a criminal issue is appropriately framed as one of *arbitrability.*[63] Even if the question of which disputes are arbitrable is determined by national legislations and varies from jurisdiction to jurisdiction, there seems to be a minimum common denominator. Given the increase in the scope of arbitrability of disputes,[64] which has now extended in a number of countries to include several public law disputes,[65] one could say that the common point is that criminal law has remained *the last bastion of non-arbitrability* in most jurisdictions. To mention once again the case of England referred to earlier, it is worth noticing that already in 1865 an English Court had excluded the possibility of employing arbitration to deal with criminal cases, by holding that:

> *"Where the submission is general and conditional to end all controversies, that an indictment for a battery was not a controversy between the parties within the meaning of the submission; for that is the King's suit, and if the arbitrators did award the ceasing of such a*

[62] Mayer, P. «Le Contract Illicite.» *Revue de l'Arbitrage*, 1984: 205 - 223, 213. However, see Banketas, I. (2008) *op. cit.*, 198: "*[i]n other systems, particularly those falling within the broader family of Islamic law, it is acceptable for the culprit and the victims, or their respective families, to agree to a final resolution of the 'dispute' through the payment of so-called blood money (diyah). These arrangements are acceptable even in cases of serious offences, such as murder. Thus, although the criminal legislation of some Muslim nations permits under their public policy rules the privatisation of particular aspects of criminal law through the payment of blood money, it does not, on the other hand, deem as arbitrable the perpetration of other offences, thus removing them from the public domain".*

[63] The notion of arbitrability answers the question as to whether a certain dispute is capable of being addressed through international arbitration (as opposed to ordinary court justice).

[64] Bahamany, L. Sustainable Development of International Arbitration Rethinking Subject Matter Arbitrability, Dissertation, Mc Gill, 2012, 2. "*[i]narbitrability of disputes arising under public policy rules in almost all areas concerning commerce has been removed, for instance in antitrust (competition) and securities laws. The expansion of arbitrability is due to the growing universal tendency to use arbitration as an alternative to litigation in national courts, as well as a result of the increasing trust in arbitrators to apply public policy rules."* There is general reference to the notion of arbitrability in a number of international instruments on international arbitration. See, for instance, the one on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (Article 5(2)(a)) or the European Convention on International Commercial Arbitration of 1961, Article 6 (2). On the expanding realm of arbitrable disputes see generally Brekoulakis, S. «On Arbitrability: Persisting Misconceptions and New Areas of Concern» *Queen Mary School of Law Legal Studies Research Paper* , n. 20, 2009: 19 - 45; Youssef, K. «Arbitrability: International and Comparative Perspectives» in *The Death of Inarbitrability*, Mistelis, L. et Al, 67 - 89. New York: Kluwer Law International, 2009, at 71. See also, Caivano, R. J. «La Expansión de la Materia Arbitrable, en Dos Recientes Ejemplos que Ofrece el Derecho Comparado» *El Derecho*, 2013: 306 – 325.

[65]Soulali, D. *L'arbitrabilité des Litiges de Droit Public*. Tolouse: These en Preparation, 2017. See also generally Devolvé P. et Al. *L'Arbitrage en Droit Public*. Bruxelles: Bruylant, 2009.

prosecution, it would be void, because it would be to obstruct justice."[66]

2. The Irruption of Criminal Law into the World of Arbitration

9. If criminal law is *the last bastion of non-arbitrability*, in fields other than arbitrability, the impermeability between criminal law and international arbitration is only apparent, and criminal law and international arbitration cross their paths in a number of ways. And, indeed, criminal conduct is a question of increasing concern for arbitrators sitting both in investment and commercial tribunals. As one scholar has pointed out:

> *"Qu'on le déplore ou qu'on l'approuve, l'irruption du droit pénal dans le monde feutré de l'arbitrage est une réalité qui doit être observée avec attention."*[67]

10. Similarly, according to another scholar,

> *"Tant sur le terrain de la procédure que sur celui du droit matériel, l'enchevêtrement de deux systèmes que tout oppose, tant par leurs méthodes que par leurs finalités, doit intéresser les praticiens comme les universitaires. À tout moment le droit pénal peut s'inviter ou être appelé à la table des arbitres."*[68]

11. When two apparently distant planets like arbitration and criminal law collide, there are a number of cascade effects created by the collision.[69] For example, it is a debated topic whether arbitrators should raise *ex-officio*, and possibly report to the competent criminal authorities of a forum State any suspicion of criminal conduct that appears before them; or whether criminal misconduct is

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[66] Horton v Benson 204 89 E.R. 145, 1675.

[67] de Fontmichel, A. *L'Arbitre, le Juge et les Pratiques Illicites du Commerce International*. Paris: Panthéon-Assas Paris II, 2004, 14. See also the comment of Professor Fouchard, whom, already in 1988, noted that the field of international arbitration had become plagued by misconduct. Fouchard, P. «'Ou va l'Arbitrage International?» *Revue de Droit de McGill*, 1989: 436 – 453, 436.

[68] de Fontmichel, A. *Droit Pénal et Arbitrage, une Question d'Actualité,* 23 03 2015, available at http://www.magazine-decideurs.com/news/droit-penal-et-arbitrage-une-question-d-actualite (Accessed on 15 10 2018) . See also generally de Fontmichel, A. «Procédure Pénale et Arbitrage Commercial International: Quelques Points d'Impact» *Cahiers de l'arbitrage*, 2012 : 309 – 330.

[69] Coelho, H. International Commercial Arbitration and Money Laundering Problems that Arise and how they should be Resolved, Master Thesis, 2016.

only for the parties to raise in arbitral proceedings.[70] Also, there are ever more frequent cases of abuse of the arbitral process, which is used as a mechanism to launder money coming from illicit activities.[71] In these cases, the arbitration would be a mere simulation, and the dispute between the parties entirely fabricated: what would be the consequences in a situation like this?

12. Evidential matters are also a crux of the general relationship between arbitration and criminal law: what is the standard of proof required for a Tribunal to persuade itself that criminality has been committed by an investor or by a party to a contract? What *ex-officio* powers does the Tribunal possess in this regard? And what again, if a party fails to disclose certain document by invoking criminal law provision on secrecy that prevent them to do so?

13. Another much debated question is the one concerning the parallel pending of arbitral proceedings and criminal proceedings that may affect the arbitration; also, the issue of how to address criminality that affects the conduct of arbitral proceedings (as opposed to the substance of the subject matter under dispute, e.g. the investment, or the contract) is a debated matter.

14. The general modalities in which criminal law becomes relevant in the context of international arbitration are not the subject of this dissertation. However, it is appropriate to address at the level of introduction the reasons why the impermeability between criminal law and international arbitration has been giving way over the years and what are the reasons for the "*irruption du droit pénal dans le monde feutré de l'arbitrage.*"[72] Of these reasons, some are internal to the system of international arbitration, and are determined by endogenous factors; others, on the other hand, are determined by exogenous factors and could be considered as external, *per se*, to the system of international arbitration.

[70] Van den Berg, A. J. *International Commercial Arbitration: Important Contemporary Questions*, The Hague - New York: Kluwer Law International, 2003 : 239.
[71] McDougall, A. «International Arbitration and Money Laundering» *American University International Law Review*, 2015: 1022 – 1052.
[72] de Fontmichel, A. (2004) *op.cit*., 14.

2.1. Reasons Determined by Endogenous Factors

15. As regards the former, one main reason rests on the consideration that, as mentioned earlier, the realm of arbitrable disputes has extended beyond merely commercial and private claims, to straddle into other, more public-oriented matters.[73] This is a general trend that is common to a number of jurisdictions, and that has brought arbitration closer to public law in general. In Italy, by way of example, the Code of Civil Procedure, prior to a reform of 2006, listed specifically those matters that could not be addressed through arbitration, and the list was exclusive. In 2006, the legislator modified the relevant legislative provisions and, with the stated purposes of desiring to increase the scope of arbitrable disputes,[74] reformulated Article 806 of the Code of Civil Procedure to read that "*parties may submit to arbitration all disputes among them that do not deal with rights of which they cannot privately dispose, save as prohibited by law.*"[75] In the new formulation, arbitrability is a standard category of residual nature, whereas non-arbitrability is the exception. The change in tone, and in approach, is apparent.

16. In France, already in 1991, the Paris Court of Appeal had recognised that inarbitrability of disputes had to be limited to certain specific cases, rather than being a general principle, namely to those cases that must "*en aucun cas échapper à la juridiction étatique."*[76] In the judgment in which the Court of Appeal formulated this position, the expression referred particularly to criminal matters and matters related to the personal status of individuals. In the U.S., the judgment of the Supreme Court in *Mitsubishi Motors* has also expanded the realm of arbitral

[73]Luiso, F. P. *Commentario Breve agli Articoli Riformulati del Codice di Procedure Civile*. Padova: Giuffrè, 2006: 12; Kennet, W. «It's Arbitration, But Not As We Know It: Reflections on Family Law Dispute Resolution?» *International Journal of Law Policy Family*, 2016: 1-31. This trend is not without criticism, however. Some scholars have held for instance that: […] "*recent arbitration jurisprudence represents the culmination of a three-decade-long expansion of the use of private arbitration as an alternative to court adjudication in the resolution of disputes of virtually every type of justiciable claim. As a result of this jurisprudence, cases that would otherwise proceed in the public realm—the courts—have been moved to a purely private realm, which is largely shielded from judicial and public scrutiny. Many observers have noted that this decades-long privatization of dispute resolutionand attendant adjudicative mechanisms has led to both a loss of confidence in public adjudication and a loss of public adjudication itself—an erosion of the public realm*". Glover, M. «Disappearing Claims and the Erosion of Substantive Law?» *Yale Law Journal*, 2015: 3052 – 3092, 3052.

[74]Luiso, F. P. (2006), *op. cit*., 253.

[75] Italian Code of Civil Procedure, Article 806.

[76]Court d'Appel de Paris, 29 March 1991. In the same way see the case Labinal rendered by the Court'd'Appel de Paris on 19 May 1993.

disputes to cover disputes that present a considerable degree of public interest, and a markedly public component, such as anti-trust and patent disputes.[77]

17. In general, the fact that public law and international arbitration have come closer together, as an effect of the extension of arbitrability, is to be accounted as one of the reasons for the irruption of criminal law into the world of arbitration.[78] Even if criminal law disputes remain non arbitrable *per se*, the increase in the scope of arbitrability means that a Tribunal has more chances to come into contact with matters that are ancillary to a main claim that presents a criminal law component. In addition, the fact that arbitrators have had to deal with matters that involve public interests has endowed them with certain tools of analysis to manage public law issues that were not a feature of the times when arbitration was limited to defusing private disputes.[79] The act of balancing private rights against public rights, for example, which is a typical method used in the context of patent claims and disputes in anti-trust law, is a recent acquisition of international arbitration.[80] The use of proportionality analysis in general,[81] as a

[77] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). The Court found that matters in the field of anti-trust can be decided by an arbitral Tribunal, and are not only subject to the determination of ordinary courts. The decision was however not unanimous, and the tension between private adjudication and public rights palpable in the words of some of the judges. According to J. P. Stevens, for instance: "*[j]ust as it is improper to subordinate the public interest in enforcement of antitrust policy to the private interest in resolving commercial disputes, so is it equally unwise to allow a vision of world unity to distort the importance of the selection of the proper forum for resolving this dispute. Like any other mechanism for resolving controversies, international arbitration will only succeed if it is realistically limited to tasks it is capable of performing well — the prompt and inexpensive resolution of essentially contractual disputes between commercial partners (...). In my opinion, the elected representatives of the American people would not have us dispatch an American citizen to a foreign land in search of an uncertain remedy for the violation of a public right that is protected by the Sherman Act (...). Unlike the Congress that enacted the Sherman Act in 1890, the Court today does not seem to appreciate the value of economic freedom"*. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), at 665-666.

[78] As the dissenting opinion in Mitsubishi Motors demonstrates, this "coming together" has attracted severe criticism from some quarters. See for instance Park, W. W. «Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration» *Brooklyn Journal of International Law,* 1986: 629 – 650, 638: "*[s]ociety never signed the arbitration agreement, and is not a party to the arbitration. If the arbitration, which is a consensual process, affects only the consenting adults who signed the agreement, they alone are hurt by the arbitrators' folly. But if the dispute affects the property of one who never signed the arbitration agreement, the arbitration takes on a different cast. Indeed, the right to proper enforcement of antitrust laws may be analogous to a third person's property right. Furthermore, the societal interest in the vindication of claims relating to matters such as free economic competition and the securities markets belongs not to the businessmen in the controversy, but to a community which never agreed to arbitrate"*.

[79] Kurkela, M. «Criminal Laws in International Arbitration – the May, the Must, the Should and the Should Not» *ASA Bullentin Vol*. 26, 2008.

[80] Lehonardsen, E. «Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration.» *Journal of International Dispute Settlement*, 2012: 95-136.

[81] See Sweet, A. S. «Investor-State Arbitration: Proportionality's New Frontier» *Faculty Scholarship Series*. *Paper 69*, 2010: 1-14, 2: "*[p]roportionality provides judges with the most appropriate analytical procedure currently available for adjudicating disputes involving conflicts between two principles (or interests, or values) that possess the same rank*

method to balance conflicting rights in constitutional law, has now also made its way in investment arbitration as a sound methodological approach to contemperate regulatory rights of States and property rights of investors. This is such a sweeping phenomenon that some authors have spoken of a costitutionalisation of investment arbitration.[82] Ultimately, the fact that the public interest, including in the context of trade and investments, is today increasingly pursued at the international level means that it is precisely adjudicators who can transcend the peculiarities of a national forum that are better suited to address certain problems.[83] The greater chance to come into contact with criminal law matters and the development of the methodological tools to address them has meant that arbitrators have started to overcome the usual approach of shunning away criminal law, and of developing models to deal with it in the context of a case brought before an arbitral Tribunal.

18. At times, the extension of the scope of arbitrable disputes and the fact that arbitrators have become more concerned with public law matters has not been the consequence of policy options by a legislator, but rather has been the product of progressive judicial interpretation and clarification. In this regard, another endogenous reason of the irruption of criminal law into the domain of arbitration - to remain in the context of arbitrability of disputes - derives from the clarification that non-arbitrability of criminal matters does not mean that issues concerning the determination of criminal liability cannot be decided by an arbitral Tribunal at all, but only that an arbitral Tribunal cannot render criminal sanctions. In particular that an arbitral Tribunal *cannot issue a criminal conviction.*[84] By way of this interpretation, the scope of what can be brought to the cognizance of an arbitral

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in a normative hierarchy. The paradigmatic example is a conflict between (a) a pleaded right, and (b) a government measure that infringes upon that right, but is nonetheless permitted under some public interest exception"

[82] Petersmann, E. U. «Constitutional Theories of International Economic Adjudication and Investor-State Arbitration», Dupuy, P. M. and Francioni, F. *Human Rights in International Investment Law and Arbitration*. Oxford - New York: Oxford University Press, 2009: 137 – 194.

[83] This also applies to criminal law specifically. See for example Mourre, A. (2006), *op.cit.*, at p. 97: "*[w]e believe, (...) that international arbitrators are perfectly suited to take the general interests of the forum into due consideration. This is also true with regard to criminal law, because, as we shall see, the rules which aim at fighting illicit behaviour in international trade are becoming increasingly international, and international arbitrators have a natural vocation to take them into consideration*."

[84] Redfern, A. and Hunter, M. (2004), *op.cit*., at 125; Mustill, M. and Boyd. S. *Mustill & Boyd: Commercial Arbitration*. London: LexisNexis, 2001: 75.

Tribunal *ratione materiae* is obviously expanded, and indirect dealing with criminal law issues becomes increasingly common.[85]

19. A 2015 judgment by the English Court of Appeal exemplifies this aspect with clarity. The *London Steamship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain and The French State* was a case concerned with the sinking of the Tanker Prestige off the coasts of Spain and France, in 2002. The sinking caused one of the greatest environmental disasters of modern times. The Governments of France and Spain sought legal redress in Spain against a number of parties associated with the disaster, including the insurer of the Prestige. In particular, they resorted to article 117 of the Spanish Criminal Code, under which the injured Parties have the right to pursue a direct claim against the defendant's insurer.[86] In the meantime, the insurer began arbitration in London seeking judicial declarations that Spain and France were bound by the arbitration clause in the insurer's contract, which provided that certain head of claims related to the incident had to be addressed through arbitration and that, based on the contract, the insurer was not to be held liable. Part of the reason why this was done was to avoid enforcement of a potential Spanish criminal judgment in the UK against the insurer. The insurer secured an arbitral award in its favour and sought to enforce it in the UK. France and Spain, however, opposed the enforcement before the Court of First Instance on a number of grounds, *including the lack of jurisdiction of the Tribunal which had issued the arbitral award, holding that the claims were by their nature not susceptible to arbitration, being criminal in nature*. In particular, counsel for the defendants held that:

> *"[A] conviction in the proceedings was an essential element of the cause of action against the insurer and since an arbitrator cannot*

[85]Albanesi C. and Jolivet E. «Tackling Corruption in Arbitration. Dealing with Corruption in Arbitration: A Review of ICC Experience» *ICC Special Supplement 2013*. Paris: ICC publications, 2014: 27-42. As noted by the authors, arbitration was in the past considered to be an inappropriate forum for deciding claims of bribery and corruption. This was largely due to a restrictive view of arbitral jurisdiction and to the arbitral tribunal's lack of authority to impose criminal penalties. As a consequence, when faced with such issues, arbitral tribunals would refuse jurisdiction.

[86] Spanish Code of Criminal Procedure, Article 117: "*[i]nsurers that have underwritten the risk of monetary liabilities arising from use or exploitation of any asset, company, industry or activity when, as a consequence of a fact foreseen in this Code, an event takes place covered by the risk insured, shall have direct civil liability up to the limit of the legally established or contractually agreed compensation, without prejudice to the right bring an action for recovery against who such may be appropriate."* (my translation)

convict a person of a criminal offence, the claim cannot be constituted in arbitration proceedings."[87]

20. The Court found that the claims brought against the insurer did not entail the application of criminal penal consequences, but that they were entirely civil in nature, as involving essentially the recovery of monetary sums and the payment of damages, and hence arbitrable. In an important *dicutm*, the Court also explained that an arbitrator has jurisdiction to find facts *which constitute a criminal offence*[88] or that in an appropriate case an arbitrator also has jurisdiction to find that a criminal offence has been committed.

21. This is not a new concept, but rather one that other jurisdictions have developed as well. For instance, in France, already in 1993, the Paris Court of Appeal had the opportunity to explain that arbitrators cannot apply criminal sanctions, but that they are in a position to address conduct that breaches public laws, when to do so is necessary to determine the civil law consequences of the criminal violation. According to the Court of Appeal of Paris in the case *Labinal:*

"[S]i le caractère de loi de police de la règle (...) interdit aux arbitres de prononcer des injonctions ou des amendes, ils peuvent né anmoinstirer les conséquences civiles d'un comportement civil jugé illicite au regard des règles d'ordre public pouvant être directement appliquées aux relations des parties en cause."[89]

22. For the sake of precision, it must be noted that also the statement that arbitrators cannot issue criminal sanctions requires a qualification and is potentially not as absolute as one would expect. Let us take the case of *punitive damages*, that courts of law in some jurisdictions can award when they want to deter the commission of particularly blameworthy conduct.[90] Punitive damages are

[87]The London Steamship Owners' Mutual Insurance Assiciation Ltd v (1) The Kingdom of Spain and (2) The French State - [2015] EWCA 2792 Civ 333, para 77. Court of Appeal (Civil Division).
[88] Somehow *contra* see the decision of the arbitral Tribunal in Kim et al v Uzbekistan: "*[t]he Tribunal notes that the determination of criminal charges is a matter for the criminal justice system of the Host State. However, the Tribunal may conclude, on the basis of an examination of the law of the Host State and the facts that pertain to an allegation, that there has been non-compliance with legislation sufficient to trigger the legality requirement."* Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Award on Jurisdiction, 8 March 2017, para 522.
[89] Court of Appeal of Paris, 1re ch. Suppl., 19 May 1993, Rev. Arb. 1993, p 645.
[90] See generally: Koziol, H. and Wilcox, V, *Punitive Damages: Common Law and Civil Law Perspectives*. New York: Springer, 2009.

a civil law sanction of a quasi-criminal nature.[91] Traditionally, in the jurisdictions that contemplate them, punitive damages have been reserved for ordinary judges to award, and not for arbitrators, precisely for their quasi-criminal connotation and their ability to impact beyond the interests of the private parties to a dispute. In *Garry v Lyle Stuart*, the New York High Court explained that:

> *"[P]unitive damages is a sanction reserved to the State, a public policy of such magnitude as to call for judicial intrusion to prevent its contravention. Since enforcement of an award of punitive damages as a purely private remedy would violate strong public policy, an arbitrator's award which imposes punitive damages should be vacated (...) The freedom of contract does not embrace the freedom to punish, even by contract."*[92]

23. Not many years after this rather blunt statement was made, however, Federal Courts in America made a full *u-turn* on the idea that arbitrators should not have the power to punish, even if by contract. Therefore, in *Willoghbuy Roofing*, a Federal Court made the following observation:

> *"[A]rbitrators are better equipped than judges to determine what behaviour is unacceptable in a specific context, and to determine the amount needed to punish and deter the unacceptable behaviour (...) Denying arbitrators the power to award punitive damages would undermine the value and sufficiency of the arbitral process as a method of dispute resolution (...) Prohibiting arbitrators from awarding punitive damages would totally frustrate the public policies and purposes served by punitive damages."*[93]

24. These remarks may be understood in light of the fact that the US has been a cradle of pro-arbitration sentiments, and the idea that arbitrators can, and must, take into account also the public good in the determination of a dispute is not a novelty in this jurisdiction;[94] it is also true that, according to subsequent case law, the possibility of awarding punitive damages has been made subject to the

[91] Derains, Y. *Intéret Moratoires, Dommages et Interets Compensatoires et Dommages Punitifs Devant l'Arbitre International.* Paris: Litec, 1991: 101; Ortscheidt, J. *La réparation du Dommage dans l'Arbitrage Commercial International*. Paris : Dalloz, 2001 : 28. Mourre, A., (2006) *op. cit*., 106.
[92] Garry v. Lyle Stuart, Inc., 40 N.Y2d 354, 356, 353 N.E.2d 793, 794 (1976).
[93] Willoughby Roofing & Supply Co. v. Kajima, Int'l, 598 F. Supp. 353, 360 (N.D. Ala. 1984)
[94] See generally, Rau, A. S. « Arbitrating 'Arbitrability'» *World Arbitration and Mediation Review*, 2013: 1- 62.

willingness of the parties – in the sense that if the arbitration agreement implicitly or explicitly excludes such power, this would certainly be foreclosed.[95] The award of a quasi-criminal sanction by an arbitral Tribunal remains therefore still a relatively uncommon occurrence. But not so uncommon that it escaped entirely the radar of international investment tribunals. In an ICSID case, *Letco v Liberia*, for instance, the Tribunal applied Liberian law to a dispute between the parties, in pursuance of a choice of law clause contained in the contract. The Tribunal reasoned that, since Liberian law did not ordinarily provide for the applicability of punitive damages, the Tribunal could not award damages other than of a compensatory nature. However, the Tribunal also recognised that according to Liberian law, if the actions of the liable party are of a criminal nature, punitive damages can be awarded. What can be deducted *a contrario* from this is that, had the law chosen by the parties provided for the ordinary application of punitive damages, or had the actions of the liable party been criminal in their character under Liberian law, the Tribunal would have considered awarding punitive damages to the winning side.

25. This state of affairs characterised by a greater openness to criminal law matters by international arbitrators signals a clear departure from the classical stance held by commentators during the first period of development of arbitral practice, in which the mere allegation of criminality in the context of a case would have the effect of rendering the entire dispute non arbitrable and impose on the arbitral Tribunal the duty to decline its jurisdiction. In particular, the new position in dealing with criminal law matters is in contrast with the famous finding by Judge Arbitrator Lagergren in an ICC case dating back to 1963. This is a paradigmatic case on issues of corruption of public officials, often quoted in the context of this dissertation. According to the Judge:

> *"After weighing all the evidence I am convinced that a case such as this, involving such gross violations of good morals and international public policy, can have no countenance in any court either in the Argentine or in France, or, for that matter, in any other civilised country, nor in any arbitral tribunal. Thus,*

[95] Mastrobuono v. Shearson Lehman Huttim, Inc. (94-18) 514 U.S. 52

> *jurisdiction must be declined in this case. It follows from the foregoing, that in concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature rather than from any national rules on arbitrability. Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes."*[96]

26. Another endogenous reason that may account for the irruption of criminal law into the domain of international arbitration derives from a degree of *degradation*, or, in any event, mutation of certain philosophical and teleological underpinnings of arbitration: this appears to be no longer a mechanism where the differences between the parties can be addressed in a less adversarial, and more conciliatory manner. On the other hand, given also the high stakes that are often in dispute, international arbitration has become yet another battlefield on which the parties challenge their respective positions fiercely: Professor Bruno Oppetit has captured the sense of this trend with the following words:

> "*L'arbitrage, par les affrontements sans concessions auxquelles il donne lieu à travers des procédures de plus en plus complexes (...) apparaît souvent aujourd'hui moins comme un facteur d'apaisement que comme la continuation de la guerre par d'autres moyens (...)"*[97]

27. If this is the case, then at war all means are allowed. In this sense, criminal law has become yet another weapon that the parties can resort to in order to fight for their respective positions before the arbitral Tribunal, or in related proceedings. Normally, criminal law is used in a legitimate manner and to pursue noble ends. As noted by some, the willingness to *"moraliser les échanges internationaux donne au droit pénal et à ses acteurs un prétexte pour s'immiscer*

[96] ICC Chamber of Commerce, Award of 1963 in ICC case No. 1110, *Arbitration International 10*, no. 3, 1994, 282 – 298 294. Commentators agree that the angle from which Judge Lagergren addressed the problem was that of arbitrability. According to Lew and Mistelis, for example, *"[i]n 1963, in ICC Case 1110, Judge Lagergren concluded that a dispute relating to bribery was not arbitrable. After determining that he had to enquire into his jurisdiction ex officio, despite a different view by the parties, Judge Lagergren held that neither French law, as the law of the place of the arbitration, nor Argentine law, as the law governing the contract, would allow the dispute to be arbitrated*." Lew, J. and Mistelis, L. (2003), *op cit.*, at 213. This position has been superseded by subsequent case law. According to Born, for example, "*if arbitrators can decide that a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery*". Born, G. *International Commercial Arbitration*. New York: Wolter Kluwers, 2009: 805.

[97] Oppetit, B. *Théorie de l'Arbitrage*, Paris: Dalloz, 1998: 15.

dans ce mode privé de règlement des litiges qui concerne souvent les litiges commerciaux les plus importants."[98] However, as is often the case, weaponry is liable to be abused, and when criminal law is invoked in international arbitration there is always a tension between legitimacy and instrumental exploitation. There are many instances of this tension.

28. By way of example, one is constituted by the parallel pending of international arbitral proceedings against a State, on the one hand, and of domestic criminal proceedings against the investor which has sued the State, on the other. In general terms, the exercise of the power to sanction at the level of criminal law investor misconduct constitutes a rightful, and sometimes even necessary option for the Host State. The system of investment protection is not at odds with the fact that a Host State retains its fundamental right to prosecute individuals and entities, including foreign investors and their employees, for criminal wrongdoing, where the State sees fit.[99] In some cases, the fact that the Host State prosecutes domestically those who have committed a crime (including on the investor's side) is an indication of its good faith in the fight against some particularly ominous forms of criminality. Let us take the case of corruption: when a Host States brings to trial its own officials who have accepted or solicited a bribe from an investor, and the investor who has offered or paid the bribe, the State shows that it is taking the crime of corruption seriously. On the other hand, failure to prosecute domestically crimes such as corruption, especially in circumstances where to do so would necessarily involve exposing the responsibility of State's apparata, signals that the State is not serious in the fight against international bribery. As will be seen later on, this is a question of particular importance also for the specific theme of this dissertation.

29. In addition to cases in which the commencement of domestic criminal proceedings against the investor constitutes a legitimate and warranted course of action, however, there are instances in which the criminal prosecution of the

[98] de Fontmichel, A. (2015) *op. cit.*
[99] Burnett, J. et Al. «Interim Measures in Response to the Criminal Prosecution of Corporations and Their Employees by Host State in Parallel with Investment Arbitration Proceedings» *Maryland Journal of International Law*, 2015: 31-50.

investor only pursues punitive purposes and either aims at sanctioning the fact that the investor has turned to international justice to find redress against the State's tampering with its investment, or is a way to sabotage and derail the arbitral proceedings.

30. The current debate in international arbitral law is whether in such cases the Arbitral Tribunal could adopt provisional measures to enjoin the Host State from commencing, or continuing the domestic criminal proceedings against the investor, especially when these can frustrate the outcome of the arbitration, or otherwise tamper with the integrity of the arbitral process (for instance, one can think of the case in which a domestic criminal judge orders the arrest of individuals that are key witnesses in the arbitration, or orders the confiscation of goods that may be necessary to acquire for evidentiary reasons before the arbitral Tribunal). Taking a position in this debate, an Arbitral Tribunal stated in the case of *Eurogas* that,

> *"the right and duty to conduct criminal prosecutions is a prerogative of any sovereign State and (...) only exceptional circumstances may therefore justify that an arbitral tribunal order provisional measures which interfere with criminal proceedings".*[100]

31. The broader issues engaged by the parallel pending of domestic criminal proceedings and arbitral proceedings, including the possibility to adopt provisional measures to prevent the State from exercising its criminal jurisdiction against the investor, is beyond the scope of this dissertation. However, in as much as the issue testifies to the possible tension between legitimacy and instrumental exploitation of criminal law in international arbitration, it is relevant for exemplificatory purposes also in the context of this work. In this regard, it is particularly important what the Arbitral Tribunal in *Quiborax* recognised, namely that, on the basis of the principle of good faith that permeates international law and that is also applicable to the system of international investment arbitration, the commencement of criminal proceedings for the sole purposes of sabotaging the investor's right to seek redress

[100]EuroGas Incorporated and Belmont Resources Incorporated v Slovakia, Procedural Order No 3, ICSID Case No ARB/14/14, Decision on the parties' requests for provisional measures of 23 May 2015, para 85.

through the arbitral process is not a legitimate exercise of a State's criminal jurisdiction, but rather an abuse, and as such is not worthy of the deference towards a State's exercise of its sovereignty in criminal matters indicated by the Eurogas Tribunal.[101]

32. In addition to the parallel pending of criminal and arbitral proceedings, as explained above, also the so called *Defence of Illegality,* which is the subject of investigation of this thesis, is indicative of the tension between legitimacy and instrumental exploitation. In general terms, the *Defence of Illegality* is the invocation of the claimant's illegal or criminal conduct by the respondent, as a defence to avoid liability in a case brought against it. *Per se*, it constitutes a powerful and legitimate weapon. But it is also prone to being abused.[102] For example, claimant's corruption is the criminal conduct that is most often used to substantiate a *Defence of Illegality*. In this regard, the late Prof. Thomas Walde noted that:

> *"[Corruption] insinuations are now frequently employed by both claimant investors and respondent governments. They should be disregarded – explicitly and implicitly, except if properly and explicitly submitted to the tribunal, substantiated with a specific allegation of corruption and subject to proper legal and factual debate for the tribunal. That is simply the implication of the "fair hearing" principle (...) It is therefore particularly important for a tribunal not to get influenced, directly or indirectly, by "insinuations" meant to colour and influence the arbitrators' perception and activate a conscious or subconscious bias, but to make the decision purely on grounds that have been subject to a full and fair hearing by both parties. Cards should be placed, "face up", on the table rather than be waved around, with hints and suggestions."*[103]

[101] This is in line with the principle of good faith as enrshrined in the Vienna Convention on the law of Treaties, according to which a treaty must be performed in good faith (Article 26) and must be interpreted in goodfaith (Article 31).

[102] See for instance, Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award of 4 October 2013, para 181: "*Uzbekistan's interpretation would allow the State to avoida hearing on the merits merely by raising violations of its laws perpetrated in the course of the investment. This is inconsistent with promoting foreign investment, as it renders a foreign investor's right to pursue arbitration against the host state illusory*."

[103] See in this regard the separate opinion of Professor Walde, in International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, 1 December 2005, para. 20.

2.2. Reasons Determined by Exogenous Factors

33. In addition to the endogenous reasons discussed above, the irruption of criminal law into arbitral proceedings depends on certain external causes, the most prominent of which is the general increase in misconduct and criminally-relevant conduct that has characterised the world of international commercial transactions and investments over the last few years.[104] This matter will be addressed in its specific details in Chapter 2 of this dissertation. Suffice it to mention here, for the purposes of the introduction to this thesis, the case of corruption, as the epitomisation of criminal conduct with which an arbitral Tribunal would have to grapple. The figures are staggering. According to Transparency International's Corruption Perception Index 2014, "*[N]ot one single country gets a perfect score and more than two-thirds [69 percent of countries] score below 50, on a scale from 0 (highly corrupt) to 100 (very clean)*."[105] In addition to this, the Index shows that 58 percent of G20 countries score below 50 out of 100. The World Bank estimates that the annual cost of corruption is US$1 trillion. It is also estimated that, in developing countries alone, corrupt officials receive bribes amounting to US$40 billion each year.

34. A phenomenon that is so common as corruption can materialise itself in a variety of forms in international trade and investment law. For example, a certain contract may be procured through corruption, just like the making of an investment could be the outcome of an activity of corruption carried out by the investor. Here, corruption would be a means to secure a contract or an investment that it would have otherwise been more difficult, or perhaps impossible, to secure. Alternatively, a contract may not be procured by corruption, but rather provide for corruption (e.g. the object of the contract would be corruption). This occurrence normally presents itself when a corrupt intermediary refuses to perform certain obligations related to a contract, or is not paid for the services that the contract of corruption provided for, and then a dispute arises as to the real nature of the obligation that has to be performed. In all these cases, issues of corruption would likely end up before an

[104] Jovanovic, M. N. «Is Globalisation Taking us for a Ride?. » *Journal of Economic Integration*, 2010: 501-549.
[105] Transparency International, *International Transparency International Corruption Index.* 2014.

international arbitral Tribunal, with varying consequences. What is certain is that, despite the varied modalities of its manifestation, the increase in foreign economic transactions has been coupled with an increase in the instances of criminality affecting them, in a direct and linear relationship.[106]

35. This state of affairs accounts *per* se to an increase of the occasions in which criminal law and arbitration cross their paths. However, it has also determined an indirect situation that essentially brings about the same outcome. This situation is the criminalisation of several areas of business law. Today, numerous violations of provisions that regulate business relations have become assisted by a criminal sanction. This is because, in a world where criminal conduct is on the increase:

> *"[L]egislators often have a sense of impotence, criminal law tends to become the ultimate medicine to impose rules where it is feared that the voice of the law would otherwise not be heard."*[107]

36. In this sense, the irruption of criminal law in investment arbitration is only the consequence of the irruption of criminal law, more broadly, in investment and trade law.

3. The Research Question

37. In light of the above, the question of how to address criminality that appears before an arbitral Tribunal has become pressing. Indeed, since non-arbitrability does no longer constitute the default answer to the appearance of criminal conduct before a Tribunal, it is necessary to develop more complex models that can take into account the new relationship between criminal law and the private mechanism of dispute resolution that is constituted by international arbitration.

[106] Suzuki, Y. and Gokcekus O. «Intensity of Trade With the EU and Corruption in Africa. » *Journal of Economic Integration*, 2013: 610-630.
[107] Mourre, A. (2006) *op. cit*., 96.

38. This thesis addresses one specific case of criminality in its relationship with international investment arbitration. This is the case of *criminal conduct perpetrated by an investor in the making of an investment in a Host State.*[108] The problem that this thesis attempts to clarify can be summed up in one question: *how is an investment Tribunal to react if, in the context of a case brought before it for breach of standards of protection of an investment, the respondent argues that the investment for which protection is sought has bee secured by resorting to some form of criminality?* An example will clarify this question.

39. The classical pattern of criminality that emerges in investment arbitration is that of an investor who corrupts the public officials of a Host State to secure a bid, or of an investor who deceives the Host State by false representation and fraud, for the purposes of obtaining an investment contract. [109] Another common case is constituted by the circumstance in which an investor violates the domestic laws of a Host State, to make its investment more profitable, or again to be able to invest in a country in the first place.

40. Against this background, a defence by the Host State that has become increasingly common is the so-called *Defence of Illegality.*[110]

41. The *Defence of Illegality* operates on the basis of the following scheme: a Host State breaches the substantive provisions that international law and BITs accord to investments made in a foreign Country, for instance by means of expropriating without compensation the investor's investment; or by not according the investment fair and equitable treatment; or also by frustrating the investor's legitimate expectations. In the ensuing dispute before an investment Tribunal, the defendant Host State raises the illegality committed by the investor in the making of the investment as a defence against the breach of the substantive provisions on the protection of the investment, of which it is accused, to avoid responsibility. In

[108] See generally on this aspect: Vasquez, H. *La Corruption Devant les Tribunaux CIRDI*. Orléans: Université d'Orléans, 2013: 270.
[109] For a general framing of the problem see Goldembaum, D. «L'Arbitre International face à la Corruption (The International Arbitrator Faced with Corruption).» *McGill Journal of Dispute Resolution,* 2016: 1-26, 16.
[110] Yackee, J. «Investment Treaties & Investor Corruption: An Emerging Defence for Host States.» *Virginia Journal of International Law*, 2012: 723-744.

particular, the Host State argues that due to the illegal nature of its investment, the investor is not entitled to any protection under applicable BITs and relevant international law.

42. A real, recent case will help demonstrate how the situation would present itself in practice. In *MOL v Republic of Croatia*, the investor, MOL Hungarian Oil and Gas Plc (MOL), commenced international arbitral proceedings against the Republic of Croatia under the Energy Charter Treaty (ECT). Claimant argued that with its conduct, Croatia breached certain provisions that protected the investment made by MOL in INA, which used to be a Croatian State-owned company active in the oil sector.

43. In 2003, the Croatian Government decided to privatize INA. MOL acquired a 25% stake + 1 share in the company, while the Croatian Government remained the major shareholder. As a part of the agreement, MOL and the Croatian government entered into a Shareholders' Agreement dated 17 July 2003. Between 2003 and 2007, the Croatian Government continued the process of privatizing INA and continued to sell its own shares to the private public. In 2008, this process led to the negotiation of a modification of the Shareholders' Agreement, as the basis for MOL to increase its stake in INA to 49.08%. As a result of the on-going privatization process, MOL became INA's biggest shareholder with just under 50% stake in INA and therefore it installed its management in the company. However, at some point after this scenario materialised, the Croatian Government tried to re-acquire the majority of INA, and acted in a manner that the investor deemed prejudicial to its rights.

44. In the course of arbitral proceedings that ensued, the Croatian Government relied on corruption as a defence strategy to avoid responsibility for the alleged breach of the investor's rights. In particular, according to the Government, the 2009 Shareholders' Agreements that led to MOL's control of INA were procured through bribery of Croatia's then Prime Minister, Ivo Sanader. Croatia relied in particular on the outcome of domestic proceedings on the basis of which, in November 2012, Mr. Sanader was convicted and sentenced to an eight-year prison

term by a Croatian court for taking a 5 million Euros bribe from INA in exchange for facilitating the 2009 Shareholders' Agreements. However, in July 2015, Croatia's Constitutional Court annulled the corruption conviction against Mr. Sanader citing procedural errors, and ordered the retrial. In September 2015, the Croatian court started another trial of former Prime Minister Sanader on a case of a bribe allegedly taken from MOL to allow it to acquire a control stake in INA.

45. The Host State claimed that corruption that allegedly underlied the 2009 Shareholders' Agreements constituted a bar to the jurisdiction of the Tribunal: according to Croatia, the investor never made a valid investment and therefore the Tribunal would lack jurisdiction to hear the case. On the other hand, the investor denied any wrongdoing, saying that neither MOL nor Prime Minister Sanader had been convicted of any crime in relation to the 2009 Shareholder's Agreements, and that the criminal charges against Prime Minister Sanader were being pursued in an effort by the Host State to regain control of INA.

46. In this case, the Arbitral Tribunal eventually found for the investor, because corruption allegations were not proven to a standard of evidence deemed sufficient by the Tribunal. Ultimately, therefore, the case was disposed of on mere evidential grounds. What if, however, corruption had been proven and a *Defence of Illegality* been made available to the Host State?

47. How is, in general, an international Tribunal to treat such a defence? This thesis will discuss this question, from the perspective of the various criminal misconduct that can be perpetrated by an investor. *It will in particular address the question as to whether illegal conduct by the investor in the making of the investment, and the* Defence of Illegality *used by Host States, produces its effects on the jurisdiction of the arbitral Tribunal, or rather whether these are issues that should be considered at the admissibility or merit phase of the arbitral proceedings.*[111] This thesis intends to demonstrate that both legal and policy considerations dictate that the *Defence of Illegality* in investment arbitration should

[111] Newcombe, A. «Investor Misconduct: Jurisdiction, Admissibility or Merits? in Evolution» Miles, K. et Al. *Evolution in Investment Treaty Law and Arbitration*. Cambridge: Cambridge University Press, 2011: 187 – 200, 191.

be strictly curtailed and that a Tribunal should only decline to exercise its jurisdiction in very limited, and indeed exceptional cases. The position advocated in this dissertation is that arbitrators and tribunals should not be quick to completely dismiss a claim on the basis of the mere presence of some form of illegality; instead, they should look at the entire set of circumstances and perform a proper balancing test between the conduct of the investor and the Host State at the merits phase of the proceedings.[112]

48. In reaching this conclusion, this thesis will take into account as point of reference two systems of law that have been for the most part neglected by scholars who have investigated the *Defence of Illegality* in investment arbitration: international commercial arbitration, and criminal law. Existing scholarship in this field has so far addressed the question exclusively from the perspective of public international law, and the rules applicable to investment arbitration.

49. However, the fact that it is criminal conduct that appears before an international Tribunal cannot be overlooked: a thorough analysis of the research question requires contemplating a criminal law dimension into the debate on the consequences of criminality in international investment arbitration. This requires in particular becoming aware that, since not all crimes - including those that can affect an investment - are the same, it may be appropriate to envisage different kinds of solutions to the response to criminality, and shun away from a *one fits all* approach.

50. Also, despite the fact that the system of investment arbitration is nowadays considered by some as a mechanism of protection not just of the private interests of the parties, but of public interests, and is at times invoked as evidence of the emergence of a system of global administrative law that revolves around public law categories,[113] it would be improper to forget the original roots of this system of dispute resolution: international commercial arbitration. A comparison

[112] Halpern, M. «Corruption as a Complete Defence in Investment Arbitration or Part of a Balance» *Willamette Journal of International Law & Dispute Resolution*, 2016: 297 - 318.
[113] Van Harten, G. et Al. «Investment Treaty Arbitration as a Species of Global Administrative Law.» *European Journal of International Law*, 2006: 121 -150.

with international commercial arbitration is therefore necessary to provide a comprehensive answer to the research question. This is the case especially when one considers that, in terms of procedure, international investment arbitration is based on international commercial arbitration almost entirely and the question of how to address criminality in international commercial arbitration is an eminently procedural one.

51. Hence, the hybridity of the model recalled in the title of this work: criminality in investment arbitration, at the crossroads between *international commercial arbitration and criminal law*.

3.1 Illegality at the time of the *making*, and illegality at the time of the *performing* of the investment

52. The ambit of investigation of this dissertation, as indicated above, is delimited to criminal conduct that occurs at one particular stage of the investor's operations in a Host State: at the time of the making of the investment – that is to say, at its genetic moment. As will be seen later on, an investor commits illegality at the time of the making of the investment when, for instance, it bribes a State official in order to secure an investment; or when it commits an act of fraud for the same reason; or when it decides to violate the laws of the Host State in order to be able to invest in the country. However, illegality, including of a criminal nature, may happen at a later stage, namely after the investment has been made. In this instance, illegality does not concern the making of the investment, but rather its performance. It may happen that the investment is made illegally, and also performed illegally. However, there may also be instances in which the investment is made legally, and only performed illegally.

53. Some cases are intuitive. Bribery, for instance, may occur not only in order to win a tender issued by the Host State and to invest; it may occur later on, once the investment has been made, in order to secure a more advantageous treatment; it may be used to alter to the investor's advantage the competition in the

market; it may be used to avoid complying with fiscal and legislative duties to which businesses are subjected under the laws of the Host State.

54. The same can be said with regard to fraud. Just as much as an investor may dissimulate having certain qualities required to invest in a country, it may dissimulate having those qualities once the investment has been made – for instance to gain access to certain advantages offered by the Host State to investors that possess certain qualities; or also, to continue running its business, even when the features originally possessed have been lost during the course of time (one can imagine for example the duty that in some countries investors have to employ a certain percentage of local workers, or have a certain percentage of local capital in the equity). The same can be said with regard to the violations of the laws of the Host State: an investor may well have abided, for example, with the environmental regulations disciplining the access to the market of the Host Country; but, at the same time, environmental regulations may be violated in the performance of the business activities, in order to save on costs and maximise profits.

55. Some forms of criminality have features that determine that they can only occur during the performance of the investment, and not during its making. This is the case, for example, with regard to money laundering. One may imagine the case of an investor that complies with local legislation in order to set up a banking business in a certain country, and then uses its investment to launder money that constitutes the proceeds of illegal activities.

56. There are two main reasons that justify the selective approach followed in this work of only focussing on illegality in the *making* of the investment. Firstly, there is an overwhelming degree of consistency among Tribunals and scholars on the fact that illegality that affects an investment in the performance phase does not constitute a bar to the jurisdiction of an arbitral Tribunal (or to the admissibility of the claim), but rather is a matter to be assessed at the merits. In the case *Fraport v Philippines*, for example, the Arbitral Tribunal expressed itself in these terms:

> *"the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction".*[114]

57. By a similar token, the Tribunal in *Hamester v Ghana* explained that:

> *"the legality of the creation of the investment is a jurisdictional issue (...) [L]egality in the subsequent life or performance of the investment (...) may well be relevant in the context of the substantive merits of a claim brought under the BIT."*[115]

58. These, and other pronouncements to a similar effect, led scholars such as Zachary Douglas, who have reviewed extensively the practice of Tribunals and doctrinal opinions to conclude that:

> *"Here there is a total consensus in the jurisprudence and it is a consensus that can be endorsed: any plea of illegality relating to the use of the assets comprising the investment by the foreign national must be considered as a defence to the merits of the claims. A plea of this nature may require an analysis of the evolution of the law of the Host State and the manner of its application to the investment in question, as well as an assessment of the conduct of both the investor and the Host State".*[116]

59. Since this approach by Tribunals is essentially undisputed, the topic of illegality in the performing of the investment does not provide the kind of fragmentation of solutions and theories that would be necessary to pursue a research-oriented and original discussion in a doctoral dissertation.

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[114] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award of 16 August 2017, para 345.
[115] Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award of 18 June 2010, para127.
[116] Douglas, Z. «The Plea of Illegality in Investment Treaty Arbitration» *ICSID Review—Foreign Investment Law Journal*, 2014: 155 – 186, 185.

60. Secondly, the solution resorted to by Tribunals and scholars with regard to illegality in the performance of an investment (a solution that, as said, does not have an impact on the jurisdiction of a Tribunal, but on the merits of the claim), is essentially the same solution that this dissertation advocates *also* with regard to illegality in the making of the investment. In this dissertation, therefore, Tribunals' approach to illegality in the performance of an otherwise legal investment is not treated as a stand alone topic, but rather referenced only as an argument in support of the main proposition of this work, when relevant.

CHAPTER 1

STRUCTURE OF THE THESIS

61. This dissertation is divided into 10 Chapters. This Chapter 1 is limited to setting out the structure of the thesis.

62. Chapter 2 addresses one of the modalities in which criminal law becomes relevant for international arbitration, namely criminality in the making of an investment, that is the subject of investigation of this thesis. It does so by proposing a taxonomical approach to the various instances of criminality in the making of an investment, based on the criminal law category of culpability. The taxonomy proposed in Chapter 2 is a necessary and constitutive element of the hybrid model built in this dissertation. In particular, the categorisation of criminal conduct indicated in Chapter 2 is operativised in Chapters 8 and 9 of the thesis. Chapter 2 accounts for the criminal law dimension of the hybrid model built at the crossroads between international commercial arbitration and criminal law.

63. Chapter 3 clarifies some basic issues around the notions of jurisdiction and admissibility that are necessary to fully appreciate the research question and explains why the distinction between the two notions is important for the purposes of the question investigated in this work.

64. Chapter 4 discusses the meaning and the origin of the *Doctrine of Separability*, and its status as a general principle in the law of investment arbitration. It shows that the *Doctrine of Separability* developed in international commercial arbitration is also applicable to international investment arbitration. The *Doctrine of Separability* is also a constitutive element of the hybrid model proposed in this work, and it accounts for its international commercial arbitration dimension.

65. Chapter 5 discusses comparative analysis in international investment arbitration. Chapter 6 continues to explain why international commercial arbitration is a valid *tertium comparationis* to address novel issues that appear in international investment arbitration, and that there is no structural incompatibility between international commercial arbitration and international investment arbitration that prevents the cross fertilisation between these two fields of law, as regards in particular the application of the *Doctrine of Separability*.

66. Chapter 7 discusses the *Defence of Illegality* in its various articulations, and how this has been applied in international investment arbitration. It does so by addressing the question of express legality clauses in BITs, the question of the implied notion of legality also in the absence of a legality requirement in BITs and by assessing the status of the so called *Clean Hands Doctrine* in international arbitration.

67. Chapters 8 and 9, together, propose the novel hybrid model for addressing criminal conduct in international investment arbitration. In particular, Chapter 8 applies the *Doctrine of Separability* to the *Defence of Illegality*. It invokes, against what seems to be a general expansive trend, an approach that significantly limits the most severe consequences of the *Defence* (e.g. the finding that a Tribunal lacks jurisdiction if the investment is tainted by criminality), to argue that this outcome should be reserved to very specific and exceptional situations. Chapter 9 explains how to apply a balanced approach to the question of criminality of the investor, which takes into account the conduct of both the investor and the Host State at the merits stage of the proceedings, on the basis of the taxonomy of criminality proposed in Chapter 2. Chapter 10 shows how there are no policy rationales for not applying the *Doctrine of Separability* to investment arbitration, in the same manner as it operates in international commercial arbitration, and constitutes the policy ground for the model proposed in Chapters 8 and 9. Conclusions follow.

CHAPTER 2:

CRIMINAL CONDUCT IN THE MAKING OF AN INVESTMENT – A PROPOSED TAXONOMY

1. Introduction

69. The preceding pages have shown briefly and by way of introduction how and why criminality, and with it criminal law, have made their irruption in the field of international investment arbitration. A few scenarios have been canvassed and even if it is not the purpose of this thesis to explain in general how criminal law and international arbitration interface, the pages that precede have given an idea of the reasons behind Professor Pavic's statement that, nowadays:

> *"[T]here are a myriad of ways in which criminal elements might appear within a dispute that is to be resolved by arbitration, or that has already been resolved by it."*[117]

70. Criminality, or *criminal elements,* are however generic words. A complete answer to the research question that is discussed in this dissertation requires venturing into a deeper assessment of the modalities in which criminal conduct can taint the investment made in a Host State. The aim of this Chapter is therefore that of identifying the most relevant criminal conducts that appear before an arbitral Tribunal with respect to an investor's investment, for the purposes of their classification. This exercise of classification is not performed for mere taxonomical ends. On the other hand, it is necessary when assessing what conclusions an arbitral Tribunal should draw when confronted with any specific kind of criminal conduct. As such, the taxonomy proposed in this Chapter is an integral and fundamental component of the model put forward in this dissertation to address criminality in the making of an investment and canvassed in Chapters 8 and 9.

[117] Hiber G, and Pavic K. (2008), *op.cit*., 67.

71. The idea behind the taxonomy proposed in the pages that follow is that, since not all crime is the same, the typology of the crime committed by the investor is relevant both as regards the specific legal consequences that should be attached to it in a certain case, and as regards broader policy perspectives. An example, which will be expanded in the pages that follow, will help to clarify this aspect.

72. Amongst the conducts that most frequently appear before an international investment Tribunal is bribery. A non-technical definition of bribery, drawn from the Merriam Webster Dictionary of English speaks of "*money or favour given or promised in order to influence the judgment or conduct of a person in a position of trust.*"[118] Another conduct that oftentimes appears before an international Tribunal and that is invoked as a ground of illegality of the investment is fraud. Again, a non-technical definition of fraud describes this crime as "*intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right."*[119]

73. Already from these non-technical definitions of bribery and fraud, a key difference emerges: bribery is a *bilateral crime*, in the sense that it requires some sort of cooperation between the person who offers the bribes, and the person who receives the bribe.[120] As noted by one author, speaking with respect to public bribery:

> *"For every person who supplies a bribe, there is a public official receiving, soliciting, or even extorting the bribe. This demand side is no less venal, especially to the citizen of that State who suffers through the governance afflictions corruption engenders."*[121]

[118] Merriam Webster Dictionary of English*, Definition of Bribery*.
[119] Merriam Webster Dictionary of English, *Definition of Fraud.*
[120] The bilateral nature of the crime is signaled also by domestic legislation. In France, for instance, the Code Pénal defines active corruption as "*unlawfully proffering, at any time, directly or indirectly, any offer, promise, donation, gift or reward, in order to induce a person … (1) to carry out or abstain from carrying out an act pertaining to his office, duty, or mandate, or facilitated by his office, duty or mandate (2) or to abuse his real or alleged influence with a view to obtaining distinctions, employment, contracts or any other favourable decision*" (Article 433-1) Passive corruption, on the other hand, is defined as the direct or indirect request or acceptance without right and at any time of offers, promises, donations, gifts or advantages. (Article 432-11). The CEO of Transparency International, Peter Eigen has spoken of a "hand in hand" crime to signal the bilateral nature of corruption. According to him: "*Corrupt political elites in the developing world, working hand-in-hand with greedy business people and unscrupulous investors, are putting private gain before the welfare of citizens and the economic development of their countries*". See Vittal, N. *Corruption in India: The Roadblock to National Prosperity*: New Delhi: Academic Foundation, 2003: 36.
[121] Halpern, M. (2016), *op. cit.*, 304.

74. Without this cooperation and without the consent of the individual who accepts the bribe, the crime cannot be perfected. It can, at most, reach the level of an attempt.

75. The crime of fraud is different. Under many systems of laws, this crime is categorized as a crime of *cooperation with the victim*.[122] The kind of cooperation that appears in fraud, however, is very different from the one that lies behind the acceptance of a bribe. In fraud, cooperation is a *vitiated form of consent*, in the sense that the victim's agreement with respect to a certain conduct is vitiated by a misrepresentation of facts or events that have the effect of swaying its will. Also in the crime of fraud, therefore, some sort of *contribution* on the part of the fraudee is necessary, but unlike the case of the bribee, the fraudee's conduct is not reprehensible, nor is *per se* indicative of any responsibility. But for the deception, the victim would not have agreed to "*to part with something of value or to surrender a legal right*".[123] Put it differently: the bribee is a party to the crime. The fraudee is just a victim thereof.

76. This differentiation has a direct impact on the possible answers to the research question discussed in this dissertation. Since, in the case of fraud, the fraudee is normally in an innocent position, it may be justifiable for an arbitral Tribunal to decide that all the consequences of the illegal act are to be borne by the individual enacting the fraud. A Tribunal that decided to dismiss in its entirety the claim of an investor that has committed fraud, and hence to place on the fraudster all the consequences of the fraud, would be acting in a manner that is overall consistent with the repartition of blameworthiness that characterises this crime under the criminal laws of most countries.

77. The situation would be different in the event of bribery. In this case, a Tribunal that declined jurisdiction over the investor's claim due to its illegality would not be in a position to assess at all the conduct of the bribee, who is not in

[122] Klaw, B. «State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities.» *Berkeley Journal of International Law,* 2015: 62-113.
[123] Merriam Webster Dictionary of English*, Definition of Fraud.*

an innocent position with respect to the act of bribery. All the consequences of the act of bribery would have to be borne by the investor, but this solution does not comport with the actual repartition of culpability that characterises this crime, and with the sanctioning regime applied in the vast majority of jurisdictions.[124] This is especially unfair when the blameworthiness of the bribee is as great, if not greater, than that of the briber. Let us take the situation when bribes are not simply offered by the briber, but are solicited by the bribee as a condition to enable the investor to actually invest in a country.[125] In the case *World Duty Free v Kenya*, for example, a British investor had to pay a sum of 2 million Euros, under the guise of a *donation* to the President of Kenya, to make business in the country and secure an investment concerning the constructions of duty frees in Kenyan airports. The *donation* paid by the investor was apparently solicited by the Kenyan President in person. After illegal tampering by the Host State with the investment, World Duty Free brought a case before an arbitral Tribunal. Kenya's defence revolved entirely around the circumstance that the investment had been secured through the corruption of Kenyan officials. The Tribunal pointed that it was a highly disturbing feature of the case that the corrupt recipient of the Claimant's bribe was more than just an official of State, but its most senior officer, the Kenyan President.[126] Despite this, *the existence of an illicit payment provided a complete defence to all claims against the Kenyan State,*[127] since the Tribunal declined to exercise its jurisdiction over the case. Not only did the investor not receive any redress with respect to Kenya's illegal interference with the investment; it was also left to bear all the consequences of the crime whose commission the Kenyan President had solicited.

78. The question is therefore relevant if different instances of criminality that appear before an international investment Tribunal should always be dealt with the same approach, or if differentiated approaches should be adopted in consideration of a mutual standard of fault - that is, mutual responsibility and culpability between

[124] OECD, *Elements of the Active and Passive Domestic Bribery Offences*, in The Criminalisation of Bribery in Asia and the Pacific: Paris, OECD Publishing, 2011. Deming, S. H., *Anti-Bribery Laws in Common Law Jurisdictions,* Oxford: Oxford University Press, 2014.
[125] Klaw, B. (2015), *op. cit*., 69.
[126] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006.
[127] Klaw, B. (2015), *op. cit*., 69.

the investor and the Host State - that characterises certain crimes. This in turn begs the question as to whether criminality by the investor should be dealt with as a matter of jurisdiction or admissibility, on the one hand, or as an issue concerning the merits of the proceedings. As will be better seen below, the phase of the merits of proceedings is the best stage at which any mutual contribution by the parties to the crime could be investigated. However, to date, the treatment of criminality by investment Tribunals has been for the most part unitary, and no differentiations between the various typologies of crimes has been considered, not even in terms of theoretical models. The tendency, which is also winning some minds among scholars, is to treat all criminality of the investor in a unitary manner and as a gateway and preliminary issue that precludes to the Tribunal an assessment of the case on the merits.

79. Tribunals that have declined their jurisdiction over cases tainted by bilateral crimes have at best tried to take into account the conduct of both parties at the time of the allocation of their costs. For example, while the general trend in international investment arbitration is nowadays that a losing party should also pay the winner's costs, in the case of bilateral criminality an equal sharing of costs is seen as a way to hold both parties accountable with regard to their misconduct. For example, the Tribunal in *Metal Tech* held that:

> *"The law is clear – and rightly so – that in such a situation [of an investment tainted by corruption] the investor is deprived of protection and, consequently, the host State avoids any potential liability. That does not mean, however, that the State has not participated in creating the situation of this participation, which is implicit in the very nature of corruption. It appears fair that the Parties share in the costs."*[128]

[128] Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award of 4 October 2013, para. 422. On Metaltech v Uzbekistan, see generally: Lamm, C. and Greenwald, B. «From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption» *ICSID Review*, 2014: 328-349; Losco, M. A. «Charting a New Course: Metal-Tech v. Uzbekistan and the Treatment of Corruption in Investment Arbitration.» *Duke Law Journal Online*, 2014, 37 – 52; Rose, C. «Circumstantial Evidence, Adverse Influences, and Findings of Corruption: Metal-Tech Ltd. v. The Republic of Uzbekistan.» *The Journal of World Investment and Trade*, 2014, 747 – 756; Kendra, T. and Bonini, A. «Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus?» *Journal of International Arbitration*, 2014: 439 - 453.

80. While the attempt to remedy some of the paradoxical effects created by decisions such as *World Duty Free* is laudable, it remains doubtful whether this can be achieved through the mere sharing of responsibility in the allocation of costs. More structured and effective solutions, both at the theoretical and at the practical level, should be devised.

81. By way of introduction to this Chapter, another point must also be made. The bilateral nature of corruption, as opposed to other forms of criminality that may taint the investment, means that corruption can be at the basis of a defence that can be raised *by an investor, as well as by a Host State*, in the context of international investment proceedings.

82. This is indeed a peculiarity of the crime of corruption. Normally the positions of the Parties are fixed in international investment arbitration: the investor is the claimant, and the Host State is the respondent. Logically, the *Defence of Illegality* is therefore a prerogative of Host States and criminality is ordinarily invoked by them. Corruption, however, may be used as a *sword*, or as a *shield*. As a *shield*, corruption can be raised by a Host State in the traditional manner, namely as a "*putative complete defence against all claims made by the claimant*".[129] Llamzon explains that corruption is invoked by Host States at least three times as often as it is raised by investors. However, investors could raise corruption as a *sword* in certain cases. For example, an investor could raise the issue of corruption to lament the violation of the standard of fair and equitable treatment that is prescribed by BITs and international law.[130] In particular, the investor may argue that its right to be treated fairly and equitably is breached any

[129] LLamzon, A. «*On Corrutpion Peremptory's Treament in International Arbitration*», in Addressing Issues of Corruption in Commercial and International Arbitration.» ICC Institute of World Business Law, 2015: 32 – 40, 35.
[130] Draguiev, D. «Bad Faith Conduct of States in Violation of the 'Fair and Equitable Treatment' Standard in International Investment Law and Arbitration», *Journal of International Dispute Settlement*, 2014: 273-305. According to the author, who surveys case law: "*[a] number of cases have dealt with allegations of bribery and corruption which have ultimately qualified as violations of the FET, falling within the scope of bad faith con- duct on the States' part. In EDF v Romania the investor, operating State-owned airport premises on long-term lease conditions, was denied renewal of its lease agreement. Electricité de France (Services) Limited (EDF) made allegations that on several occasions its representatives were solicited to pay bribes by persons who claimed they were acting on behalf of the Romanian government. As EDF refused to pay bribes, the government retaliated by refusing lease renewal and thus deprived the company of its business in Romania. The Tribunal was not persuaded by the evidence adduced by EDF and could not agree that the corruption allegations were substantiated. However, what may be inferred from the dicta of the Tribunal (...) is that corruption solicitation does breach the FET"*. (at 304).

time that the Host State seeks to illegally obtain sums that are the price to avoid being sanctioned, or to be spared arbitrary or unjust treatment, or just to continue operating in a certain country.[131] These are considerations that will be useful in the pages that follow, and will be addressed later on.

83. With all these premises in mind, and having specified that not all criminality that appears before an arbitral Tribunal is the same, it may be useful to recall a passage from the decision of the Tribunal in the case of *Hamester v Ghana*, in which six forms of investor's wrongdoings were identified. These are as follows: 1) lack of good faith; 2) bribery; 3) fraud; 4) deceitful conduct; 5) misuse of the system of investment protection; 6) violations of Host State laws.[132] For the purposes of this dissertation, which deals with criminal conduct by the investor, only some of the instances of investor wrongdoing sketched out above become relevant. Lack of good faith is not one of those, since lack of good faith is not normally sanctioned as a criminal offence, *per se.* At most, bad faith can be a component of the *mens rea* that is necessary to integrate the material elements of certain crimes. For example, under English law, statute provides for the possibility of resorting to abortion in the case of multiple pregnancies. This is an option to which a woman may resort to when one of the foetuses is regarded as being at risk of, or is diagnosed with, some serious illness, as defined by the relevant legislation. In these instances, doctors are required to provide a certified medical opinion that has to be rendered in good faith. If the doctor provides the medical opinion in bad faith and on the basis of this an abortion is performed, he or she may be charged with a criminal offence under Part 2 of the Serious Acts Crime of 2007.[133]

[131] LLamzon, A. (2015), *op.cit*., at 35. Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16.

[132] Gustav F W Hamester GmbH & Co KG v . Republic of Ghana, ICSID Case No. ARB/07/24. Award, 18 June 2010, para 123: "*an investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law." See also, for a similar classification, Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award of 4 October 2013, para 164: "[t]he Tribunal agrees with this view. In general, on the basis of existing case law, it considers that the subject-matter scope of the legality requirement covers: (i) non-trivial violations of the host State's legal order, (ii) violations of the host State's foreign investment regime, and (iii) fraud – for instance, to secure the investment or to secure profits. There is no doubt that corruption falls within one or more of these categories*".

[133] Ormerod, D. and Laid, K. *Smith and Hogan's Criminal Laws*, Oxford: Oxford University Press, 2016: 700.

84. Bribery is criminalised internationally and therefore certainly falls within the categories of criminally relevant conduct that may be encountered by an arbitral Tribunal, and so does fraud. Deceitful conduct that does not amount to fraud, on the other hand, does not fall within the scope of the investigation of this dissertation. However, in consideration of the fact that deceitful conduct is part of the material element (the *actus reus*) of the crime of fraud, it is encompassed by this crime, when the deceitful conduct reaches a threshold of magnitude that makes it relevant to criminal law.

85. Misuse of the system of investment protection does not *per se* constitute a criminally relevant conduct. Certainly, there are instances in which investment arbitration is abused in a manner that constitutes a crime, as is the case, for example, with international arbitral proceedings used as a mechanism of money laundering. However, these instances do not concern substantive illegality in the making of the investment, but rather the question of the procedural abuse of the mechanism of dispute resolution. In turn, these matters do not raise issues relevant for the research question of this thesis. As such, they are not addressed in this thesis.

86. Lastly, violations of Host State laws constitute criminally relevant conduct only when these laws are assisted by criminal sanctions. This is the field in which it is possible to identify the greatest variability: whereas bribery is universally criminalised and fraud constitutes a crime in the vast majority of jurisdictions,[134] the question is different with respect to the violation of specific legislation in Host Countries. In *Fraport v Philippines* for instance, a case that is discussed at length in the pages that follow, the alleged violation committed by the investor was the breach of a constitutional provision according to which a foreign investor was restricted from possessing more of 40% of the shares of a locally incorporated company holding a concession in the public utility sector.[135] This provision was assisted by a criminal sanction set out in the Anti-Dummy law of the

[134] Pradel, J. *Droit Pénal Comparé*. Paris: Dalloz, 2016. Heller, K. and Dubber, M. *The Handbook of Comparative Criminal Law*. Stanford: Stanford University Press, 2010.
[135] Schill, S. W. «Illegal investments in Investment Arbitration.» *The Law and Practice of International Courts and Tribunals*, 2012: 281-323.

Philippines. Amongst other things, this law sanctioned citizens of the Philippines who lent themselves to act as strawmen for foreign nationals in an attempt to circumvent the constitutional prohibition on anti-dummy. However, restrictions of ownership provisions are not always assisted by a criminal sanction. The same can be said for instance with regard to environmental regulations that require investments to comply with certain standards, or to abide by certain limits.

87. Even if this thesis concerns itself with *criminality* in investment law, it is in any event necessary to recall that the debate on investor misconduct in international arbitration is not limited to *violations that amount to crimes*. A number of BITs contain provisions that require that the investment be made in *accordance with Host State laws* in general terms.[136] These clauses refer in general terms to the legality of investments, and are not specifically aimed at addressing illegality that reaches the threshold of criminal conduct. The same can be said for the *Clean Hands Doctrine*, which is another way, as will be seen in Chapter 7, in which the *Defence of Illegality* may operate. The doctrine prescribes that under equitable principles, a person cannot rely on their illegal act or conduct to base an action against another person, in compliance with the principle *ex iniuria ius non oritur*, which is alleged by some to be part of international law.[137] However, under the *Clean Hands Doctrine*, the relevant *iniuria* is not only the one that derives from a violation of criminal law. On the contrary, the *Clean Hands Doctrine* has also been raised to counter claims when the wrongdoing by the investor consisted in violations of law not assisted by a criminal sanction.

88. This means that in the current state of investment law and arbitration, investor illegality, and that specific form of investor illegality that is constituted by criminality, are treated by resorting to the same legal tools and solutions. This sometimes leads to the paradoxical conclusion that an investment acquired in bad

[136] See for example Article 2 of the Equador-Spain BIT, according to which "*Each Contracting Party (...) will admit investments according to its legal provisions. The present Article will also apply to investments made before its entry into force by investors of a Contracting Party in accordance with the laws of the other Contracting Party in the territory of the latter.* Article 3, titled *"protection"* similarly provides that*: "Each Contracting Party shall protect in its territory the investments made in accordance with its legislation."*

[137] While "*equity does not demand that its suitors shall have led blameless lives (...) it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue*." See Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945).

faith may be sanctioned in the same manner as an investment acquired through fraud or corruption. All the more so, the need to avoid these paradoxical effects requires devising different solution that take into account the different kinds of misconduct that can affect substantively an investment. From this angle, violations of law that do not amount to a criminal breach are also taken into account in this work.

89. The only significant difference in approach applied with some consistency is constituted by the application of a *de minimis* approach to certain cases of investor's misconduct. For example, in the event that only minor provisions of law are violated by the investors, especially those provisions of an administrative nature, the *Defence of Illegality* may not even be invoked, according to some Tribunals. For example, in *Alpha Projektholding v Ukraine*, the arbitral Tribunal considered that "*an investment is not excluded from the Tribunal's jurisdiction by virtue of alleged defects in Claimant's registration paperwork*"[138] This is because even those who believe that the proper sanction of illegality in investment should be that the Tribunal decline its jurisdiction over an investor's claim, have to recognise that it would not comport with a system of investment protection and promotion to exclude investments only for minor infringements of law.[139]

90. *De minimis* considerations are by definition not applicable with respect to conduct that reaches the threshold of criminality: since only the most serious violations of domestic laws are assisted by a criminal sanction, the application of a *de minimis* theory as used in the context of general illegality of an investment is excluded *ab orgine* when the provision whose violation is invoked are assisted by a criminal sanction. However, minimal violations of law by the investor and in general violations that do not amount to a criminal sanction are also mentioned for the purposes of the discussion in the model developed in Chapters 8 and 9, which postulates that also these kinds of misconduct can be subject to an assessment on the merits of a case, and properly dealt with (and if needs be disregarded due to

[138] Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award of 8 November 2010, para 297.
[139] This is however a debated and at time controvertial question, and will be assessed in full in the relevant passages of this work.

their non-gravity) at that stage. Violations of law that do not amount to a criminal breach are also mentioned in the context of the assessment of the culpability of the investor which is carried out in Section 3.2 of Chapter 2, because the analysis used by Tribunals to assess and graduate the gravity of non-criminal violations is useful also with regard to criminal ones.

91. With these premises, in the pages that follow a taxonomy is proposed of criminal conduct that can appear before an arbitral Tribunal. This taxonomy follows as a criterion of classification based on the reciprocal level of *culpability*[140] of the investor and of the Host State in the commission of the crime. *Addressing culpability presupposes, first and foremost, that the State is involved in the wrongdoing and responsible for it, such as through direct participation, or instruction or omission*. After responsibility *is established*, culpability is intended here in a composite sense both as a measure of the psychological element of the crime, namely the

> *"Situation d'une personne qui se voit reprocher l'élément moral d'une infraction, soit au titre de l'intention, par hostilité aux valeurs sociales protégées, soit au titre de la non-intention, par indifférence auxdites valeurs"*[141]

92. And in its normative dimension as an assessment of the *reprehensibility* or *blameworthiness* for the anti-juridical nature of the conduct, *vis à vis* the obligation posed by the norm.

93. Most importantly, culpability is critical for this taxonomy also in its conception of *Strafzumessungsschuld,*[142] that is to say as a criterion for graduation of the penalty imposed on the author of the crime. From this angle, it constitutes a parameter that the arbitral Tribunal must take into account when establishing what consequences to attach to the criminality committed by the investor. In this sense,

[140] See Arnone, M. ans Borlini, L. *Corruption: Economic Analysis and International Law*, London: Edward Elgar, 2014: 297. The degree of culpability can then be graduated on various level, depending on the circumstances of the crime that measure the involvement of the author in the crime itself.
[141] Définition du Lexique juridique de: Culpabilité (Culpability).
[142] Achenbach, H. *Historische und Dogmatische Grundlagen der Strafrechtssystematischen Schuldlehre*, Berlin: Schweitzer, 1974.

culpability *is the synthesis of all the elements that can be imputed to an individual, on which the gravity of the single crime depends*[143]. Since arbitral Tribunals cannot issue criminal sanctions, culpability as meant in this dissertation is not a measurement of the desirable extent of the penal law consequences of the crime – but a parameter to guide the decision of the arbitral Tribunal in the application of the sorts of measures that fall within its competence – essentially, the awarding of damages, or of restitutionary remedies, when they are available.

94. In this sense, the level of culpability of the Host State can be assessed through several parameters such as the willingness to commit the crime, the failure to supervise or to maintain adequate controls or the lack of a culture aimed at deterring the commission of certain crimes. While the culpability of the investor, in its capacity as the *author of the crime* is not generally disputed when criminality on its part is invoked,[144] the question of the culpability of the Host State is often neglected.

95. One scholars captures the consequences of this situation with lucidity, speaking with regard to a *Defence of Illegality* centered on corruption:

> *"[T]he "corruption Defence" (...) allows tribunals to void an underlying contract if procured through an act of corruption or bribery. Peculiarly, however, the corruption Defence has not concurrently developed a doctrine of contributory fault, whereby the recipient of the bribe is deemed culpable for its own participation in the corrupt acts. Taken together in the ICSID context, should a host state injure the investment of a foreign investor that paid a bribe to acquire a valuable agreement with the host state, a successful corruption Defence will completely excuse the host state from liability. Thus in investor-state arbitration involving issues such as expropriation, a host state may emerge from the dispute in a net positive position despite the host state's substantial involvement in the illicit payment while the investor loses his entire investment*.[145]

[143] Fiandaca, E. (2014) *op. cit*.
[144] However, as indicated below, also the culpability of the investor is not always one and the same, but rather can be graded according to several parameters.
[145] Fawler Torres, Z. «Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration» *Virginia Journal of International Law*, 2014: 996 -1030, 999.

96. The idea behind the culpability approach to classification is consistent with the thesis advocated in this dissertation: that, when addressing criminal conduct in investment law, Tribunals should develop mechanisms that allow them to weigh the conduct *of both parties*, and that such solution is mandated both by law, and policy[146].

2. Bribery[147]

97. The pages that follow are devoted to the crime of bribery.

2.1. Introductory Remarks for a Basic Taxonomy of Bribery

98. The idea of bribery in international trade and investments provokes invariably great condemnation. Legal commentators, judges and arbitrators alike have been resolute in labelling it as a vile, repugnant behaviour that *tears the very fabric of society and the cross-border exchange of goods and services*[148] and that it is even more serious a crime than theft. At times, corruption has been compared to the crime of high treason.[149] Yet, despite the almost universal condemnation, corruption is a widespread phenomenon both domestically and internationally.[150] It is so widespread that in many cultures it has become interiorised at the cultural level. In Japan, it has been ritualized to such a degree that the payment or present that constitute the bribe is frequently paid through the mechanism of a fake bet in the context of a golf match between the briber and the bribee. In this manner, the briber can lose the game and pay the bribe/bet without anyone losing their face. In Kenya a famous newspaper cartoon depicted a man meeting St. Peter at heaven's gate and offering *kitu kidgo — something small* in Swahili, to be sure to get access.

[146] Raeschke-Kessler, H. and Gottwald, D. «Corruption in Foreign Investment-Contracts and Dispute Settlement between Investors, States, and Agents.» *The Journal of World Investment & Trade*, 2008: 7 -33, 19: "*The arbitral tribunal must also consider the role both parties have played in the corrupt activity*."
[147] The terms "bribery" is used throughout this dissertation as a synonim of the word "corruption".
[148] Pavic, V. «Corruption in International Commercial Arbitration, Role of Mandatory Rules and Public Policy» *Victoria University Wellington Law Review*, 2012: 661- 686, 663.
[149] Sayed, A. «La Question de la Corruption dans l'Arbitrage Commercial International: Inventaire des Solutions.» *ASA Bulletin*, 2001: 653 - 700, 653.
[150] See for instance the analysis carried out annually by Transparency international and available at: Transparency international.com.

The same *kitu kigdo,* something small, was how the President of Kenya Daniel Arap Moi referred to the 2 million Euros bribe that he asked as a condition for a British investor, World Duty Free, to operate in his country.[151] In Kenya, the cartoon implies, bribing officials is so much a part of life that it may even transcend life.[152]

99. In investment law, in general, corruption has manifested itself in a variety of ways: through the bribery of senior members of government;[153] by means of the concealed participation of officials in the investment either through a commission or agency agreement[154] or through shares or other benefits from an entity involved in the investment;[155] or, also, through the corruption of the judiciary to overcome regulatory obstacles.[156] In a recent case, it was held that the refurbishing of the President of the Kyrgyz Republic's home by an investor was a way to buy his good will and secure an investment in the country. However, the refurbishment occurred years after the investment had been made, and the bribery allegation was not ultimately substantiated in that case.[157]

100. In general, the commonality of corruption means that its notion can be understood intuitively. From the perspective of international commercial law and investment law,[158] however, a first distinction is necessary. Indeed, international transactions can be affected by either *hard corruption* (or *grand corruption*) or by a *lighter form of corruption*. The definition of corruption provided by the OECD Convention on Combating Bribery of Foreign Public Officials in International

[151] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award of 4 October 2006.
[152] Omestad, T. «Bye-Bye to Bribes.» *Nesweek*. 22 12 1997.
[153] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006. See also SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID case ARB/01/ 13, Decision on Objections to Jurisdiction, 6 August 2003, para. 78
[154] Wena Hotels Limited v. Arab Republic of Egypt, ICSID case ARB/98/4, Award of 8 December 2000.
[155] Metalclad Corporation v. United Mexican States, ICSID case ARB (AF)/97/1, Award of 30 August 2000.
[156] Lucchetti S.A. and Lucchetti Peru, S.A. v. Republic of Peru, ICSID case ARB/03/4, Award on jurisdiction, 7 February 2005, at paras 37, 43, 51 and 57. «Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum Robert Briner» Aksen, G. and Briner, R. *Corruption in Investment Arbitration*. Paris: ICC Publishing, 2005, 234.
[157] "*At one stage the Claimant refurbished the Kyrgyz President's Guest Residency, which was used to accommodate distinguished guests. The Claimant says that it did so as a good-will gesture, at the request of the Kyrgyz Republic. The Respondent suggests that it was an attempt to bribe the Kyrgyz President*". See Sistem Mühendislik In aat Sanayi ve Ticaret A. v. Kyrgyz Republic, ICSID Case No. ARB(AF)/06/1, Award , 9 September 2009 at 40.
[158] Yannaca-Small, K. «Les Paiements Illicites dans le Commerce International et les Actions Entreprises pour les Combattre.» *Annuaire Français de Droit International* , 1994: 792-803.

Business Transactions[159] accounts for the hard form of corruption, and it describes the most serious pattern of criminality that can present itself in the relationship between an investor and a Host State. According to Article 1 of the Convention, corruption is the act committed by those who:

> *"Intentionally offer or promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."*[160]

101. In addition to this form of *hard corruption*, or *grand corruption*, international investment and trade law also know another form of bribery, that is referred to as *trading in influence*, *trafic d'influence* or *influence peddling*.[161] Influence peddling is not covered by the OECD Convention definition of corruption primarily because there was no international consensus as to whether or not influence peddling should be established as a criminal offence, as opposed to an administrative felony, at the time when the OECD Convention was negotiated.[162] However, this conduct is disciplined by the Criminal Law Convention of the Council of Europe, whose Article 12 defines it as follows:

> *"The promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any public official in consideration thereof, whether the undue advantage is for himself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result."*[163]

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[159] Quinones, E. «L'Evolution du Droit International en Matière de Corruption : la Convention de l'OCDE .» *Annuaire Français de Droit International* , 2003: 563-574.
[160] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997, Article 1
[161] See generally: Munoz Lorente, J. «Los Delitos de Tráfico de influencias (Situación actual y Propuestas de Reforma en la Lucha contra la Corrupción).» *Eunomia: Revista en Cultura de la Legalidad*, 2013: 73-101.
[162] Lucchini, R. «Entre Relativisme et Universalisme. Réflexions Sociologiques sur la Corruption.» *Déviance et Société*, 1995: 219-236.
[163] Criminal Law Convention on Corruption, 1999, Article 12.

102. Nowadays, there seems to be general consensus that influence peddling is as detrimental as corruption, and that their moral disvalue is the same. As noted by Raymond, for example, "*il se dégage un large consensus des ordres juridiques des États de droit pour condamner la corruption et la pratique des trafics d'influences*."[164]In an international investment context, influence peddling is a very frequent phenomenon and therefore it is also considered in this work.

103. From the practical perspective, the *hard corruption* of a foreign official can fall into one of the two following mechanisms, that also correspond to different typologies of cases in investment arbitration: a) hard corruption through a direct agreement; b) hard corruption through an agency agreement.[165]

104. Under the first modality (the direct scheme), the investor engages directly with the Host State to pay a bribe. This method accounts for a minority of cases. A study carried out in 2008 by Raeschke and Keller identified 36 cases of alleged corruption in international investment arbitration, and found that only 11 fell into this first category. [166]

105. According to the second modality (the indirect scheme), an investor retains an agent/intermediary with the stated purpose of providing consultancies or other legitimate services regarding issues that are relevant to the making of the investment in a foreign country, or to its performing. These may be fiscal matters, legal matters, or other questions of strategy.[167] The real purpose of the agency agreement, though, is different from what stated in the contracts, and consists in the bribing foreign officials and decision makers in the Host State.[168] In particular,

[164] Reymond, P. «Trafic d'Influences et Contrats de Distribution: Quelques Aspects de Droit International Privé.» *Contributions offertes au Professeur François Dessemonetet*, Vojame, J. 308-357. Lausanne: Lausanne, 1998.
[165] Crivellaro, A. «Arbitration Case Law on Bribery: Issues of Arbitrality, Contract Validity, Merits and Evidence» *Transnational Dispute Management*, 2005: 23 -56.
[166] Raeschke-Kessler, H. and Gottwald, D. (2008), *op cit*., 12
[167] El Kosheri, A. and Leboulanger, P. «L'Arbitrage Face à la Corruption et au Traffic d'Influence» *Revue de l'Arbitrage*, 1984: 3 – 12.
[168] The case of Metaltech v Uzbekistan provides an interesting example in this regard. The Tribunal sought to clarify the nature of certain payments that were formally made to consultants to the investor, but that the Tribunal suspected could in fact constitute agency agreements aimed at corrupting foreing officials of the Host State. The Tribunal thus identified some red-flags in the contracts between the investors and the consultants. These red flags included the size of the payments made to the consultants; the lack of proof that the consultants provided any legitimate services; the consultants' lack of qualifications or experience in the sector; their connections with public officials in charge of the investment; and the conclusion of sham contracts with mysterious foreign entities designed to conceal the true nature of

part of the commission that the investor pays to the agent/intermediary does not remunerate the work of the intermediary, but rather constitutes a bribe to be paid to the foreign officials of the target Host State. In this case, the agency agreement is essentially a tool to perform the crime of *grand corruption*, as defined in the OECD Convention. A crime of *grand corruption* can occur through both schemes indicated above. The final point is that in the case of *grand corruption*, the person who receives the money or other advantage that constitutes the bribe *is always the official of the Host State*. Even though materially this transfer could happen through an intermediary, the recipient of the bribe is not the intermediary, but the public official. In other words, the existence of an intermediary is not a necessary constituent element of the material conduct of the crime of grand corruption, but is only a potential one.[169]

106. Things are different as regards the crime of influence peddling, since this crime can only happen through the second mechanism indicated above, the indirect one that relies on an intermediary.[170] The material conduct of the crime of influence peddling is in fact necessarily trilateral in its nature, since it presupposes a) the person who pays the money or confers the undue advantage; b) the person who receives that money or undue advantage because he or she "*asserts or confirms that he or she is able to exert an improper influence over the decision-*

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the relationship among the parties. The Tribunal further noted that these "consultants" included a retired police investigator who happened to be the brother of the Uzbek prime minister, a pharmaceutical scientist and newspaper manager, and a human resources functionary in the office of the president of Uzbekistan. Moreover, the vast majority of payments were made indirectly, through opaque Swiss and British Virgin Islands holding companies owned by the consultants, rather than directly to the consultants themselves. In the broader realm of international commercial arbitration, relevant cases include for instance: Broker v Contractor (Final Award) (1988) 19 YBCA 105; Consultant (Liechtenstein) v Contractor (Germany) (Final Award) (1994) 24a YBCA 71; Company S v Company F (Final Award) (1998) 4 J Droit Intl 1076; State-Owned Corporation X v Corporation Y (Final Award) (2003) 33 YBCA 24; Consultant v German Company (2005) 31 YBCA 685; Thales v Y & Z Swiss Federal Tribunal 4A.596/2008, 6 October 2009.

[169] However, according to Raeschke and Keller, investors hardly ever commit illicit activities themselves. In the majority of the cases, they contract intermediaries, often agents or consultants, to act on their behalf. The advantages for the investor are obvious: he does not have to lose face to anyone, and leaves the "dirty work" to others. In addition, the agent or consultant often has his seat in the host country or is even its national, so he is culturally and geographically closer to the officials of the host countries and knows more about their culture, including the habits governing corrupt practices. Raeschke-Kessler, H. and Gottwald, D. (2008), *op cit*., 12.

[170] Losco, A. M. «Streamlining the Corruption Defence, A Proposed Framework for FCPA-ICSID Interaction.» *Duke Law Journal*, 2014: 1201-1242, 1220. According to the author, influence peddling by definition involves an intermediary.

making of any public official;"[171] c) the public official on whom the undue influence is exerted by the person who receives the money or other advantage.

107. This *divisio* between hard corruption and influence peddling also introduces another important differentiation. This is the differentiation between *contracts procured through corruption and contracts aimed corruption* (also known as contracts for corruption). In investment law, a contract for corruption is a contract between two parties whose aim is that of paying bribes for the purposes of securing an investment. A contract for corruption, in other words, is the kind of legal relationship that normally ties an investor to an intermediary who is tasked with bribing a Host State on behalf of the investor. Fake consultancies agreements, as described above, are contracts for corruption. The kind of criminality that affects a contract for corruption cannot, *per se*, be invoked to substantiate a *Defence of Illegality* before an investment Tribunal by a Host State. As a matter of fact, a contract for corruption only regulates the relationship between the investor (the principal) and its agent (the intermediary), but the Host State is not party to that relationship. The archetypical pattern is as follows: the principal enters into an agency agreement with an intermediary and camouflages that agreement under the guise of a consultancy agreement. In reality the agreement between the parties is a contract for corruption.[172] Once the agent manages to secure the investment for its principal, by bribing the foreign officials of a Host State, the agent requires payment of his or her commission.[173] However, the investor, who is unwilling to pay such commission, declares (or the Tribunal in any event finds out) that the real purpose of the agreement with the agent was that of bribing foreign officials and that, as such, the contract is not enforceable. As we shall see, in cases like these, the outcome is that the contract for corruption is null and void.

108. Contracts for corruption are often the subject of litigation in international commercial arbitration. For instance, in ICC case 3913 the arbitral

[171] Criminal Law Convention on Corruption, 1999.
[172] See for instance, Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3., Award of 3 October 2013, para 218: *"[f]or all these reasons, the Tribunal comes to the conclusion that the December 2000 Contract cannot be regarded as a genuine agreement and must be deemed a sham designed to conceal the true nature of the relationship among the parties to it."*
[173] As an example, see See, for instance, ICC Case No. 9333 (final award), ASA Bull. 19 (2001), 757 ff.; ICC Case No. 6497 (final award), YbCA XXIVa (1999), 71.

Tribunal found that the claimant was a financial intermediary who had received sums under the guise of consultancy fees. The real scope of the contract was however to redistribute the money received among certain decision makers in an African country in order to secure public contracts. The arbitral Tribunal, after being satisfied of the evidence concerning what was the real purpose of the contract, held that bribes were illicit and immoral under the applicable law and *Transnational Public Policy*, and concluded that the consultancy agreement was null and void.[174] In a similar fashion, ICC case 8891 dealt with the respondent's failure to pay to the claimant the commission that had been agreed upon for certain services. The arbitral Tribunal relied on the testimony of several witnesses and established that part of the commission paid to the claimant had been used to influence public officials to obtain a certain favourable price under two public contracts.[175] In this case, also, the contract was considered as null and void.[176]

109. In cases of contracts for *corruption*, the remedial phase of the proceedings is normally governed by the principle that *the loss lies where it falls* and hence that no restitutionary remedies are available for either parties. This approach has been called the *zero tolerance approach* because of the kind of harsh - and even potentially unfair - [177] consequences that it attaches to a finding of bribery.[178] These will be further discussed in other sections of this work, alongside the features of the model proposed in this thesis.

110. In addition to contracts that *provide for corruption*, there also exist contracts *procured by corruption*. This is the situation that is most relevant in international investment arbitration, where an investor secures and investment by means of bribing a public official, either directly or indirectly. Indeed, as discussed above, this act of bribing is very often enacted through a false agency agreement whereby an intermediary of the investor is tasked to corrupt the relevant foreign

[174] Case note, *Journal du Droit International,* 1984 : 920.
[175] Case note, *Journal du Droit international,* 2000 : 1076.
[176] Case note, *Journal du Droit international,* 2000 : 1076.
[177] ICC Case No. 6497 YbCA XXIVa (1999), 71, para 72: "*By the way, the result of such nullity is not necessarily equitable. The enterprise having benefited from the bribes (i.e., having obtained substantial contracts thanks to the bribes) has not a better moral position than the enterprise having organised the payment of the bribes. The nullity of the agreement is generally only beneficial to the former, and thus possibly inequitable. But this is legally irrelevant*".
[178] Davis, K. E. «Civil Remedies for Corruption in Government Contracting: Zero Tolerance Versus Proportional Liability» *New York University Law and Economics Working Papers*, 2009: 1 – 49.

officials. This scenario also allows to shed some light on the relationship between contracts for corruption and contracts procured through corruption in investment law. In particular, in light of all that has been said above, a contract for corruption between an investor and its agent is often instrumental in securing an investment from the Host State (which investment is the contract procured through corruption). In investment arbitration, as mentioned, the corruption that may be invoked as a defence is the one that has resulted in the investment (the bribing of the officials of the Host State). The contract for corruption, on the other hand, would only become relevant in an incidental manner: for example, as a piece of evidence that the investment obtained by the investor was actually procured through bribery.

111. Ultimately, therefore, *the scheme of the contract procured by corruption is the one that is the closest to the case of the investment procured by corruption, which is the archetypical situation in international investment arbitration*. This consideration will become relevant further on during the course of this dissertation, when, in Chapter 8, the solutions to criminal conduct in international commercial arbitration are used as a model to discuss how criminality should be dealt with in investment law. It may be worth noting however at this stage that the *zero-tolerance approach* that is the typical sanction of contracts that provide for corruption is not the standard approach with regard to contracts procured by corruption. In this case, the possible range of applicable sanctions varies considerably, and a contract procured by corruption is not always null and void, but most often only voidable at the instance of one party.

112. Using the sanctioning model of contracts aimed at corruption (*the zero tolerance approach*) for investments procured by corruption, and transposing liberally solutions from one field to another, in particular, does not seem a method that is warranted, in consideration of the non-similarity of the situations that are compared. Investments procured by corruption should be contrasted and compared to contracts procured by corruption, and not contracts for corruption.

2.2. Culpability in Bribery: the Relevant Parameters with regard to the Host State

113. Against this background of great variability of the typologies of corruption, the identification of those elements in the reciprocal conduct of the parties that allow to assess and allocate their respective culpability in the crime becomes a crucial aspect. Some scholars have put forward proposals and methods to address the level of blameworthiness of the Host State and the investor, respectively. For instance, Zachary Fawler Torres proposes that certain elements may be taken into account. He argues as follows:

> *"Determining the relative levels of culpability between the claimant and host state should be a fact-based inquiry whereby the tribunal will assess a number of factors that will ultimately place the host state on a spectrum ranging from low-culpability to high-culpability. Possible factors may include: (i) the number of government officials involved in the bribery scheme; (ii) levels of government involved in the bribery scheme; (iii) the frequency to which bribes were paid; (iv) the amount of money exchanged; and (v) the degree to which the host state engaged in extortive measures to illicit the bribes."*[179]

114. While these elements are certainly useful in determining the *gravity and the magnitude* of the crime of bribery, they do not seem useful in helping establish the *respective culpability* of the parties to the crime. For example, if one takes the first element of the list, *the number of government officials involved in the bribery scheme*, it is clear that this indicator can provide an assessment of how large the corruption scheme was. But it says nothing in terms of how much each party contributed to it: if several bribes were paid, because several government officials were involved, the Host State retains a significant level of culpability – but this is not different from the investor's level of culpability, who decided to get involved in a large bribery scheme. While useful for other taxonomical ends, such as determining the gravity of the crime in absolute terms, and identifying the appropriate criminal law response, the parameters indicated above are not as useful for modulating responsibility between the parties that engaged in a bilateral crime.

[179] Fawler Torres, Z. (2014) *op.cit*.,1030.

This dissertation therefore proposes a different set of indicators. These are briefly outlined below as a list of questions, and then each of them is addressed in detail in the pages that follow:

1) *Is the conduct that constitutes the crime of corruption attributable to the Host State?*
2) *Has the Host State solicited the bribe, and has it made the payment of bribes a condition to the making of the investment by the investor?*
3) *Has the Host State prosecuted those that, on its part, engaged in the crime?*
4) *Has the Host State passed legislation to fight corruption domestically and seek to provide a corruption-free environment within its jurisdiction?*

115. Methodologically, the questions above are extrapolated from an analysis of case law, including those cases in which the Tribunal found that a corrupt investor should bear all the responsibility for the bribery in which it had engaged with the Host State. For instance, in *Word Duty Free*, mentioned earlier, the Arbitral Tribunal dismissed in its entirety the investor's claim on the basis of the principle that a contract procured through corruption is contrary to *Transnational Public Policy* and, therefore, no rights could be granted on the basis of the contract. The Tribunal commented that the circumstance of the involvement of the President of Kenya in the corrupt agreement did not change this rule, but pointed with some uneasiness that "*the bribe was apparently solicited by the President himself (not having been initiated by the Investor), and (...) no proceedings to prosecute former President Moi or recover the bribe were underway*".[180] Solicitation of a bribe and prosecution of those responsible are therefore two aspects that are considered in determining the culpability of the Host State in the criminal arrangement. The same goes for the other aspects taken into account in the repartition of culpability.

116. The order in which the questions are presented is reflective of their relative importance in establishing the level of participation and culpability of the

[180] LLamzon, A. *Corruption in International Investment Arbitration*. Oxford: Oxford University Press, 2014: 26. World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006, at 180.

Host State to the crime. The first question, in particular, is whether the conduct is attributable to the Host State. This aspect is relevant from the angle of responsibility, even before that of culpability. Put it in other words, the question means: is the State party to the crime? Can the crime be legally attributed (also) to the State? Only after the question of responsibility is answered in the affirmative, can the question of culpability be addressed.

117. Indeed, the notions of responsibility and attribution have a specific meaning in international law, and are connected with the question of State responsibility.[181] If the corruptive conduct can be attributed to the Host State from the perspective of international law, the cooperation of the State in the perfecting of the crime is established. On the other hand, if the conduct is not attributable to the State, then the State cannot be considered as party to the crime, and the enquiry into the level of culpability would have no logical ground to proceed further. Whereas this mechanism is clear and uncontested, a specification is necessary.

118. When the question of attribution of State conduct is discussed, it is normally discussed in the context of State responsibility for internationally wrongful conduct. After the question of attribution is decided, and a certain act is in fact found to be attributable to the State, the next question, for the purposes of establishing that State's responsibility under international law is whether the act constitutes an international wrongful conduct.[182]

119. When it comes to corruption, this question may receive a different answer depending on the kind of corruption-related act that is actually imputed to the State. For example, some commentators contend that a single act of bribery committed by a State official would not, *per se*, constitute an internationally wrongful act in breach of the international norms against bribery, because such norms only impose *an obligation to criminalise bribery or to develop anti-*

[181] Leben, C. «La Responsabilité Internationale de l'État sur le Fondement des Traités de Promotion et de Protection des Investissements.» *Annuaire Français de Droit International* , 2004: 683-714.
[182] See for instance LLamzon, A. «State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration.» *Transnational Dispute Management*, 2013: 63. Even assuming that the *ultra vires* or domestically unlawful corruption of a public official is ultimately attributable to the host State, the question of whether such conduct amounted to a breached an international obligation would still remain.

corruption policies. The prevention of any single act of corruption would not feature among the obligations. As a consequence, with respect to those norms, the internationally wrongful act would be only the non-criminalisation domestically of corruption, the non-development of anti-corruption policies, and so on; but not the single instances of corruption that may nonetheless occur.[183] Other authors hold a different view. For instance, Llamzon notes that:

> *"[w]hatever vagaries there may be in the content of international anti-corruption law, it is almost inconceivable that an arbitral tribunal would sanction the idea that international anti-corruption norms would not extend to a prohibition of public official corruption."*[184]

120. For the purposes of this taxonomy, it is not necessary to take a position in this debate and decide what instances of corruption constitute a wrongful conduct under international law. For the present purposes it is only necessary to determine whether the bribery can be attributed to the State, *so as to say that the State is party to that crime*. Indeed, there may be situations, which are addressed above, in which the host State is not only not internationally liable for corruption, *but in which the criminal conduct cannot even be imputed to it, because the Host State is the innocent victim of a crime of corruption committed between the investor and an intermediary, who is not himself or herself the Host State*. In a situation like this, in which the Host State is the victim of a crime carried out by others, the criminal relationship between the investor and the innocent Host State is not one that can be described in terms of bribery. The bilateral criminal relationship typical of corruption would be altered. For instance, it may be described in terms of fraud, when the bribery perpetrated between the investor and the intermediary has the aim of deceiving the Host State.

121. With this consideration in mind and before addressing the various scenarios regarding the different levels of culpability that may occur in the context of a crime of corruption, one last specification is necessary. This is necessary to demonstrate how assessing the culpability of the parties in the crime is indeed a

[183] Klaw, B. (2015) *op.cit*., 79.
[184] LLamzon, A. (2015), *op.cit.*, 63.

good parameter that should be taken into account when discussing the consequences that a non-criminal law Tribunal, like an investment Tribunal, should attach to a finding of bribery.

122. As mentioned in the preceding pages, contracts that aim at bribery are normally null and void, and they do not give rise to any rights of either performance or restitution to the parties. This means that, normally, *the loss lie where it falls*, and the party that may have performed its share of the bribery-tainted contract has no means to get the other party to enforce its share of the contract. The risk is essentially on the party that performs first, and that has to bear the consequences of the possible non performance of the other party, and the lack of any restitutionary remedy. This is based on an old Roman maxim *in pari delicto potior est conditio possidentis*.[185] Case law reports circumstances in which the parties, however, are not *in pari delicto*, but one bears more responsibility than the other. In cases like these, restitution would not be foreclose to the less culpable party.

123. Among these situations, one can recall for instance a case in which a foreigner was deceived by a dishonest compatriot, who convinced him that a residence permit in Germany could only be obtained through the bribery of public officials. The fraudster took the money from his victim, with the stated intention of using it to bribe the officials - but eventually did not do so, and kept the money for himself. The payer of the bribe was aware of the illegality of the contract. Nonetheless, the judge allowed the claim for restitution because the victim of the fraud was clearly unfamiliar with the circumstances in Germany and, as a result, was taken advantage of by the fraudster.[186]

124. Cases like these are hardly ever replicable in investment law, in which the operators are sophisticated professionals. However, sometimes, the investor's unfamiliarity with the illegal nature of certain payments – a situation similar to the

[185] Lim, K. «Upholding Corrupt Investors' Claims Against Complicit or Compliant Host States — Where Angels Should Not Fear to Tread.» *Yearbook on International Investment Law and Policy:* 2014. 601-679. LLamzon, A. «The State of the "Unclean Hands" Doctrine in International Investment Law: Yukos as both Omega and Al- pha.» *ICSID Review*, 2015: 1-15.
[186] AG Offenbach, NJW-RR 1992, 1204.

one described in the German case above – is indeed advanced as a potential defence. In World Duty Free, for example, the investor's first argument was that the payment made to the President of Kenya was not an illegal bribe and therefore Kenya could not have tried to have the case dismissed on the basis of the *Defence of Illegality* because only a donation had been made to the Kenyan President. World Duty argued that Mr. Ali, a manager of the investor, did not believe he was "*bribing to get the job* (...) *since it was routine practice to make such donations in advance of doing business in Kenya*"[187]. In particular, the argument was that the payment was a legitimate expression of the Kenyan cultural *Harambee* system, and that, since bribery required a specific *mens rea*, that the investor did not have, then its conduct was only based on a mistake and a wrong appreciation. As said, defences like these have invariably failed in investment arbitration.

125. However, the fact that the respective culpability of the parties in the delicto (for instance, in terms of lack of full awareness of the criminality of a certain conduct) enters into the debate to determine the civil law consequences of a crime (for the purposes of awarding remedies, for instance) confirms that the respective culpability of the investor and the Host State does constitute a valid parameter to take into account in determining how a Tribunal should deal with criminality that taints the investment.

2.2.1 The Host State not Party to the Crime of Bribery – the Case of Private Bribery and the Dubious Case of Influence Peddling

126. As mentioned earlier, corruption is a bilateral crime and it cannot take place without the cooperation of the bribee. In international investment law this means that an investor that seeks to corrupt a Host State for the purposes of securing an investment will have to find at the receiving end of the corruptive conduct an official who accepts the bribe and is willing to be part of the mechanism of corruption. This corresponds to the general idea of bribery, that is *public bribery*, and that is universally criminalised. In this case, the conduct of the

[187] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006, para 130 (quoting of witness statement).

Host State may be attributable to it at the formal level, as a matter of international law.

127. However, not all instances of corruption are attributable to the State. For instance, another form of bribery is possible in the world of investment law in addition to public bribery: *private bribery*. Private bribery has not received much attention in the debate on criminality in international arbitration, but the role that it plays should not be overlooked. Private bribery can be defined as the act of offering consideration to another's employee or agent in the expectation that the latter will be sufficiently influenced by the offer, so as to favour the offeror over other competitors of the offeror.[188] All this, without the principal being aware of the illicit scheme. In other words, the offense involves the bribing of private sector employees or other types of private sector agents so that the agents show favour to the briber when carrying out their work-place duties.[189] Private corruption, so defined, determines primarily a question of breach of contractual duties between the disloyal employees and their principals. From the criminal law perspective that is the focus of this thesis, private bribery is not universally sanctioned.[190] The different approach followed by States in fighting public, as opposed to private bribery, is demonstrated by the fact that public bribery is always prohibited as a matter of criminal law. The provisions that outlaw private bribery, on the other hand, are to be found in a sparse body of legislation whose effectiveness States do not guarantee with the same degree of commitment that they show towards the enactment of criminal law prohibitions. Japan, for instance, a country that scores high in terms of levels of corruption, places its public bribery norms in its penal code, but its private bribery legislation in labour and commercial codes. In many of the countries that present the highest rates of public bribery, such as India, African and South American countries, private bribery does not constitute a criminal

[188] See generally Callman, R. *The Law of Unfair Competition, Trademarks and Monopolies*. New York: Sweet & Maxwell, 1990.
[189] Boles, J. R. «Examining the Lax Treatment of Commercial Bribery in the United States: A Prescription for Reform» *American Business Law Journal*, 2104: 119-174, 123. See also generally Segonds, M. «Corruption Active et Passive de Personnes n'Exerçant pas une Fonction Publique.» *JCL. Pénal des Affaires*, 2006: 1 - 20.
[190] Huber, B. «Supranational Measures» Huber B. et Al. *Private Commercial Bribery: A Comparison of National and Supranational Legal Structures*. Berlin: Max-Planck-Institut f. ausländ. u. inter. Strafrecht, 2003: 564 – 580

offence at all. And, in the countries where it does, the rate of prosecutions is in any event minuscule.[191]

128. Overall, the efforts of the international community, and in particular of international commercial institutions[192] to outlaw this particular form of corruption are not comparable to the global efforts that have been put in place by the global anti-bribery regime with regard to public corruption.[193] And, of particular notice here is the fact that instances of private bribery that have a *transnational dimension* are those most neglected in terms of criminalisation. According to Heine, for instance, "*international matters relating to private bribery crimes seem to be a new subject for most countries.*"[194]

129. Despite the general lack of criminalisation of private bribery, and the lenient approach that many jurisdictions take with regard to it, its occurrence is not rare in investment law. An example can help clarify the pattern.

130. Country A needs to have a railways system built in its territory. For this, it launches a public tender aimed at identifying potential investors interested in taking up the project. In doing so, it seeks the assistance of a consultancy company that can provide advice as to the identification of which investors are in the position to best comply with the requirements set out in the bid. For example, which investor has the most modern technology to build the railways, with the least environmental impact. In this context, an employer of the consultancy company retained by the State is approached by one of the investors ("Investor B") and is offered a sum of money to provide to Country A an assessment of the

[191] Boles, J. R. «The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes» *Michigan Journal of International Law*, 2014: 673-713.
[192] In 1999, the ICC published its rules of conduct that include provisions that prohibit private bribery. See ICC, combating extortion and bribery: ICC rules of conduct and recommentations 3, 5–6 (2005), available at http://www.iccwbo.org/Advocacy-Codes- and-Rules/Document-centre/2004/ICC-Rules-of-Conduct-and-Recommendations-to-Combat -Extortion-and-Bribery-%282005-Edition%29/
[193] These are a few of the instruments currently resorted to for the fight against international corruption. Inter-American Convention Against Corruption, 1996; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997. Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, 1997. Criminal Law Convention on Corruption, 1999; Civil Law Convention on Corruption, 1999; Convention on Preventing and Combating Corruption, 2003.
[194] Gunter Heine, Comparative Analysis, in Private Commercial Bribery, supra note 4, at 603, 625. An exception is constituted by the UK Bribery Act of 2010. See Bribery Act, 2010, c. 23, § 1 (U.K.).

technical skills and capabilities of Investor B that allows Investor B to be selected as the winner of the bid. In particular, the bribee is required to state that investor B is the one that has the most modern technology to build the railway with the least environmental impact, *even if this is not the case on the basis of a real assessment of the capabilities and skills of Investor B*. In this manner, Investor B manages to win the bid over its competitors, something which, but for the bribing of the consultancy company's employee, it would not have been able to do.

131. In a scenario like the one presented above, the Host State is just the inculpable victim of a crime of private corruption perpetrated by the investor and the employee of the consultancy company hired by the Host State. This crime of corruption cannot be imputed and attributed to the Host State; and indeed, as indicated previously, in the relationship between the inculpable Host State and the investor that has bribed the consultancy company hired by the Host State, the relevant crime is not that of corruption, but rather that of fraud. Due to the bribery perpetrated by the investor, the Host State is induced in a mistake and its consent to the investment is vitiated by a misrepresentation of the relevant circumstances. Conceptually speaking, this scenario is not different from the one in which the investor deceives the State directly about the possession of certain features or skills that are key for the admission of the investment in the Host State. The situation of private bribery, from the perspective of the Host State, would be that of a *fraud by proxy*.

132. And it is with respect to a scenario like this that, presumably, some scholars have spoken of *unilateral corruption*.[195] According to Dr. Losco, for example, *unilateral corruption involves misconduct on the part of only one party.*[196] The author then moves on to quote cases where fraud and deception was the crime at issue before the Tribunal.[197] On the basis of the mechanism explained above, this thesis adopts the term fraud, as opposed to *unilateral corruption*, given

[195] Losco, A. M. (2014), *op.cit.*, 1219.
[196] Losco, A. M. (2014), *op.cit.*, 1219.
[197] Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award, 5 (Aug. 16, 2007), http://italaw.com/ documents/FraportAward.pdf; Inceysa Vallisoletana, ICSID Case No. ARB/03/26, Award, 3; see also KULICK, supra note 42, 328.

the invariably bilateral nature of this crime, and the *fictio* of considering corruption a unilateral crime.

133. Another situation that may not engage any responsibility on the part of the Host State is the instance of influence trafficking that, as also noted earlier, always requires an intermediation agreement for its perfecting as a crime. In the context of intermediation agreements, it may be useful to distinguish between two different situations: a) the situation in which the intermediation contract is used as a tool for transferring a bribe to a foreign official. In this sense, the intermediation contract is a modality for the performance of the crime of grand corruption, or hard corruption; b) the situation in which the intermediation contract is not used to transfer any money or other advantage to a foreign official, but the money or advantage given to the intermediary constitutes the *price* for him or her to exercise undue influence on the foreign official, who is not though the recipient of the bribe. In the first case, there is no doubt that the crime is attributable to the State, because the State is a party to the crime through its public official. The second case, on the other hand, is more problematic.

134. Just like in the case of private bribery, it may be that the Host State is entirely innocent with respect to the crime of influence peddling that defines the relationship between the investor and its intermediary. Once again, the State may be the innocent victim of a crime perpetrated by others. This would be the case if the public official on whom the undue influence is exercised by the intermediary is in no way involved in the bribery scheme between the investor and its intermediary, and is in an entirely good faith position. Public officials, in other words, may let themselves be swayed by the influence put on them by the intermediary of the investor, without having any knowledge of the agreement between the investor and the intermediary. Determining when this is actually the case is a complex operation that may not always prove possible in the context of investment arbitration.

135. However, it must be noted that the issue, albeit theoretically important, is of limited practical importance. Tribunals have so far allowed investors to invoke a *Defence of Illegality* based on corruption only with regard to hard

corruption. Instances of influence peddling, on the other hand, do not seem to reach the threshold beyond which an arbitral Tribunal would be willing to treat the investor misconduct as a defence for the Host State. In *Wena Hotel v Egypt*, for example, the investor made a number of suspiciously-timed payments, amounting in total to £52,000, to its agent in the Host State. The Tribunal, quoting Professor Lalive, explained that:

> *"[T]he delicate problem[…] remains for an arbitral tribunal 'to determine precisely where the line should be drawn between legal and illegal contracts, between illegal bribery and legal commissions."*[198]

136. In particular, the Tribunal could not establish the existence of an instance of hard corruption, but seemed open to the possibility that a trafficking of influences had occurred. Despite this, it did not allow Egypt to raise a *Defence of Illegality* in the form of a corruption defence. Ultimately, as noted by some scholars:

> *"Whereas a number of ICSID tribunals have upheld the corruption defence in cases of hard corruption, no tribunal has allowed a state to invoke the defence for "mere" influence peddling, and history suggests that future tribunals will also hesitate do so."*[199]

137. And, indeed, this prediction turned out to be right, and tribunals are in fact hesitant to attach legal consequences to instances of influence peddling. In *Kim v Uzbekistan*, commenting specifically on the question of the prohibition of corruption as a matter of *Transnational Public Policy*, the Tribunal confirmed its unwillingness to measure itself with anything below the threshold of hard corruption. It held:

> *"Simultaneously, the Tribunal acknowledges that the effort to combat corruption is an evolving area. Insofar as the UN Convention makes broader reference to "Trading in Influence", or "Bribery in the Private Sector", the relevant articles of the*

[198] Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 I.L.M. 896 (2002), 111, 112 and 132.
[199] Losco, A M (2014), *op.cit.*, 1221.

> *Convention use the language "consider making". This language matches the evolving and serious effort to combat corruption. It also suggests a lower level of consensus amongst the parties to the Convention as to corruption within the private sector, a sector governed by a broad range of criminal statutes. In that sense, the language employed, if anything, supports the conclusion that the scope of international public policy is focused on the corruption of governmental officials."*[200]

138. Therefore, the question to ask, in these cases, is not so much whether, in the context of the crime of trafficking of influences, the public official was inculpable as regards the agreement entered into between the investor and the intermediary. The more important thing to ask is if, in the context of an agency agreement between the intermediary and the investor, sums of money transferred to the intermediary were the price for his or her activity of influencing, or if they constituted bribes to be paid to public officials. In other words, it must be established whether the Tribunal is confronting itself with a case of hard corruption, or with a case of influence peddling.[201] This is not always and easy task, and problem can be seen from the general perspective of the fact that proving corruption in investment arbitration, and, all the more so, the kind of corruption that has been put in place, is a particularly difficult exercise.[202] Among other things, arbitral Tribunals do not possess the instruments of investigations that are available to criminal law courts.[203] The case of *Metaltech v Uzbekistan* provides an interesting example of these complexities, and a glimpse of the difficult reality that at times tribunals have to face. As noted by one author, the Metaltech Tribunal found that:

> *"[C]onsulting payments constituted mutual corruption in the procurement of the investment. It is not apparent, however, whether they were "soft" or "hard" in character because it is unclear how the funds paid to the consultants were ultimately used. At least one of the consultants was a public official himself, but he*

[200] Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Award on Jurisdiction, 8 March 2017, para 598.
[201] Tirado, J. et Al. «Corruption Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship.» *ICSID Review*, 2014: 493-513.
[202] Mills, K. «Corruption and Other Illegality in the Formation and Performance Of Contracts and in the Conduct of Arbitration Relating Thereto.» *ICCA Congress Series N 11*, 2003: 288 – 295.
[203] Kulick, A. and Wendler, C. «A Corrupt Way To Handle Corruption?: Thoughts on the Recent ICSID Case Law on Corruption.» *Legal Issues o Economic Integration*, 2010: 61, at 83. "*Needless to say, tribunals lack sufficient instruments and equipment to pursue criminal investigations*".

> *seems not to have had direct authority over the approval of the project. If the consultants retained the funds themselves in exchange for exerting undue influence on public officials, the payments would constitute "soft" corruption. Alternatively, if they funnelled some of the funds to public officials as bribes, the payments would constitute "hard" corruption."*[204]

139. Ultimately, the Tribunal, in the lack of any explanation from Uzbekistan as to the use of the contested sums, was satisfied that the conduct of the investor amounted, at least in part, to the hard corruption universally criminalised[205] and upheld the *Defence of Illegality* invoked by Uzbekistan even if it realised that the Host State itself retained responsibility, and a certain degree of culpability, in the bribing.[206] Probably, had the corruptive conduct been limited to influence peddling only, the Tribunal would not have admitted Uzbekistan's defence.

2.2.2 The State as a Party to the Crime of Bribery and the Criteria for Attribution

140. In the previous pages two cases have been described in which a Host State could not be deemed to be a party to the corruption committed by the investor. These are the cases of private bribery, on the one hand, and influence peddling, on the other, as long as the official of the Host State on whom the undue influence is exercised is unaware of the agreement between the investor and the intermediary. In those cases, since the State is a victim of a crime concluded by others (as indicated above, potentially the victim of a crime of fraud), it does not retain any responsibility, let alone culpability, with respect to the crime.

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[204] Losco A. M. (2014), *op. cit*., 45.

[205] It is important to note that the Methaltech Tribunal introduced a new standard for proving corruption, based on circumstantial evidence. In the case , in particular, the Tribunal thought that the investor was not persuasive enough in explaining what the purposes was of the contested sums of money and, by a process of inference, concluded that they were bribes, including destined to public officials. See on this aspect, for instance, Draguyev, D. *Proving Corruption in Arbitration: Lessons to be Learned from Metal-Tech v. Republic of Uzbekistan*. 2014 02 11. http://kluwerarbitrationblog.com/2014/02/11/proving-corruption-in-arbitration-lessons-to-be-learned-from-metal-tech-v-republic-of-uzbekistan (accessed on 05 05 2017).

[206] Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award of 4 October, 2013, paras 199 ff and 389.

141. The question of the participation of the State to the crime of corruption is a matter to be assessed from the angle of international law. In particular, from the perspective of international law the question is one of attribution of the corrupt conduct to the Host State.[207] In this regard, the first rule of the law of attribution under general international law prescribes that the only conduct attributable to the State at the international level is that of "*its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State*".[208] The conduct of private persons, on the other hand, is not as such attributable to the State.[209] It becomes therefore crucial, at the outset, to determine whether the corruptive acts can be attributed from the subjective perspective to the State, namely if the conduct can be ascribed to one of the individuals indicated above. Ultimately, the question of attribution of State conduct to a State revolves around determining whether the material authors of the crime can be tied to the State by way of an organic relationship, *de fact*o or *de jure*, that makes the individuals' conduct not only a personal conduct, but one that engages and commits the State in its international dimension.[210]

142. In this regard, it must be noted that corruption that occurs in a Host State can involve a number of individuals at various levels, each of which may play a part in the commission of the crime. And indeed, experience shows that the

[207] This is consistent with the approach followed by the ICJ in the Iran Hostage case. According to the Court "[*f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State*." Following this, "*it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable*. Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment of May 24, 1990, 1980 I.C.J. 29, para. 90.

[208] Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–Jun. 1 and Jul. 2–Aug. 10, U.N. GAOR, 56th Sess., Supp. No. 10, A/56/10, arts. 41, 48, 54. See also Bin Cheng: States can act only by and through their agents and representatives.' The acts of the agents of a State are, therefore, to be considered as the acts of the State itself. Moreover, since 'an officer or person in authority represents pro tanto his government, which in an international sense is the aggregate of all officers and men in authority,' it means that a State is represented by its government, whose acts are imputable to it as its own." Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 183-4 (1953), citing German Settlers in Poland, P.C.I.J. Adv. Op., B.6, p. 22 (1923); Moses Case (Mexico v. U.S.), 3 International Arbitration. 3127, 3129 (1871).

[209] Draft Articles on Responsibility, supra note 23, ch. II, cmt. 3

[210] Pellet, A. «Les Articles de la CDI sur la Responsabilité de l'État pour Fait Internationalement Illicite. Suite - et fin?» *Annuaire Français de Droit International*, 2002: 1-23. Forteau, M. «L'Etat Selon le Droit International: une Figure à Géométrie Variable?» *RGDIP*, 2007: 737- 770, 756. Fischer, C. *La responsabilité Internationale de l''Etat pour les Comportements Ultra Vires de ses Organes*. Lausanne: Chabloz, 1993.

plethora of individuals involved can range from the highest levels of the State (such as the President or the Prime Minister[211] of a country) to low level officials.

143. The simplest scenario to address is the one in which the person who commits the crime of corruption is indisputably a *State organ*. A State organ means "*any individual who represents the State or who exercises State functions*".[212] The definition of State organ is not further detailed in international law, but the International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts (the "ILC Draft Articles") point towards two basic criteria to identify a State organ for the purposes of attribution: first, that State organs are those so defined by domestic law; second, that the notion is to be interpreted in a rather broad manner, so as to cover not only the highest officials of a State, but also those who exercise State authority at a more peripheral level. Article 4 of the ILC Draft Articles specifies that:

> *"The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*
>
> *An organ includes any person or entity which has that status in accordance with the internal law of the State."*[213]

144. In addition, according to the Commentary to the ILC Draft Articles, the notion of State organ:

> *"[I]s intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local*

[211] See EDF (Servs.) Ltd. v. Republic of Romania, ICSID Case No. ARB/05/13, Award of 8 October 2009 (alleging bribe solicitation involving the Romanian Prime Minister.
[212] Draft Article 2(e), Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted by the International Law Commission, UN Doc. A/69/10, p. 231.
[213] Drat Article on the Responsibility of States for Internationally Wrongful Conduct.

level. No distinction is made for this purpose between legislative, executive or judicial organs."[214]

145. When the notion of State organ is not disputed, the conduct of the individual who acts as an organ of the State is attributable to the State itself *ratione personae*. However, not all actions of an organ of the State are attributable to it *ratione materiae*. This means that after establishing if the person is an organ, it will be necessary to shift the focus of the investigation towards the nature of the acts that he or she has committed. As a general rule, in order to be attributable to the State, the acts of a State organ must be committed in an *official capacity*. There is copious jurisprudence as to what official capacity means, but, essentially, an act carried out in an official capacity is an act that can be defined in the negative as conduct that is not private, but undertaken on behalf of a State.[215] In conformity with this, the International Law Commission has succinctly defined an act carried out in official capacity as "*any act performed by a State official in the exercise of State authority*".[216]

146. Importantly, it must be stressed that the official capacity in which a certain act may be carried out does not cease if the act is unlawful. In particular, the unlawfulness of the conduct of the State official has no impact on the question as to whether the act is attributable to the State. If one were to opine otherwise, the illogical conclusion would be that no illegal conduct would ever be attributable to a State.[217] This point was raised with significant clarity by the Intern American Court of Human Rights, in the case *Velasquez Rodriguez v Honduras*, where the Court, finding the responsibility of Honduras for certain violations committed by its officials explained that:

"this conclusion [that the conduct is attributable to the State] is independent of whether the organ or official has contravened

[214] Commentary to ILC Articles, Article 4.
[215] *Prosecutor v Blaskic*, Judgment On The Request Of The Republic Of Croatia For Review Of The Decision Of Trial Chamber II of 18 July 1997, IT-95-14-AR 108, 29 October 1997, Appeals Chamber, para 38. See also para 49.
[216] Draft Article 2(f), Text of the draft articles provisionally adopted by the Drafting Committee at the sixty-seventh session, UN Doc. A/CN.4/L.865 (29 July 2015).
[217] Buzzini, G. «Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the Djibouti v. France Case» *Leiden Journal of International Law*, 2009: 455 - 470, 466: "*If unlawful or criminal acts were considered, as a matter of principle, to be "non-official" for purposes of immunity ratione materiae, the very notion of 'immunity' would be deprived of much of its content*"

> *provisions of internal law […]: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents […] violate internal law"*[218]

147. In line with this, the relevant provision for attributing corruption to a Host State when this is carried out by a State official in the context of his or her mandate is Article 7 of the Draft Articles, according to which:

> *"The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."*[219]

148. The Commentary to the ILC Draft Articles in this regard confirms that acts that are illegal and outside of a State official mandate's, but that are still committed under colour of authority (what is normally defined *ultra vires acts*), do not escape from the qualification of acts carried out in an official capacity and are attributable to the State.[220]

149. This is also applicable to investment law, and Tribunals have found that acts committed by State officials who went beyond their authority or acted outside the limits of the legislative provisions that governed their mandate would still be attributable to the State. In *Southern Pacific Properties v. Egypt*, Egypt claimed that its public officials who authorized a foreign investment regarding the development of certain touristic facilities in the archaeological area of the pyramids had done so in contravention of national laws on antiquities and protection of cultural properties. The Tribunal rejected that defence holding that even though the actions of the public officials may have been illegal and *ultra vires*,

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[218] Vélasquez Rodriguez c. Honduras, Judgement 29 July 1988 1988, ILR, vol. 95, p. 296, para170.
[219] Article 7, Draft Articles.
[220] This is a position consistently approved by international courts and tribunals. See for example the position of the European Court of Human Rights: "*A State may ... be held responsible even where its agents are acting ultra vires or contrary to instruc- tions. Under the Convention, a State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected*": ECtHR, Ireland v. the United Kingdom, judgment of 18 Jan. 1978, at para. 159. See also Ilaşcu and others v. Moldova and Russia, judgment of 8 July 2004, at para. 319. An older case is Caire, heard by the French–Mexican Claims Commission in 1929, in V Reports of International Arbitral Awards (RIAA) 528.

Egypt was still to be held liable for them, as public officials' *"acts were cloaked in the mantle of Governmental authority*".[221]

150. And, as regards in particular corruption, the Commentary to Article 7 of the ILC Draft makes the example of bribery as a typical *ultra vires* act that would still be attributable to the State. According to the Commentary:

> *"[o]ne form of ultra vires conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction."*[222]

151. The only instance in which an act performed by a State organ is not considered as carried out in an official capacity is when the act is entirely private, namely not carried out in an official capacity, under colour of authority.[223]

152. Under this first set of rules, therefore, a Prime Minister, Head of State, government officer, or any other organ of the State, including low level State officials, acting in an official capacity - as described above - and not in a private capacity, engage the involvement of the State if they accept or solicit a bribe from an investor. There is arbitral practice to this effect as regards specifically bribery. In *EDF v Romania*, the Tribunal addressed an instance of bribe solicitations by certain Romanian officials, and it held:

> *"The conduct of organs of a State engages the State's international responsibility. The bribe request by Mr. Sorin Tesu*

[221] Halpern, M. (2016) *op.cit.*, 306. Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, Award, ICSID Case No. ARB/84/3, Award of May 20, 1992. According to the Tribunal in particular: "*The principle of international law which the Tribunal is bound to apply is that which establishes the international responsibility of States when unauthorized or ultra vires acts of officials have been performed by State agents under cover of their official character. If such unauthorized or ultra vires acts could not be ascribed to the State, all State responsibility would be rendered illusory*" (paragraph 81).

[222] Draft Article, comment to Article 7, n.150.

[223] 2nd Preliminary Report of the Special Rapporteur on Immunities of State Officials from Foreign Jurisdiction, 29 May 2008 U.N. Doc. A/CN.4/631, p. 54. Epiney, A. *Die völkerrechtliche Verantwortlichkeit von Staaten für rechtswidriges Verhalten im Zusammenhang mit Aktionen Privater*. Baden Baden: Nomos, 1992. An act ultra vires may become private only when the conduct is so far away from anything that can resemble the official authority of an official, as to be entirely separate from it. See for example the comment of Roberto Ago, on previous versions of the ILC Draft Articles: *"[h]owever, such conduct is not considered to be an act of the State if, by its very nature, it was wholly foreign to the specific functions of the organ or if, even from other aspects, the organ's lack o competence was manifest*. Roberto Ago, Fourth Report on State Responsibility, II ILC Y.B. 95, para. 60 (1972).

and Mrs. Liana Iacob on behalf of Prime Minister Nastase is attributable to Romania."[224]

153. In this same context, Professor Cremades has noted as follows:

"Officials [means officials] of whatever status, in their official capacity, even when the officials exceed their authority, contravene instructions, or violate internal law. Accordingly, if a public official accepts a bribe to exercise his public duties in a certain manner, for example by smoothing the regulatory path for a foreign investment, then the acts of that official are attributed to the State itself in public international law."[225]

154. In addition to State organs as defined above, the ILC Draft Articles provide for other categories of individuals that, albeit not being State officials, are under certain conditions able to carry out actions that can then be imputed to the State. According to Article 5 of the Draft Articles:

"[t]he conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."[226]

155. This article has been introduced by the ILC in the Draft Articles specifically to take into account economic actors, who cannot qualify as State organs, but that nonetheless exercise elements of governmental authority. The rationale is to avoid that these entities may hide behind a private corporate veil to escape attribution of their conduct to the State.[227] It is not surprising therefore that the ILC Commentary to Article 5 mentions a famous arbitral case, *Maffezzini v Spain*, in which the Tribunal had to assess if a private Spanish company was exercising elements of State authority in order to impute to Spain its wrongful

[224] EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, para 111.
[225] Cremades B. (2005) *op.cit.,* 216.
[226] Article 5 Draft Articles on State Responsibility.
[227] For a general comment see Momtaz, D. «Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority» Crawford, J. et Al. *The International Law of State Responsibility.* New York: Oxford University Press, 2010: 239 – 247.

conduct (consisting of breach of a contract entered into with the investor).[228] The relevance of the Maffezzini case lies primarily in the Tribunal's finding that a State will not necessarily escape responsibility for wrongful acts or omissions by hiding behind a private corporate structure.[229] As a consequence, acts of parastatal entities which exercise elements of governmental authority in lieu of State organs, as well as conduct of State corporations that have been privatized but retain certain public or regulatory functions are all amenable to being attributed to the State.[230]

156. The role of State entities, or privatised companies that retain certain public powers is not merely theoretical in international corruption. As noted by Transparency International, State-owned enterprises, in addition to corruption risks facing companies in general, are also exposed to specific governance challenges due to their proximity to policy makers and market regulators.[231] Similarly, privatised State entities seem to be a particularly fertile soil for corrupt practices.[232] The question to ask is therefore what elements of governmental authority a company must exercise in order to fall within Article 5 of the ILC Articles. The Commentary to the ILC Draft Articles does not offer any definition of what is meant by the expression *elements of government authority*, and recognises that this notion changes depending on historical and cultural factors alike. The examples made in the Commentary, however, range from the case of private security firms charged with guarding prisons, to State airlines authorized to discharge certain immigration responsibilities, to foundations established and controlled by a State to identify, seize, and hold State property for charitable purposes.[233]

157. In light of this, two approaches are normally advocated: one is functionalistic, and takes into account the specific ends pursued by the activity

[228] Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award on Jurisdiction of 25 January 2000, para 75 *"[T]he Tribunal has to answer the following two questions: first, whether or not SODIGA is a State entity for the purpose of determining the jurisdiction of ICSID and the competence of the Tribunal, and second, whether the actions and omissions complained of by theClaimant are imputable to the State*".
[229] Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award on Jurisdiction of 25 January 2000, para 78
[230] Comments on Draft Articles on State Responsibility, Article 5.
[231] Transparency International, Transparency of State Owned Enterprises, Report, available at http://www.transparency.org/whatwedo/answer/transparency_of_state_owned_enterprises
[232] Fishman, Y. and Wang, R. «Corruption in Chinese Privatizations.» *Journal of Law, Economics, and Organization*, 2014: 1- 29.
[233] Klaw B. (2015) *op.cit*., 73.

carried out; the other one is based on a more objective standard, and calls *government authority* what is considered as such by the majority of countries, thus relying on a comparative approach.[234] Be that as it may, State companies that promote investments, organisations that issue licences, regulatory bodies, environmental agencies are among those *entities exercising governmental authority* that an investor would normally come into contact which, and whose dynamics and operations can certainly be affected by corruption.[235]

158. The last case to take into account from the perspective of the individuals who can engage the responsibility of the State for corruption are *de facto* State agents.[236] In order for a private individual who is not formally placed within the system of the State to be able to engage the responsibility of the State, it is necessary that he or she be acting under the control or direction of that State. Once again, the ILC Draft Articles on State Responsibility provide some clarification of this situation. According to Article 8, in particular:

> *"[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."*[237]

159. Since Article 8 does not provide further guidance as to what is to be intended with the expression *acting under the instructions* or *under the direction or control*, this has proven a particularly fertile territory on which international judges and commentators have measured themselves.[238] It is beyond the scope of this dissertation to take into account the various methods and tests that have been developed to assess when private individuals may, despite their formally private

[234] Dolzer, R. and Schreuer, C. *Principles of International Investment Law*. Oxford: Oxford Univerisity Press, 2008.
[235] See for example the recent initiatives adopted by the Malasyan government to monitor State agencies "particularly prone" to corruption. http://www.nst.com.my/news/2017/02/212276/sabah-macc-monitor-prone-corruption-state-agencies.
[236] This matter has been addressed a number of times in international law, since the seminal judgment of the ICJ in Nicaragua v United States. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports (1986) p. 14 (hereafter, Nicaragua v USA). Townsend, G. «State Responsibility for Acts of De Facto Agents.» *Arizona Journal of International and Comparative Law*, 1994: 100.; Cassese, A. «The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia» *European Journal of International Law*, 2007: 649 - 668.
[237] Draft Articles, Article 8.
[238] Cassese A. (2007), *op.cit*.

capacity, be nonetheless acting under the authority or control of a State. Suffice it to mention here that some of these tests are more stringent, and require some form of close coordination between the private individual and the State *behind* him or her; while other tests, like the effective control test, are more liberal and flexible in identifying in which circumstances a State may exercise its State authority over a private person.

160. From the practical standpoint, there are cases to be reported in which a private individual acts under the instructions or control of a State in the context of corruptive practices. The simplest scheme to imagine is when a private citizen, who may in some capacity be involved with the investor as an advisor, middleman or negotiator, solicits a bribe to be paid to State officials. The idea is that he or she would do so on behalf of agents of the State who may want to distance themselves from the *technicalities* of the corrupt dealing. In a case that has recently made headlines and that is currently under scrutiny by Italian magistrates, for instance, the oil giant ENI has been accused of paying a multi-millionaire bribe to the then Minister for Oil of Nigeria, Dan Etete. The intermediation for the payment was allegedly performed by a private entrepreneur, Mr Emeka Obi, upon clear instructions by the Minister of Oil. In a case like this, the conduct of Mr Obi would be imputable to the State of Nigeria due to the instructions issued by the Minister, in addition to the conduct of the Minister himself, that would be imputable in consideration of his formal official capacity.[239]

161. In a somewhat similar case that reached an investment Tribunal, the arbitrators found that the person who was alleged to have received a bribe was not formally a State official at the time of the alleged bribing, despite having held positions in Government previously. The Tribunal found:

> *"As to whether Ms. Karimova was a "government official", it is undisputed that Ms. Karimova is the daughter of the then-*

[239] GlobalWitness, Shell and Eni's Misadventures in Nigeria, Shell and Eni at Risk of Losing Enormous Oil Block Acquired in Corrupt Deal November 2015, Available at https://www.globalwitness.org/documents/18122/Shells_misadventures_in_Nigeria.pdf. http://royaldutchshellgroup.com/2017/01/06/former-nigerian-president-jonathan-allegedly-involved-in-1-3-billion-opl-245-oil-fraud/

> *President of Uzbekistan. That relationship rendered her a "politically exposed person". However, although that characterization can suggest a greater risk that bribery or corruption may play a role in a transaction, neither Ms. Karimova's familial relationship, nor her status as a "politically exposed person", of itself can render her a government official."*[240]

162. After establishing this, the Tribunal hinted to the possibility that Ms. Karimova, despite not being formally a State official, may have acted as an intermediary for the State in respect of the alleged bribe. Had this functional connection been proven, Article 8 of the ILC Draft Articles may have become relevant. However, the Tribunal did not explore this possibility, since the respondent State did not raise this angle in its pleadings.

163. Despite the operational clarity of the law on attribution, the examples indicated in the ILC Draft Articles and the fact that wrongful conduct is routinely attributed to States at the international level, including in the context of international investment arbitration,[241] there seems to be a typology of acts that are particularly resistant to the application of the attribution paradigm. *Precisely, acts of corruption*. And, to date, there are very few cases in investment law in which the corruptive conduct of individuals that are tied by an organic relation to a Host State has been attributed to the State itself, [242] and no case in which the State has been found to be internationally responsible for the crime of bribery.

164. One of the few cases in which the law on attribution was employed with respect to bribery was *EDF v Romania*. This was also one of the rare occurrences in which the corruptive conduct in which a Host State had engaged was not raised by the Host State as a defence, but rather as a cause of action by the investor. The investor lamented that the request of a bribe from officials of the

[240] Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Award on Jurisdiction, 8 March 2017, para 576.
[241] Hober, K. «State Responsibility and Investment Arbitration.» *Journal of International Arbitration*, 2008: 545 – 568.
[242] LLamzon, A. (2013), *op.cit.*, 63. "*Despite the regular use of principles on State responsibility by international investment tribunals, one nearly ubiquitous form of pathological conduct engaged in by foreign investors and public officials of host States alike seems surprisingly resistant to its application: corruption. Foreign investors decry public sector corruption as a hindrance to doing business in developing countries;5 yet there has simply never been a case in international investment arbitration where public official corruption has been attributed to the host State*".

Romanian Government and State-owned enterprises constituted a breach of the fair and equitable standard owned to the investor under international law. The Tribunal denied the violation of the fair and equitable standard of treatment on evidential grounds; however it found that *many of the acts of the State-owned enterprises requesting the bribe were attributable to Romania*. Even though the State was not found to be internationally responsible, at least the case constitutes a primer with regard to the law of attribution of corruptive conduct to a State in international law.

165. In *World Duty Free v Kenya*, on the other hand, the arbitral Tribunal found that a certain conduct involving corruption could not be attributable to the State. In that case, also mentioned in previous parts of this dissertation, the Chief Operating Office of the Investor, Mr Ali, admitted before the international arbitral tribunal that he had made a payment to the President of Kenya, in the context of establishing itself in Kenya as an operator of duty-free complexes in airports. The Tribunal, recalling the facts that gave rise to the dispute, so explained:

> *"in order to be able to do business with the Government of Kenya, Mr. Ali was required in March 1989 to make a "personal donation" to Mr. Daniel arap Moi, then President of the Republic of Kenya. The Claimant adds that this donation amounted to US$2 million, and contends that the donation was "part of the consideration paid by House of Perfume to obtain the contract"*[243]

166. Despite recognising the involvement of the President of Kenya, the Tribunal went on to state as follows as regards the question of the attribution of corruption:

> *"Mr. Ali's payment was received corruptly by the Kenyan head of state; it was a covert bribe; and accordingly its receipt is not legally to be imputed to Kenya itself. If it were otherwise, the payment would not be a bribe."*[244]

> *"The President was here acting corruptly, to the detriment of Kenya and in violation of Kenyan law (including the 1956 Act [outlawing corruption]). There is no warrant at English or Kenyan law for attributing knowledge to the state (as the*

[243] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006, para 63.
[244] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006, para 169.

> *otherwise innocent principal) of a state officer engaged as its agent in bribery."*[245]

167. Admittedly, the position of the Tribunal on attribution of State conduct was based only on Kenyan and English law, which was the law applicable to the contract in this case. No reasoning was carried out by the Tribunal on the public international law dimension of attribution. It is not clear why this was the case. Indeed, the arbitration was carried out under ICSID investment rules. According to Article 42(1) of the ICSID Convention,

> *"[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*

168. Even imagining a situation where the Tribunal had resolved to apply the domestic laws of the parties over international law, due to their agreement in this sense as per Article 42(1) of the ICSID Convention, it could still be argued that the principles of attribution as developed in international law are part of English and Kenyan law. In common law systems, in fact, international law is *part of the law of the land* and these two countries are no exception. It is to be hoped that the World Duty Free Tribunal's position on attribution of *ultra vires* act to the State, which blatantly disregards international law on attribution, will remain isolated, and that international investment tribunals will be more willing in the future to apply the rules on attribution of the ILC Draft Articles. This is all the more so in cases like the Kenyan one. It is well known that under the years of the Presidency of Daniel Arap Moi, a common phrase, and appropriate pun, was *l'État, c'est moi*. President Moi was not just to be considered an agent of Kenya *but the personification of the Republic.*[246] The decision of the Tribunal not to attribute the conduct of the President of Kenya to the State, defied not only the law, but also common sense.

[245] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006, para 185.
[246] Halpern, M. (2016) *op.cit.*, 305.

2.2.3 Has the State Solicited or Extorted the Bribe?

169. Establishing that the corruptive conduct can be attributed to the State is the first step to take. Once it is established that the crime of corruption is imputable to the Host State, an aspect that has an impact in determining the level of *culpability* of each party is the question as to whether the bribe has been spontaneously paid by the investor, or, on the other hand, solicited or even extorted by the Host State. Indeed, oftentimes Host States portray the payment of a bribe as a precondition to making business in the country. A work by the International Chambers of Commerce and Transparency International identifies the classical pattern of extortion and bribe solicitation in the context of the making of an investment, as follows:

> *"Your company is running a relatively new operation in a remote territory. You have received an unannounced visit from the local government official whose agency is responsible for technical approval of equipment that you have been waiting for. The official makes it clear that the approval of the goods will not be given unless you pay a "fee" in cash directly to the official."*[247]

170. As seen above, these scenarios present themselves with a certain regularity in investment law. In *EDF v Romania*, the claimant argued that the extension of a contract to run certain airport facilities had not been granted because the investor had refused to pay to high officials in the Romanian Government a bribe amounting to 2.5 million Dollars.[248] Similarly, in *World Duty Free v Kenya*, mentioned earlier, *government officials took the initiative to solicit the bribe as a condition for their agreement* with respect to the making of the investment. [249] In the memorial submitted before the World Duty Free Tribunal, the manager of the investor who had dealt with the Kenyan officials specified as follows:

> *"I felt uncomfortable with the idea of handing over this "personal donation" which appeared to me to be a bribe. However, this was the President, and I was given to understand that it was lawful*

[247] ICC, Transparency International, 2013: Resisting solicitation and extortion in International transactions.
[248] EDF (Servs.) Ltd. v. Republic of Romania, ICSID Case No. ARB/05/13, Award of 8 October 2009, para 222.
[249] LLamzon, A. (2013), *op.cit.*, 63.

and that I didn't have a choice if I wanted the investment contract."[250]

171. There are two main reasons why extortion of bribes (and to a lesser degree solicitation) should be considered as a more serious situation in terms of Host State's culpability than solely accepting a bribe offered by an investor, and hence determine a different repartition of the faults between the parties to the crime.[251] These are as follows: a) extortion has an autonomous criminal disvalue which adds to the disvalue of bribery and normally has an exculpatory effect for its victim; b) extortion of bribes and bribe solicitation by the Host State has been adjudged to constitute a breach of the standard of treatment owned to investments under international law. In this sense, it is a conduct that breaches not only criminal law, but also investment law.

172. The first point requires addressing primarily the question of the differentiation between bribery, bribe solicitation and extortion.[252] The International Chamber of Commerce explains the relationship in the following terms:

> *"Corruption is the abuse of entrusted power for private financial or non financial gain. It diverts resources from their proper use, distorts competition and creates gross inefficiencies in both the public and the private sectors. Corruption can occur in the form of bribery, bribery solicitation or extortion. Bribery: is an offer or the receipt of any gift, loan, fee, reward or other advantage to or from any person as an inducement to do something which is dishonest or illegal. Bribe solicitation: is the act of asking or enticing another to commit bribery. Extortion: when bribe solicitation is accompanied by threats it becomes extortion.*[253]

[250] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006, para 130.

[251] According to some authors, when the State extors the bribe, the investor should have no liability at all. According to Klaw, for instance, the State would be held liable for the solicitation or extortion of bribes by its organs and de jure or de facto agents. He "*differentiate[s] bribery (for which no State liability would exist because it is the payer's own corrupt intention and acts that gave rise to the payer's harm, if any) and extortion (for which State liability would exist, because it is the Stateagent's corrupt intention and acts that gave rise to the investor's harm)*" Klaw. B. (2015) *op.cit*., note 77.

[252] The term extortion is present in various jurisdictions, but it may mean different things. While common law jurisdictions, for instance, contemplate the crime of extortion by public officials, other jurisdictions have created a specific crime for this conduct. The Italian Code of Criminal Procedure defines for instance "concussion" as the crime of the State official whom, by abusing his powers or functions, forces someone to unduly give or to unduly promise to him or to a third party money or other consideration (Article 317).

[253] See also, OECD, Corruption, a Glossary of Criminal Standards in International Law, 2008, p.27. See also this definition of extortion: *[t]he seeking or receiving of a corrupt benefit paid under an implicit or explicit threat to give*

173. This definition of extortion can be unpacked in two constitutive elements.

174. Bribe solicitation and extortion have two elements in common. First, the payment to the official is necessary to obtain just *fair treatment*, whereas in the case of corruption the briber wants to obtain *better than fair treatment*. In the case of extortion the threat may mean, for instance, that an investor will not have its investment awarded or renewed (the threat), unless a bribe is paid. Professor Reisman elucidates this point by explaining that:

> *"One can distinguish extortion from bribery by looking into whether the payer receives "better than fair treatment" or must pay to be treated fairly. Put another way, "extortion" is a situation in which the capacity of the official to withhold a service or benefit otherwise required by law exceeds the capacity of the private party to sustain the loss of that service or benefit."*[254]

175. The second element of extortion and bribe solicitation is that these conducts are started on the initiative of the corrupt public official. While in the case of ordinary bribery it is the investor who approaches a public official to offer a bribe, when solicitation or, all the more so, extortion are at issue, the dynamic is reversed. According to some commentators, the element of threat is not even central to configure the *actus reus* of extortion; the differentiation between bribery and extortion would only rest on who takes the initiative to pay/request the transfer of the money or other advantage. According to Argandoña, for instance:

> *"Extortion or solicitation is the demanding of a payment or bribe, whether or not coupled with a threat if the demand is refused. In bribery, the payer is the one who takes the initiative. In extortion,*

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the payor worse than fair treatment or to make the payor worse off than he is now." Lindgren, J. «The Elusive Distinction Between Bribery and Extortion: From the Common-Law to the Hobbs Act.*» UCLA Law Review*, 1988: 815 - 836, 825.

[254] Reisman, M. *Folded Lies: Bribery, Crusades, and Reforms*. New York: Free Press, 1979.

the initiative is taken by the person who receives the money or favour."[255]

176. While the lack of threat is more apt to describe the case of solicitation than the case of extortion, and indeed the element of threat is what makes extortion more serious than solicitation, the fact remains that in establishing the respective culpability of the parties in the payment of the bribe, extortion, and to a certain extent bribe solicitation, signal a more marked blameworthiness on the part of the Host State.[256] Whether this is because the Host State has *simply* taken the initiative of requesting the bribe, or has taken the initiative and also threatened negative consequences in the case of non-payment, the fact remains that the investor that gives in to the request is not in a situation that is comparable to the one in which it has taken autonomously the initiative to pay. In some cases, but for the request of the Host State, the investor would not have considered paying the bribe at all. And it is significant in this regard that, as indicated previously, some countries consider that extortion constitutes a full defence with respect to an act of bribery.[257] This strengthens the consideration that the person who yields to a request to pay a bribe is in a less culpable situation than the person who solicits it. A work by the OECD for example notes as follows:

"[E]xtortion and coercion are generally accepted as full defences or mitigating factors at sentencing. In many jurisdictions, these are defences or sentencing factors of general application."[258]

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[255] Argandona, A. «Extortion.» *IESE Business School Working Paper No. 1149-E*, 2016, 1 – 5, 2.

[256] From the practical perspective, it may be useful to report two cases that provide a clear differentiation between a bribe willingly paid, and a bribe extorted. (1) the Monsanto matter in Indonesia; and (2) the Tyson Foods Inc. matter in Mexico. In the first case, Monsanto's Government Affairs Director for Asia instructed an Indonesian consulting firm to make a secret payment of fifty thousand dollars in cash to a senior Indonesian environment official in an unsuccessful effort to convince him to dispense with the need for an environmental impact statement. See Press Release, Dep't of Justice, Monsanto Company Charged With Bribing In- donesian Government Official: Prosecution Deferred for Three Years (Jan. 6, 2005), available at http://www.justice.gov/opa/pr/2005/January/05_crm_008.htm. In the second case, during the course of Tyson's participation in a required agricultural inspection program, veterinarians employed by the government of Mexico expressly threatened to disrupt the operations of two of its chicken processing plans unless their wives were placed on Tyson's payroll. See United States v. Tyson Foods Inc., No. 1:11-cr-00037-RWR, 16(b), (h) (D.D.C. Feb. 10, 2011). These examples are from Klaw, B. «New Strategy for Preventing Bribery and Extortion Harvard Journal on Legislation.» *Harvard Journal on Legislation*, 2012: 303 - 371, note 127.

[257] In the case of Kim et Al v Uzbekistan, for example, the Arbitral Tribunal quoted a passage from the criminal code of Uzbekistan according to which: "*The person who has given a bribe shall be discharged from criminal liability in the instance if there was extortion with regard to the person, or he communicated voluntarily about the event of the crime, after having committed criminal actions, repented honestly, and facilitated actively detection of the crime".* Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Award on Jurisdiction, 8 March 2017, para 554.

[258] OECD, 2011, The Criminalisation of Bribery in Asia and the Pacific, 33. The article continues to note that "*one danger of coerction or extortion defences is that they could be interpreted too broadly. For example, the defences*

177. It is also true that the exculpatory threat and coercion indicated above are often intended in physical terms, as opposed to economic terms. In this sense, they are often considered to be something more akin to duress. Therefore, according to a certain line of thought, the economic threat of not allowing access to a market, or of not renewing an investment, would not qualify as a full defence or a mitigating factor. In the context of the enacting the American Foreign Corrupt Practices Act, for example, Congress noted as follows:

> *"The defence that the payment was demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract would not suffice [for exculpation] since at some point the U.S. company would make a conscious decision whether or not to pay a bribe. The fact that the payment was "first proposed by the recipient (...) does not alter the corrupt purpose on the part of the person paying the bribe."* [259]

178. This distinction between extortion and economic coercion was recognized by the US Supreme Court in *United States v Kozeny*. There, the Court decided that an investor who makes a payment under duress (i.e., upon threat of physical harm) is not criminally liable under the Foreign Corrupt Practices Act. However, a bribe payer who claims that payment was demanded as a necessary condition for gaining market entry or obtaining a contract cannot argue that he or she lacked the intent to bribe the official, after making the conscious decision to pay.[260]

179. It can be doubted however that this narrow reading is the correct interpretation of the notion of threat and coercion in the context of investment law, for at least three reasons.

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should not succeed merely because a person feels that he or she has no choice but to pay a bribe in order to obtain or maintain business (page 33). While this position is to be shared, the existence of a defence based on extortion, whether it succeeds or not, signals in principle that the position of the party who is victim to the extortion, even when he or she gives in to the extortion, is in a position that is less reprehensible than the person who sought the bribe".

[259] S. Rep. No. 95-114, 1977, at 11. Available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/senaterpt-95-114.pdf

[260] United States v. Kozeny, 582 F. Supp. 2d 535, 540 n.31 (S.D.N.Y.2008).

180. First, there is the question of the consistency of such a narrow interpretation of the term *threat* with the practice of other areas of law. To remain in the context of US law, in *Evans v United States* the Supreme Court held that:

> *"[T]he public officer's misuse of his office supplies the necessary element of coercion, and the wrongful use of official power need not be accompanied by actual or threatened force, violence, or fear."* [261]

181. Secondly, in investment law, direct physical duress against the investor is a rare occurrence. Some scholars have noted that:

> *"Placing foreign investors under direct duress, although still possible, has been gradually substituted by more covert means of coercion that serve to mask the unlawful pressure on the investor. This may be for instance a forced sale of assets, a share transfer arranged under pressure to effect full or partial nationalization of the investment, conclusion of agreements under physical or financial threat, etc*."[262]

182. Against this scenario, excluding the relevance of forms of coercion that follow below the threshold of physical duress, especially those that have an economic component, would mean to negate the prevalent reality in international investment law.

183. The practice of investment Tribunals seems to recognise that there are coercive conducts by a Host State that, while falling short of physical duress, are still relevant for the purposes of assessing whether the Host State has abided by the relevant standards of treatment prescribed by international law. This will ultimately be a matter of judicial interpretation of the facts. In this regard, the Commentary to the Harvard Draft of the Convention of the International Responsibility of States

[261] See Evans v. United States, 504 U.S. 255, 268 (1992) "*[t]he public officer's misuse of his office supplies the necessary element of coercion, and the wrongful use of official power need not be accompanied by actual or threatened force, violence, or fear.* Contra Halpern, M. (2016) *op.cit.,* 309. "*Duress can negate mens rea if the perpetrator of the illegal act was under duress or compulsion such as the paradigmatic having a gun to one's head. Most likely, the inability to make the investment does not satisfy that Defence*".

[262] Draguyev, D., «Bad Faith Conduct of States in Violation of the 'Fair And Equitable Treatment' Standard iInternational Investment Law and Arbitration» *Journal of International Dispute Settlement*: 2014, 273 - 305, 280.

for Injuries to Aliens, specifies the central role of judicial assessment in these matters:

> *"Since economic duress of a sort may be present in virtually any settlement, it must rest with judicial decision to draw the line between, on the one hand, economic compulsion exercised by the respondent State over the claimant in order to force him to settle, and on the other hand, the normal operation of economic forces."*[263]

184. In *Desert Line Projects v Yemen*, for example, the investor had secured several contracts related to the construction of roads in Yemen. After the relationship between the parties turned sour, the sites where the works were being carried out started suffering a series of attacks from the military, as well as local militias controlled by Yemen, that hindered the completion of the works. In addition to this form of physical tampering, the Yemeni Government refused to pay for a significant proportion of the works and did not release the bank guarantees provided by Desert Line Projects. The dispute between the parties was referred to international arbitration, whose outcome was not however entirely satisfactory for the claimant. At a later stage, the Yemeni Government proposed that the parties should resolve their differences by means of a settlement agreement, whose proposed amount was however significantly lower than the one indicated in the arbitral award. Despite this, and somewhat surprisingly at that stage, the settlement agreement was entered into by the parties. However, Desert Line Projects continued to demand payment of the outstanding sums. Faced with a refusal by the Yemeni Government to accede to the requests, the investor yet again commenced arbitral proceedings against the Host State.

185. The reason for the commencement of the new arbitration was, among others, that the settlement agreement was effected under duress and therefore deemed unenforceable. The arbitral Tribunal considered *that, in general terms, financial pressure on the investor would not always mean threat or duress*. However, where the financial pressure is coupled with an element of abuse, the

[263] Sohn, L. and Baxter, R. Commentary to the Harvard Draft of the Convention of the International Responsibility of States for Injuries to Aliens, 1961, 161.

Tribunal held that economic coercion can be the same as duress. The circumstance that the investor faces a hostile environment and fears economic loss is capable of constituting this element of abuse, and may indicate that the investor's decision making process was affected by duress.[264] As explained by the Tribunal, in any given case, it would be necessary to draw:

> *"[T]he line between the ordinary economic pressure created by delay in the payment of debt (...), on the one hand, and, on the other, the kind of compulsion that can be created by a superior force in a hostile environment, where the scales of justice have been manifestly compromised"*

186. Under these circumstances, the Tribunal found that Desert Line Projects was left without any realistic course of action but to enter into the settlement agreement, since the requests for payment were consistently rejected, the award was not honoured by the Yemeni Government, and this had caused the financial condition of the claimant to deteriorate to the extent that it needed any available cash flow to survive.[265] Ultimately, the Desert Line Projects award demonstrates *that investment law recognises that economic pressuring can amount to coercion*, and sway an investor's conduct.

187. Thirdly, and perhaps most importantly, for the purposes of the taxonomy presented in this Chapter, the question is not whether an economic threat can constitute the element of a full defence against criminal liability on the part of the investor, as was the case in *United States v. Kozeny*. The question is simply that of defining whether, in the repartition of the faults between the investor and the Host State, *a higher degree of culpability can be apportioned on the Host State, as opposed to the investor*, in the event of extortion exercised through economic coercion. And if one looks at the experience of those countries that have developed quite a large body of case law in this regard, due to the high involvement of their business in international transactions, it appears that this question is answered in the affirmative. For example, in *United States v Alfisi*, the US district court held that:

[264] Draguyev, D. (2014) *op.cit.*, 297.
[265] Draguyev, D. (2014) *op.cit.,* 297.

"[E]conomic coercion is generally relevant to the culpability of the intent of a defendant charged with bribery."[266]

188. There is support for this position also in scholarship. According to one commentator, for example:

[T]he fact that one party may have been extorted (economically or otherwise) to pay a bribe does—or at least should—matter. From a moral perspective, the existence of an extortionate demand casts doubt on whether the payer's conduct is truly culpable. Coercive pressure renders the payer's conduct involuntary, in some sense, since the choice to pay the bribe is not dictated primarily by the payer's free will, but rather by the choice-between-evils that is presented by an extortionate demand. From a legal perspective, the existence of economic coercion and/or extortion should cast doubt on whether such payments were truly "corrupt".[267]

189. This conclusion is especially well-grounded if one considers that there exist *hostage scenarios* in which a Host State can exert a formidable amount of economic coercion over an investor, and leave the investor with the alternative of giving in to the bribe request, or suffer very conspicuous economic loss. This happens for instance when the investor *has already made* some economic commitment to the Country that then solicits the bribe. Arguing *a contrario* from the decision of the Tribunal in World Duty Free, it would appear that, where the circumstances of the case so warrant, Tribunals could recognise the different level of culpability of the parties in instances of bribes solicitation, *at the very least* within a *hostage scenario*. The Tribunal, in that case explained that:

"Albeit that the balance of illegality may not be factually identical between [the foreign investors] and the Kenyan President, this remains a case, legally, of par delictum. The bribe was not procured by coercion or oppression or force by the Kenyan President nor by 'undue influence'; and as regards any investment, there was at the material time no 'hostage factor' because there was then no investment or other commitment in

[266] United States v. Alfisi, 308 F.3d 144, 150 n.1 (2d Cir. 2002). See also United States v. Kay, 359 F.3d 738, 756 (5th Cir. 2004) and United States v. Barash, 365 F.2d 395 (2d Cir. 1966).
[267] Klaw, B (2012), *op cit.,* 345. Basu, K. «Why, for a Class of Bribes, the Act of Giving a Bribe Should be Treated as Legal» *Ministry of Finance, Government of India Working Paper*, 2011. Available at http://finmin.nic.in/WorkingPaper/Act_Giving_Bribe_Legal.pdf.

Kenya by [the foreign investors]. Prior to paying the bribe, [the investors] retained a free choice whether or not to invest in Kenya and whether or not to conclude the Agreement"[268].

190. So far, the greater level of culpability of the Host State in the case of solicitation and extortion of bribes has been analysed from a criminal law perspective. At the beginning of this Section, however, it was mentioned that there are also considerations of international investment law that render a Host State that solicits and extorts bribes *more culpable* than the investor who pays them. Indeed, as anticipated, bribery solicitation and extortion by a Host State constitute a violation of the standard of treatment owned to an investment[269]. This is so from a number of angles.

191. From the general perspective of the fair and equitable treatment (which includes freedom from coercion), the arbitral Tribunal in *EDF v Romania* held that:

"[A] request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, and that exercising a State's discretion on the basis of corruption is a (...) fundamental breach of transparency and legitimate expectations".[270]

192. In addition to fair and equitable treatment, transparency and legitimate expectations, there may be other canons of protection that are breached by the act of soliciting or extorting a bribe. One of this would be the obligation to refrain from arbitrary or discriminatory action. It has been authoritatively held, for example, that:

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[268] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006, para 178l.

[269] Draguyev, D. (2014) *op.cit*., 297. "*There may also be another factual scenario where claims concerning alleged corruption are asserted. While in EDF bribery was solicited from the investor, in Jan Oostergetel and Theodora Laurentius v The Slovak Republic the investors contended they had become victims of corrupt practices in the host State. The claimants acquired shares in a privatized company in the Slovak Republic. As the company had increasing debts and liabilities, some of its creditors, including the tax authorities, applied for bankruptcy proceedings. The company was found insolvent, and its prop- erty was distributed to creditors in accordance with a realization plan. The claimants alleged that their business had been ruined by the Slovak financial mafia and particularly local competitors who wanted to acquire unlawfully the assets of the claimant's com- pany. For this purpose they instituted the bankruptcy proceedings, bribed the Slovak authorities, including the judiciary, and finally obtained the assets upon the company's dissolution. The Tribunal rejected the claim as unsubstantiated and based on insinu- ations. However, in its dicta the Tribunal noted that, if it had been proven, such conduct would have been bad faith to the effect of a breach of the FET*".

[270] EDF (Servs.) Ltd. v. Republic of Romania, ICSID Case No. ARB/05/13, Award, para 221.

> *"Bribery of a public official leads to a decision by that official that is unfair and discriminatory, especially when the competitors of the bribe giver are thereby put at a disadvantage. Thus, to the extent that a decision arising from an illicit payment could be imputed to a Government as an official measure, such a measure would be prohibited by the relevant treatment standards of an applicable [international investment agreement]."*[271]

193. In light of these circumstances, it is appropriate to take the conduct into account in the repartition of culpabilities. If the solicitation and extortion of bribes can amount to a breach of the standard of protection owned under the Treaty, there is an additional layer of culpability (in addition to the criminal one) that adds to the offensiveness and illegality of the conduct of the Host State: the international investment law one. An arbitral Tribunal should be in a position to take this into account when determining the consequences of corruption in investment arbitration.

2.2.4. Has the State Prosecuted the Instances of Corruption on which it Wishes to Rely? The Case of Condonation

194. Another question that weighs heavily on the reciprocal culpability of the Host State and the investor in the crime of corruption (but that applies to any other crime on which a *Defence of Illegality* could be grounded) regards the question of the Host State's response to the instances of bribery on which it intends to base its defence against the investor's claims.[272] When a State suspects corruption of an investor, or when corruption is indeed established before the commencement of arbitral proceedings, there are many options that are open to a State to rectify this situation and address it from the domestic perspective. Professor Cremades, for instance, notes that:

> *"[I]n the case of an official suspected of corruption, the State might commence an investigation, remove or suspend the official,*

[271] U.N. Conference on Trade and Development, at 71–72, U.N. Doc. No. UNCTAD/ITE/IIT/25, U.N. Sales No. E.01.II.D.20 (2001)

[272] This is in line with the declarations made by many states that the prevention and eradication of corruption is a responsibility of all States. U.N. Convention Against Corruption pmbl., adopted Oct. 31, 2003, T.I.A.S. No. 06-1129, 2349 U.N.T.S. 41.

> *institute criminal proceedings against the official and/or the investor, initiate legal proceedings to annul or rescind any contract or concession granted to the investor, or even pass legislation to deprive the investor of rights acquired corruptly. At a broader level, the State party might review its anti-corruption policies and practices, review its selection and training programmes for officials, implement codes or standards of conduct for the correct, honourable and proper performance of public functions, review its procurement or public reporting systems, etc."*[273]

195. In light of this, the domestic criminal law response towards the corrupted State officials and the corrupting investor becomes crucial. If prosecution has not occurred, the State may be considered to have condoned the conduct of the investor and consequently may even be procedurally estopped from invoking the claimant's corruption to substantiate a *Defence of Illegality*.[274]For the taxonomical purposes of this Chapter of the dissertation, however, what is relevant to note is that a State that has failed to prosecute the crime of corruption as mandated under domestic and international legislation retains a significant level of culpability with respect to that crime. In a case like this, a Tribunal that accepted a *Defence of Illegality* by entirely dismissing an investor's claim would be overlooking the fact that the Host State laments at the international level the commission of a crime that it has failed to address domestically, and that it would therefore be exploiting the crime to its advantage in international investment arbitration, without showing a real commitment to addressing the substantive issue of corruption also from its criminal law perspective.

196. A case of this nature presented itself in the case of *Wena v Egypt*. While the case has been mentioned earlier on for other purposes, it is appropriate to discuss its details here, as they illuminate the way in which a State may acquiesce to the investor's corruptive conduct at the domestic level, while attempting to make

[273] Cremades, B. (2005) *op.cit*., 216.

[274] The idea behind estoppel in this case is that if the State has not prosecuted the crime at the domestic level, it should not be authorised to rely at all on the crime at the international level. The principle of estoppel in international law requires a State "*to be consistent in its attitude to a given factual or legal situation"* and it *"operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself*." Case concerning the Temple of Preah Vihear [Cambodia v Thailand] [Merits] [Dissenting Opinion of Sir Percy Spender] 143–44; International Court of Justice [ICJ]

the most of it internationally. The dispute arose out of two long-term agreements between Wena Hotels Limited ("Wena"), a British investor intending to lease, operate and manage two hotels in Egypt, and the Egyptian Hotels Company EHC ("EHC"), that was wholly-owned by the Egyptian Government. Shortly after the signing of the agreements, Wena alleged that the condition and quality of the hotels was far below those agreed in the lease. Wena therefore withheld part of the rent due under the terms of the lease. Because of this non-payment, EHC threatened to repossess the hotels through force. This actually happened and, when the Egyptian prosecutor ordered that the Hotels be returned to Wena, they were returned in a vandalised state. Wena brought a dispute against Egypt under the ICSID Convention, claiming violation of investment protection under the UK-Egypt investment treaty. Among the arguments raised to counter the claim of the investor, Egypt resorted to a *Defence of Illegality*, in the form of a corruption defence, by holding that Wena had actually secured the investment through the bribery of Egyptian public officials, enacted by means of a series of false agency agreements, and that therefore its claim should have been dismissed.

197. Ultimately, the Tribunal was not satisfied of the existence of bribery as a matter of evidence, and therefore found that there were no grounds to substantiate a corruption defence. However, it also noted that, had bribery actually been proven, as Egypt claimed, *no domestic action appeared to have been taken by the Egyptian authorities to hold those allegedly involved in the crime accountable*. In an important dictum, the Tribunal held:

> *"The Tribunal does not know whether an investigation was conducted and, if so, whether the investigation was closed because the prosecutor determined that Mr Kandil was innocent, because of lack of evidence, or because of complicity by other Government officials. Nevertheless, given the fact that the Egyptian Government was made aware of this [allegedly corrupt agreement] […] but decided (for whatever reason) not to prosecute Mr Kandil the Tribunal is reluctant to immunize Egypt from liability in this arbitration because it now alleges that the agreement with Mr Kandil was illegal under Egyptian law."*[275]

[275] Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award of 8 December 2000, para 116.

198. Albeit not in the context of a *Defence of Illegality*, but in set aside proceedings of an arbitral award, also the Court of Appeal of Paris in the case *Congo v Commisimpex* has shown a certain reluctance to overlook the complete inactivity by a Host State in prosecuting instances of corruption on which it sought to rely. Commisimpex involved a 1992 agreement providing for a payment schedule of debts owned by Congo to the claimant, a supplier of public works. The arbitration proceedings involved a claim by Commisimpex based on a 2003 agreement, whose conclusion, Congo argued, could only be explained by *a general climate of corruption*, of which Commisimpex had taken advantage. In the set aside proceedings the Court of Appeal rejected the position of Congo on various grounds, but also held that Congo's mere allegations of a general climate of corruption within the government administration, without indicating the persons likely to be involved in the corruption *or without prosecuting the alleged beneficiaries of the corruption,*[276] were an insufficient basis to set aside the award against Congo.[277]

199. Considerations as to whether the Host State condoned the corruption of the investor therefore enter in the balancing of circumstances that Tribunals are willing to take into account. The Paris Court of Appeal considered them in the context of set aside proceedings; the Tribunal in *Wena v Egypt* addressed them, albeit incidentally, with respect to the possibility of raising the corruption defence. The proposal that is developed in the model outlined at the end of this dissertation (Chapters 8 and 9) is that Tribunals may consider the prosecution of the crime of bribery (or failure to do so) at the merit phase of proceedings, including for purposes of the quantification of damages owned to an investor that has suffered a breach of its protected investment.

[276] Cour d'Appel, Paris, Pôle 1, chambre 1, 14 Octobre 2014 – n° 13/03410: "*Et considérant qu'il ne saurait être admis, sans ruiner la force obligatoire des contrats sur laquelle est fondé le commerce international, qu'un Etat se dégage des engagements contractuels souscrits par ses représentants apparents en se bornant à alléguer un climat général de corruption au sein de son administration, sans indication des personnes susceptibles d'être en cause et sans que les bénéficiaires éventuels aient fait l'objet de poursuites*"

[277] Greenwald, B. «The Viability of Corruption Defences in Investment Arbitration When the State Does Not Prosecute.» 15 04 2015. https://www.ejiltalk.org/the-viability-of-corruption-Defences-in-investment-arbitration-when-the-state-does-not-prosecute/ (accessed on 05 05, 2018).

200. Obviously, failure to prosecute an individual domestically for corruption will not always signal that the Host State is unwilling to pursue the crime seriously, and that this therefore has to affect the repartition of culpabilities between the parties. At times, failure to prosecute will be justified on the basis of entirely legitimate reasons. For example, a domestic prosecutor generally will be required to prove its case on corruption *beyond reasonable doubt* under domestic criminal law, which is a higher threshold than the standard of proof in international arbitration.[278] Also, in certain jurisdictions, prosecutors may have a measure of discretion in deciding as to whether to prosecute a crime, and may have to take into account the balancing of various circumstances.[279] Failure of a State to even open investigations on instances of corruption, however, may be suggestive of a general attitude of impunity towards the crime. As some commentators have demonstrated, currently, many foreign States lack the political will to assist in the investigation and prosecution of their own officials. Part of the reason for this, it is submitted, is because such foreign States do not regularly face real consequences when they do not cooperate in the battle against corruption.[280]

201. As a last consideration, it may be worth mentioning here that non-prosecution of instances of corruption, in the model proposed in this thesis, is a circumstance that aggravates the culpability of a crime *that is already attributed to the State*. However, even when the corruptive conduct cannot be attributed to the State on the basis of the principles of State responsibility discussed in the previous pages of this work, failure to prosecute corruption may constitute an autonomous breach of international law, attributable as such to the State. This breach would be attributable to the State not on the basis of its active conduct, but due to the inaction of its State organs (such as, for instance, prosecuting authorities, magistrates, etc.). This is because, responsibility can arise from the failure of a State to prevent or redress an internationally wrongful act that was not initially attributable to that State.[281] This should not come as a surprise, in consideration of the fact that State responsibility can ordinarily arise not only from actions, but also

[278] Greenwald, B. (2015), *op.cit*.
[279] Olaniyan, K. *Corruption and Human Rights in Africa*. Oxford: Hart Publishing, 2014: 149.
[280] Klaw, B. (2015) *op.cit*., 65.
[281] LLamzon, A. (2015) *op.cit*., 74.

from omissions. For example, in the case of the *American Embassy Hostage case* in Teheran in 1979, Iran was not held responsible for the acts of the students who had seized the American embassy and taken hostages. However, the omissions committed by Iran in not guaranteeing the safety of the US Embassy and in not regaining its control from the students were attributed to the State, and engaged its international responsibility.

2.2.5 Has the Host State Passed Legislation to Deter the Commission of Corruption within its Jurisdiction?

202. Another question that has an impact on the level of culpability of a Host State regards the degree of compliance of the State with the set of obligations that international law imposes in the context of the global fight against bribery. These obligations include a) to criminalize under domestic law the request or receipt of a bribe by a State's public officials; b) to prosecute or extradite a State's domestic officials engaging in such acts of corruption; c) to develop and implement or maintain effective, coordinated anti-corruption policies, including codes of conduct and anticorruption training for public officials; d) the obligation to take such measures as may be necessary, in accordance with principles of domestic laws, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage, in order to obtain compensation.

203. For the most part, anti-bribery conventions are not self-executing, which means that they require enabling acts before they can function inside a country and bind domestic courts.[282] While one option to sanction the lack of implementation of obligations contained in international conventions would be to hold the State internationally responsible for the lack of compliance, another option would be to take the lack of compliance into account in determining the level of culpability of the Host State with respect to single instances of corruption to which it is also a party. As will be later discussed further, the risk in allowing

[282] Armone, M. and Borlini, L. *Corruption, Economic Analysis and International Law*. Northampton: Edward Elgar, 2014, 31.

States to resort to an ample *Defence of Illegality*, including the one based on corruption, is that this may constitute a disincentive to creating corruption-free environments domestically. If States have a litigation advantage in investment arbitration proceedings by simply invoking the corruption of the investor as a defence, this may be a disincentive to tackling corruption when dealing with foreign investors domestically. In addition, the knowledge that no (or little) consequence would follow from the commission of an act of corruption domestically may in turn be an incentive for State officials to actually solicit bribes. Why should a State criminalise corruption, if it is precisely corruption that allows it to walk away scot-free in investment proceedings that are brought against it? Not unlike the case of failure to prosecute corrupt State officials, the unwillingness to pass legislation to criminalise corruption may be framed as a form of indirect condonation of and acquiescence to the crime.

204. In addition to this, and similarly to the case of bribe solicitation and extortion, failure to criminalise certain conduct and to take appropriate measures against it could constitute a violation of a specific standard of treatment owned to investors under international law, that of *full protection and security*. Even though this standard is vague and ample, and it covers a number of conducts, it also *[imposes] an obligation upon the Host State to actively protect the investment from adverse actions by the Host State itself, by its authorities or by third parties.*[283] This obligation is one whose violation is not assessed on the basis of gross negligence or fault – but merely on lack of due diligence.[284] Certainly, failure to sustain a corruption-free environment is something that exposes the investor to *adverse actions from the State itself*. Therefore, this particular conduct by the Host State is not one that should be overlooked, but that should play a role in the allocation of culpability if corruption actually occurs. And, just like bribe solicitation and extortion, this conclusion is not only warranted from the criminal

[283] Haugeneder, F. and Liebscher, C. «Corruption and Investment Arbitration: Substantive Standards and Proof.» *Austrian Yearbook of Arbitration*, 2009: 539 - 550.
[284] Malik, M. *Corruption and Investment Arbitration: Substantive Standards and Proof*. The International Institute for Sustainable Development. Nov. 2011. available at http://www.iisd.org/pdf/2011/full_protection.pdf (noting that "*tribunals have emphasized that there is no need to prove negligence or bad faith for a state to be liable*"); See also Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award of 27 June 1990, para 77.

law perspective, but also derives from the contrariety to international investment law of maintaining corrupt environments for investors.

2.3 The Culpability of the Investor

205. So far, this classification has focussed on assessing the various degrees of culpability of the Host State in the crime of bribery, by taking into account conduct that is attributable to it. The reason why the conduct of the Host State has been the centre of the analysis so far is that, when the illegality of the investor is raised by the Host State, it is always assumed that the investor is responsible, and that it *retains a full degree of culpability* with respect to the crime of which it is accused. The *full culpability* of the investor, once the existence of the crime is proven, is generally taken for granted. Against this classical scenario, the novel approach of this thesis consists in disclosing and bringing to light *also* the culpability of the Host State that invokes the *Defence of Illegality*.

206. However, even if the role of the investor in the crime of corruption cannot be called into question, it would be wrong to consider that an investor who engages in corruption is always *in the same situation of culpability*, and that this can never be arranged according to higher or lesser degrees. As seen earlier, in certain cases the degree of culpability of the investor can be judged in comparative terms with the level of culpability of the Host State. The higher the culpability of the Host State, the lower, conversely, that of the investor. For example, in the case of a Host State that extorts bribes, the Host State retains a high degree of culpability; the reverse side of the coin is that the investor, especially when a *hostage scenario* materialises, is less culpable.

207. However, there are also circumstances that may aggravate or diminish the degree of culpability of the investor and that do not require a comparison with the respective conduct of the Host State, being entirely *endogenous and exclusive* to the investor's behaviour. These conditions are still useful for assessing the respective blameworthiness of the parties to the crime, and they can be appreciated

by turning the attention to the posture that the investor alone has adopted on certain issues. These are addressed briefly in the pages that follow.

208. As seen in the preceding pages, conduct by a State agent is attributable to the Host State even when this conduct is carried out *ultra vires*. However, there are very few cases in which Tribunals have applied these seemingly unequivocal criteria and in World Duty Free, the only case where corruption was proven by admission of the investor, the conduct was ultimately not attributed to the Host State, despite the fact that the person receiving the bribe was the President of Kenya. The reasoning used to exclude liability of the State was based on an entirely domestic law perspective, and resembled an agency law argument. Specifically, it transpired from the words of the Tribunal that Kenya was considered an innocent principal, unaware of the bribery that had involved its own President and that the President was the (disloyal) agent of the principal. According to the Tribunal:

> *"The President was here acting corruptly, to the detriment of Kenya and in violation of Kenyan law (including the 1956 Act [outlawing corruption]). There is no warrant at English or Kenyan law for attributing knowledge to the state (as the otherwise innocent principal) of a state officer engaged as its agent in bribery."*[285]

209. In this scenario, the State official who accepts or solicits a bribe is considered a *falsus procurator* of its own principal and, in order for the State to escape attribution and responsibility, it is necessary that the agent be unaware of the corruptive acts perpetrated by its disloyal procurator.[286] This was exactly the reasoning of the Tribunal, which held in a passage that:

> *"[The] payment was received corruptly by the Kenyan head of state; it was a covert bribe; and accordingly its receipt is not legally to be imputed to Kenya itself."*[287]

[285] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006, para 185.
[286] LLamzon, A. (2013), *op.cit.*, 63: "*By [the State Responsibility] standard, the specific World Duty Free holding that a Head of State's corrupt actuations are not attributable because that act was in violation of Kenyan law would not have been sustained in international law".*
[287] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006, para 169.

210. Now, the agency law argument used to prevent the attribution of an *ultra vires* corrupt act of a State official to the State could also be relevant to the other side of the corruptive conduct, namely to the investor. And indeed, it would be illogical to treat the Host State with the categories that are proper to agency law (that allows to distinguish between a principal and its procurator, and whether this acted within the mandate of the principal, or *ultra vires*) and to treat the investor as a single unity, to which such an agency relationship is never applicable. The consequence of this would be that of holding the investor always responsible to the highest standard of culpability, including for *ultra vires* acts of its employees; and of allowing the Host State to escape responsibility for the *ultra vires* acts of its officials.

211. This thesis proposes that, first and foremost, an agency law approach should be employed also for the analysis of the conduct of the investor in its commission of the crime. A fundamental clarification is however necessary: what is proposed here *is not* to apply agency law principles *to exclude responsibility of an investor*, in case it turns out that the briber (for example, an employee of the investor), acted *ultra vires* and in an disloyal manner *vis à vis* its principal. Indeed, just like acts *ultra vires* by a Host State should be attributable to the State, so also acts *ultra vires* of a disloyal employee should be attributable to the investor, and the investor should be held accountable for those. What is proposed in this dissertation is that, for the present taxonomy, the question as to whether the crime was committed by an employee of the investor who acted *intra vires*, as opposed to *ultra vires,* should be considered as *an element to modulate and graduate the level of culpability of the investor in its relationship with the Host State*.

212. This modality of assessing the culpability of the investor draws from a criminal law perspective. In that context, the responsibilities of firms and legal entities for illegal acts of their employees is also assessed on the basis of an agency relationship between the principals and the agents.[288]

[288] See generally, Braithwaite, J. and Fisse, B. *Corporations, Crime, and Accountability*. Cambridge: Cambridge University Press, 1993.; U.S. Sentencing Guidelines Manual, 2016, Ch. 8, 487-531 (federal sentencing guidelines for organizational defendants).

213. For example, in the Italian system, a legal entity (including corporations) can be held liable, from a quasi-criminal law perspective, for the criminal acts that go to the advantage of the legal entity and that are committed by a) directors or representatives of the legal entity, or people with overall managerial responsibility b) people who operate under the control of those specified under point a), above. In this context, it is a full defence to liability of the legal entity that the person who acts illegally does so in its exclusive personal interest. Exclusive personal interest is not normally the case when bribery committed by the employee of an investor enables also the investor to secure an investment contract. However, another exception to full culpability provides as follows:

> *"If the crime has been committed by one of the individuals specified above (...), the legal entity is not liable if it proves that:*
>
> *1. The directors of the legal entity have adopted, and effectively enacted, before the crime was committed, models for its internal organization and management that are able to prevent crimes of the nature of those that was committed;*
>
> *2. The task of supervising the effectiveness of, and the abidance by those models, and of updating them, has been entrusted by the legal entity to one of its internal bodies with autonomous powers of control;*
>
> *3. The authors of the crime have committed it by fraudulently avoiding the organization and management models*
>
> *4. There was no lack of, or insufficient, surveillance by the internal bodies indicated under b), above."*[289]

214. A provision like the one mentioned above presupposes the possibility of distinguishing between the conduct of the legal entity as such, and the conduct of disloyal employees of the legal entity, in terms of agency law. It distinguishes the situation where the commission of a criminal act *is endorsed* by the legal entity, and is therefore *intra vires*, from the situation in which the commission of a criminal act occurs *contrary* to the willingness and the policy of the legal entity, and is therefore *ultra vires*. Whether the person from the investor side bribing the

[289] Article 6, Decreto legislativo 8 giugno 2001, n. 231 as modified by L. 27 maggio 2015, n. 69 e dalla L. 29 ottobre 2016, n. 199.

Host State therefore acts *in furtherance of a policy* of the investor, or *contrary to the policy of the investor* is something that should bear on the level of culpability of the investor in the commission of a crime like corruption.

215. In deciding whether a criminal conduct, or any other kind of misconduct, is contrary to the policy of an investor, or rather is in its furtherance, the question of the respect by the investor of parameters similar to those indicated in the context of the Italian law provision mentioned above should be taken into account.[290] According to Davis, for instance, who speaks with respect to the question of the quantification of damages,

> *"[T]he extent of liability (…) should depend not only on proof that the firm failed to prevent bribery, but also on evidence of whether it made reasonable efforts to monitor, supervise and punish its employees and co-operate with law enforcement authorities."*[291]

216. The investor that has implemented internal policies aimed at deterring and sanctioning corrupt conduct by its employees is less culpable than the investor that has not enacted anti-corruption provisions. Similarly, when a company has adopted internal procedures aimed at reporting and disclosing instances of corruption that may occur, it should be deemed less culpable than a company whose business structure fosters a culture of non-reporting and covering up of bribes. This is so because those described above are the typical anti-corruption standards that are requested from businesses that operate in the international environment.[292] These provisions are the equivalent for the investor of the obligation for Host States to comply with the anti-corruption legislation approved

[290] That resembles many others: See the Sapin II Law in France.
[291] Davis, K. E. (2009) *op.cit*., 36.
[292] There is a wealth of legislation imposing these kinds of measures to company. Law Decree 231/2011 has already been mentioned. In France, similarly, the Sapin II Bill provides the following obligation for companies: a) adopt a code of conduct, which shall be annexed to the Internal Rules ("Règlement Intérieur"), b) implement and update on a regular basis c) corruption risk mapping and assess their corruption risk based upon their types of activities and organization (by types of activities and by geographical zones, based on the main clients, suppliers and intermediaries (this last category is not defined but may also encompass agents and distributors)), d) screen customers, providers, business partners and intermediaries, e) provide regular training to employees targeting those exposed to the risk of corruption and influence peddling, f) adopt accounting control systems, g) disciplinary sanctions against employees for breach of the internal rules h) implement a whistleblowing process, and i) set-up an internal control and appraisal process of these measures

at the international level, which has been described earlier as one of the parameters to judge the level of a State's culpability.

217. The fact that the culpability of the investor should be assessed having due regard to the level of internal compliance with anti-corruption legislation and best practices is confirmed by a number of sentencing guidelines adopted worldwide to sanction the crime of corporate corruption.[293] The 2014 Sentencing Guidelines of the UK, for instance, require that a court must determine whether the offending corporation has demonstrated a high, medium or lesser level of culpability in the commission of the offence by looking at its role and motivation. One of the elements that signal a *high level of culpability is the circumstance that the company wilfully disregards the commission of offences by employees and agents and that it places no effort in implementing an effective anti-corruption system internally*. Similarly, the Italian law indicated earlier specifies that, in the cases when the adoption of an internal anti-corruption system does not operate as a circumstance precluding wrongfulness, the sanction of the legal entity must at least be diminished when *the company has adopted and made operative an organisational model that is apt to prevent crimes (...).*[294]

3. Fraud and Violation of the Laws of the Host State

218. In addition to bribery, the other two types of criminal misconduct of which an investor may be responsible are fraud[295] and violation of the laws of the Host State. Even though these correspond to different criminal typologies, and case law provides examples with respect to both situations, they are addressed together here. As a matter of fact, unlike bribery, that is a bilateral crime, fraud and violation of laws that are assisted by a criminal sanction have one trait in common: that they do not require the necessary cooperation of the Host State, but can be carried out by the investor alone. The fact that fraud and violations of the laws of

[293] https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf ; See generally: Braithwaite, J. and Fisse, B. (1993), *op. cit.*

[294] Article 11 Law 231/2001.

[295] For a general discussion see Levy, D. *Les Abus de l'Arbitrage Commercial International* . L'Harmattan / Logiques Juridiques / Les Cahiers du CeFap, 2015. See also Dudas, S. and Tsolakidis, N. «Host-State Counterclaims: A Remedy for Fraud or Corruption in Investment-Treaty Arbitration?» *Transnational Dispute Management*, 2013: 1 - 15.

the Host State do not require the cooperation of the Host State as a constitutive element of the crime does not mean however that cooperation of the Host State (for instance, in the form of direct involvement or subsequent acquiescence) may never occur. And, when this happens, the circumstance should be part of the assessment on culpability.

219. For this classification, fraud is defined as a knowing misrepresentation of the truth of a material fact, to induce another to act in a manner that is detrimental to their interests.[296] In the investment arbitration context, fraud can be described as a wilful misrepresentation of the truth by an investor to induce the State to act in a manner that is detrimental to its interests.[297] Similarly to bribery, fraud is considered as a crime in several domestic legislations; and, also at the international level, efforts are being made to criminalise this conduct. However, the fight against fraud in international business does not seem to have yet achieved the same magnitude and coherence of the anti-bribery movement. As acknowledged by Professor Cairn:

> *"[F]raud has not been the subject of the same degree of international cooperation and rule making as bribery and money laundering. Nevertheless, some steps have been taken to combat this kind of misconduct, particularly with respect to fraudulent record keeping that might facilitate or conceal corruption, money laundering or other crime."*[298]

220. This is probably the reason why this type of crime is often implicitly sanctioned in a number of conventions that criminalise bribery, as opposed to being the subject of dedicated instances of criminalisation. For example, Professor Bernardo Cremades explained that the OECD Bribery Convention contains articles requiring complete and accurate financial records from firms, in order to avoid off-the-books or secret accounts or transactions, non-existent or deceptive descriptions

[296] Hanatiou, B. «Misdeeds, wrongful conduct and illegality in arbitral proceedings.» *ICCA Congress Series*, 2002: 261 – 288.
[297] Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award of 2 August 2006, para 102-128.
[298] Cremades, B. and Cairns, D. «Corruption, International Public Policy and the Duties of Arbitrators» *Dispute Resolution Journal*, 2004: 76 - 84. Kriebaum, U. «Investment Arbitration – Illegal Investments.» *Austrian Yearbook on International Arbitration*, 2010: 307 - 355.

of expenditures, and the use of false documentation. Anti-fraud provisions are therefore included in the context of a broader anti-corruption convention.

221. In investment treaty arbitration, the cases of *Inceysa*, *Plama* and *Kim* are instructive of the appearance of fraud before arbitral Tribunals. In *Inceysa v El Salvador*, the claimant brought a claim against El Salvador lamenting breach of contract and expropriation with respect to a contract awarded to the claimant by the Republic of El Salvador. Amongst the defences that it raised, the respondent argued that the investment made by the claimant was not one of those that deserved protection under the BIT, in consideration of the fact that it was not made in compliance with the laws and regulations of the Host State. In particular, El Salvador explained that Inceysa had secured its investment through fraud, having submitted false financial statements, having misrepresented the experience of Inceysa's sole administrator, Inceysa's general experience in the field of vehicle inspections, its relationship with its alleged strategic partners and having submitted forged documents to support the existence of multi-million dollar contracts in the Philippines and in Panama. In essence, that Inceysa had simulated to be an experienced investor with significant financial capacity and a structural ability to operate in the field in which the investment was made. However, in reality, Inceysa did not possess these skills, being only a small company run by one entrepreneur.

222. In a similar fashion to Inceysa, in *Plama v Bulgaria* the investor brought a case against the respondent State and argued that Bulgaria a) failed to create stable, equitable, favourable and transparent conditions for the investment, b) failed to accord the investment fair and equitable treatment; c) failed to provide to the investment constant protection and security, d) subjected the investment to unreasonable and discriminatory measures, e) breached its contractual obligations *vis-à-vis* Plama, and f) subjected the investment to measures having an effect equivalent to expropriation. In its defence, Bulgaria raised objections going to the admissibility of Plama's claims, by arguing that the company's investment involved misrepresentations and instances of fraud in violation of Bulgarian law. In particular, these had concerned the question of the ownership of the investor's

assets, a matter that in turn had impinged on the decision to grant certain authorisations that were necessary to make the investment legally.

223. In *Kim v Uzbekistan*, the most recent one of the cases of fraud discussed by an arbitral Tribunal, the Host State based a *Defence of Illegality* on several instances of deceitful conduct that the investor had allegedly put in place to the detriment of the State. According to Article 168 of the Criminal Code of Uzbekistan, fraud is the *acquisition of someone's property or the right thereto by deception or abuse of confidence*. The Tribunal that addressed these alleged instances of fraud ordered them by the criteria of the importance of the provisions of law that they violated. In particular, as follows: a) fraud in violation of Uzbek Securities law, by false representation of financial data that misled the market;[299] b) false disclosure and concealment in registering the investor's investor in the Uzbek Market;[300] c) fraud causing significant harm to the State and minority shareholders of the investor.[301]

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[299] This conduct was alleged to be in violation of Order No. 04-103 on "Regulations on the Prevention of Manipulation of the Stock Market" dated 25 June 1999: "*Prohibits any market participants from '[p]erform[ing] any act aimed at artificially inflating/underpricing of securities, the product of a false or misleading impression of active trading in order to induce third parties to buy/sell securities at a bargain price for the manipulators*". "*A member (group members) of the securities market and/or their customers do not have the right to conclude a transaction of sale and purchase of a particular type of security on the basis of mutual agreement, with the intent to mislead other market participants*".

[300] This conduct was alleged to be in violation of: Uzbekistan Civil Code Art. 116 "*A transaction whose content does not correspond to the requirements of legislation, and also concluded for a purpose knowingly contrary to the foundations of the legal order or morality shall be null*". Uzbekistan Civil Code Art. 124 "*A transaction concluded only for form, without the intention to create legal consequences, shall be null (fictitious transaction). If a transaction is concluded for the purpose of concealing another transaction (sham transaction), then the rules relating to such transaction which the parties actually had in view shall apply*". Law No. 260-II (Law on Exchange Activity), Art. 15: "*The following are not allowed on the Exchange...spread of false information that may be the reason for artificial change in the market structure*". Law 218-I "on the Mechanism of Securities Market Performance", Art. 31: "*Securities market participants for violation of securities legislation shall be liable in accordance with established procedure [for...] misleading investors and supervising authorities by release (provision) of deliberately false information"*. Law 218-I "on the Mechanism of Securities Market Performance", Arts. 6 and 25. Article 6 provides that the *"[m]ain principles of trading in the securities market" include "pricing based on actual current demand and supply; strict compliance with the legislation on the securities market by all participants; ...providing full disclosure about the securities and their issuers[;] transparency and accessibility of that information; protection of the interests of investors and issuers; [and] prohibition and prosecution of fraud and other illegal activities on the market*". Article 25 prohibits "*manipulation at the securities market through bogus transactions*". Order No. 04-103 (Order on the Prevention of Stock Market Manipulation), Art. 2.3.2 "*All market participants are prohibited from 'distribut[ing] / transmit[ting] information to other participants or to make any statement, which, in terms of time and/or the circumstances under which they were made, is false or misleading [to] any other market participants, and in respect of which the declarant was aware that it is false and misleading*". Order No. 2002-06 (Securities Disclosure Order), Art. 28: "*Participants of the securities market shall bear responsibility established by the legislation for the improper disclosure of the information at the securities market or disclosure of the information, which is misleading*". TSE Rules, Rule 2:293 This rule provides the "*basic principles of exchange activities*" were "*strict compliance with the legislation legal acts of the securities market and other internal regulations- orders and contractual relations between all participants in the securities market; [...] transparency and publicity of the exchange trade; equality of conditions for participation in*

224. Turning now to issues of violations of the laws of the Host State that are assisted by a criminal sanction, the case of *Fraport v Philippines* and *Valeri Belokon v Kyrgyz Republic* are indicative. In the first case, the Tribunal found that through secret shareholders agreements, Fraport had eluded[302] the provisions of Commonwealth Act No. 108, entitled *An Act to Punish Acts of Evasion of the Laws on the Nationalization of Certain Rights, Franchises or Privileges*, commonly known as the Anti-Dummy Law. By *renvoi* to the provisions of the Filipino Constitution, that imposed quotas of participation of Filipino nationals into certain types of investments made by foreigners in the territory of the Philippines, the Anti-Dummy law imposed criminal sanctions in the case of the violation of those dispositions. In particular the law prescribed that any individual violating the relevant rules on anti-dummy would *be punished by imprisonment for not less than five nor more than fifteen years and by a fine of not less than the value of the right, franchise or privilege enjoyed or acquired.*[303]

225. As it is apparent from the practical examples mentioned above, when a Tribunal is concerned with addressing fraud or instances of violations of the laws of the Host State perpetrated by the investor, it is confronted with crimes that are unilateral in nature, and whose pattern of criminality presents an author of the crime (the investor) and a normally inculpable victim of the crime (the Host State). The scheme of mutual culpability that has been proposed with respect to bribery,

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exchange trading for all members of the exchange; voluntariness of settlement of stock transactions on purchase and sale of securities; freedom of pricing on the stock exchange trading; timeliness and publication of reliable and complete data on securities admitted to stock exchange trading and informing participants of trading on prices of stock exchange transactions; openness and accessibility of information on settled transactions to the participants of trading; prohibition and prosecution of fraudulence, price manipulation, [and] knowingly proving unreliable information [to the Exchange]"

[301] This conduct was alleged to be in violation of Uzbekistan Criminal Code Article 168: Fraud is the "*acquisition of someone's property or the right thereto by deception or abuse of confidence*". Uzbekistan Criminal Code Articles 30 and 184:296 "[...] *helpmates shall be subject to liability under the same Article of the Special Part of this Code, as committers [...] Intentional concealment or understatement of profit (income) or other taxable objects as well as other evasion from taxes, duties, or other payments, established by the State, in large amount [...is punishable by fine, correctional labor, arrest, or imprisonment*]." Uzbekistan Civil Code Article 123: "*A transaction concluded under the influence of fraud, coercion, threat, or ill-intentioned agreement of a representative of one party with the other party [....] may be deemed by a court to be invalid upon the suit of the victim*".

[302]"*The investor, Fraport, concluded that the only plausible way for its equity investment to prove profitable was to arrange secretly for management and control of the project in a way which the investor knew were not in accordance with the law of the Philippines*". Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award of 16 August 2007, para 189.

[303]Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award of 16 August 2007, para 166.

therefore, cannot be transposed automatically into cases where the crime at issue is not by its nature bilateral, and does not require for its perfecting the participation of both Parties. Nevertheless, an analysis informed by criminal law categories is still required in order to decide how ultimately a Tribunal should treat instances of criminality of this nature that are brought to its attention.

226. In particular, as mentioned previously, even if the crimes discussed above are structurally unilateral in nature, there may be *accidental* circumstances that effectively determine the need to assess the respective culpability of the Parties, and that alter the unilateral nature of the crime. For example, it may be that the investor has violated a legal provision in an entirely inculpable manner, due to its obscure nature or contradictory formulation. It would be contrary to any basic principle of proportionality to equate the position of an investor who commits an inculpable mistake, to which the State may have contributed due to the lack of clarity of its laws, to the case where the investor carried out a deliberate violation of a clear and unmistakeable provision of the legal system of a Host State, with full intent to breach it. And, indeed, if one looks at the way domestic legal systems treat situations like these, it is apparent that the response is not unitary, but diversified according to the culpability of the violation.

227. In consideration of the fact that in unilateral crimes the investor - in its capacity of author of the crime - is *structurally* the side which is more likely to retain the highest level of culpability for the misconduct, culpability of the investor is discussed first, and the position of the Host State follows.

3.1 Awareness of the Illegality by the Investor and the Intent of the Violation

228. One first element to take into account in assessing the position of the investor to whom a crime is imputed is the question as to whether the violation was intentional, or whether it was caused by recklessness, by a culpable mistake on the legality of the conduct, or even by an inculpable mistake, to which the Host State

may somehow have contributed.[304] The Tribunal in *Kim v Uzbekistan*, in March 2017, identified for the first time in general and systematic terms the need to investigate the nature of the intent of the investor and its subjective position with respect to the violation as an important parameter in the context of a balanced assessment of the conduct imputed to it. The Tribunal asked itself:

> *"What does the investor's intent suggest as to the seriousness of the investor's conduct? Where a particular state of mind is not required for the violation, does the intentionality of the investor's conduct suggest a more egregious act? In contrast, does an act of non compliance that is a mere accident suggest a less egregious act?"*[305]

229. These questions are reflective of the classical modality of graduation of culpability in the criminal law field. Indeed, the elements indicated above fall within the notion of culpability as used in this dissertation.

230. The question of the knowledge by the investor of the violation of the law has been raised in practice before an arbitral Tribunal in the case of *Fraport v Philippines*, discussed earlier. In the decision, the Tribunal hinted to the possibility of inculpable violations of the laws of the Host State, but concluded that in the case before it the investor had with knowledge and intent breached the provisions of the Anti-dummy Law. According to the Tribunal,

> *"When the question is whether the investment is in accordance with the law of the Host State, considerable arguments may be made in favour of construing jurisdiction ratione materiae in a more liberal way which is generous to the investor. In some circumstances, the law in question of the Host State may not be entirely clear and mistakes may be made in good faith. An indicator of good faith error would be the failure of a competent*

[304] See generally on the relationship between culpability and error of law: Fiandaca, *op.cit.* (2014) . Jescheck, H. H. «L'Errore di Diritto nel Diritto Penale Italiano e Tedesco» *Indice Penale*, 1988, 185 - 204. Stortoni, L. «Introduzione nel Diritto Penale dell'Errore Scusabile di Diritto, Significato e Prospettive» *Rivista Italiana di Diritto Processuale Penale*, 1988, 1313 – 1332. Kumaralingam A., «Ignorance of Law, Criminal culpability and Moral innocence: Striking a Balance between Blame and Excuse», *Singapore Journal of Legal Studies:* 2003, 302-327. See also Husak, D. «Mistake of Law and Culpability», *Criminal Law and Philosophy,* 2010: 135. – 159.

[305] Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Award on Jurisdiction, 8 March 2017, para 406. "*It does not matter that the Tribunal conducted this assessment to decide if the defence of illegality should determine that the Tribunal should decline its jurisdiction. These parameters are important to establish the respective conduct of the investor and of the Host State, whatever the purpose of that assessment".*

> *legal counsel's due diligence report to flag the issue. In this case, the comportment of the foreign investor, as is clear from its own records, was egregious and cannot benefit from presumptions which would ordinarily operate in favour of the investor.*[306]

231. In *Fraport*, the Tribunal dismissed the investor's claim at the jurisdictional level, finding that the violation of the Anti-Dummy law had been perpetrated with full intent. The case, therefore, does not provide any insight into how the Tribunal may have reacted, had it found the violation to be inculpable, and it does not serve as guidance in understanding what consequences a Tribunal may consider appropriate to sanction the conduct of an investor who has violated Host State law provisions, without the intention to do so.

232. However, a systematic analysis of the kind specified above is still possible, and other cases provide good guidance in this regard. On the one side of the spectrum, that corresponds to the lowest level of culpability of the investor, there is a situation in which the Host State represents to the investor that the investment that it intends to make is in compliance with the laws of the Host State; only to change its mind at a later stage, in order to use the newly proclaimed illegality as a shield to avoid the investor's claims. In a scenario like this, the investor would have no knowledge of the illegality of its conduct, but would rather assume its compliance with the legislation in force, so that no intent to breach the law could be established. In the *Thunderbird v Mexico* case, for instance, an investor that intended to invest in the business of gaming machines had started the procedure to transfer capitals to Mexico. Before completing it, it had sought the advice of the relevant Mexican legal authorities on the question as to whether the features of its investment would be in compliance with the laws of Mexico. The advice provided by the Mexican authorities was in the sense that the investment was legal. However, after approximately one year of the making of the investment, Mexican authorities confiscated the investment and closed the premises where the investor was operating, alleging the illegality of its activity. In particular, the investment was considered to be contrary to the provisions of Mexican law that prohibited gambling.

[306] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award of 16 August 2007, paras 396-397.

233. In this case, the arbitral Tribunal explained that the investor could not in good faith have relied on the advice provided to it by the Mexican authorities. In fact, the information shared by Thunderbird on the nature of its project was incomplete, omissive and deliberately misleading. The Tribunal concluded that Thunderbird was not entitled to rely on any legitimate expectation ingenerated by Mexico as to the legality assessment of an investment that the investor knew had not been portrayed for what it really was.[307] *A contrario*, it can be argued that culpability on the investor's side would have been excluded had Thunderbird accurately depicted the features of its economic venture to the Mexican authorities, and had these authorities concluded that the investment was legal.

234. This is precisely what happened in the case of *Kardassopoulos v Georgia*. Faced with an investor's claim brought under the Energy Charter Treaty, the Respondent State raised a usual *Defence of Illegality*. It did so by arguing that a joint venture agreement and a concession concluded between the investor and two State-owned enterprises were illegal under Georgian law. The investor countered this defence by arguing that the State-owned companies had given reassurances on the legality of the concerned economic operations and that this had created a legitimate expectation, on which the investor had relied, on the illegality of the joint venture agreement and the concession. In particular, Kardassopoulos relied on the fact that Article 2.1 of the joint venture agreement provided that the joint venture was established *in accordance with the provisions of the legislation for Joint Ventures*.

235. The Tribunal was sympathetic to this line of argument. It found that the assessment of legality made by the State-owned companies had been endorsed by the Government through the approval of some of its most senior officials, who were also closely involved in the negotiation of both instruments. In consequence of this, the Tribunal held that Georgia's *Defence of Illegality* was unsustainable.[308]

[307] See for instance International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award of 26 January 2006.
[308] In similar terms: "*It is possible that under Egyptian law certain acts of Egyptian officials, including even Presidential Decree No. 475, may be considered legally non-existent or null and void or susceptible to invalidation.*

Both in the case of *Thunderbird v Mexico*, and in the case of *Kardassopoulos v Georgia*, the Tribunal reasoned in terms of the need to protect legitimate expectations, that constitute a part of the fair and equitable standard of treatment owned to investors under international law. In particular, as stated by the Tribunal in *Tecmed v Mexico*:

> *"[T]he commitment of fair and equitable treatment [...] is an expression and part of the bona fide principle recognized in international law, although bad faith from the State is not required for its violation [...] The Arbitral Tribunal considers that [commitment of fair and equitable treatment], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment".*[309]

236. And, while it is true that legitimate expectations have to be based on objective factors, and not on fanciful interpretations or subtle speculations, a clear and unequivocal affirmation by the Host State that a certain investment does comply with domestic regulations is certainly sufficient. For instance, in *Parkerings v Lithuania*, the Arbitral Tribunal noted that:

> *"The expectation is legitimate if the investor received an explicit promise or guarantee from the host State, or if, implicitly, the*

However, these acts were cloaked with the mantle of Governmental authority and communicated as such to foreign investors who relied on them in making their investments. Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authority of the Government. These acts, which are now alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law. A determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victims who relied on the acts. If the municipal law does not provide a remedy, the denial of any remedy whatsoever cannot be the final answer". Southern Pacific Properties (Middle East) Limited v. Egypt, ICSID Case No. ARB18413, Award of 20 May 1992, para 81.

[309] Tecnicas Medioambientales TECMED S.A. v United Mexican States, ICSID Case No ARB(AF)/00/2, Award of 29 May 2003, para 153. See also, e.g., Biwater Gauff Ltd v United Republic of Tanzania, ICSID Case No ARB/05/22, Award of 24 July 2008, para 602; EDF (Services) Ltd v Romania, ICSID Case No ARB/05/13, Award of 8 October 2009, para 216; Eiser Infrastructure Ltd & Energia Solar Luxembourg S.à.r.l. v Kingdom of Spain, ICSID Case No ARB/13/36, Award of 4 May 2017, paras 362 et seq.; El Paso Energy International Co v Argentine Republic, ICSID Case No ARB/03/15, Award of 31 October 2011, para 348; Franck Charles Arif v Republic of Moldova, ICSID Case No ARB/11/23, Award of 28 April 2013, para 231; Frontier Petroleum Services Ltd v Czech Republic (UNCITRAL), Final Award of 12 November 2010, paras 284-288; LG&E Energy Group et al. v Argentine Republic, ICSID Case No ARB/02/1, Decision on Liability of 3 October 2006, para 127-131; Metalclad Corp v United Mexican States, ICSID Case No ARB(AF)/97/1, Award of 30 August 2000, paras 85-89 and 99; Parkerings-Compagniet AS v Republic of Lithuania, ICSID Case No ARB/05/8, Award of 11 September 2007, para 330; Sergei Paushok, CJSC Golden East Co & CJSC Vostokneftegaz Co v Government of Mongolia (UNCITRAL), Award on Jurisdiction and Liability of 28 April 2011, para 253.

host-State made assurances or representations that the investor took into account in making the investment."[310]

237. A reasoning based on protection of legitimate expectations in the context of the fair and equitable standard of treatment is not incompatible with one that diminishes, or excludes entirely, the culpability of the investor in the context of a *Defence of Illegality*, precisely because the investor has relied inculpably on the information provided to it by the Host State and therefore cannot be said to have committed a violation with intent.

238. The sanctioning regime for violations of competition law in the EU system provides an interesting example of this, and shows that reliance on legitimate expectations to reduce culpability is a method broadly used also in other areas of law. In a recent case,[311] the EU Commission had to decide whether the position of a national competition authority that a certain commercial practice was in line with national competition law could be invoked before the EU Commission as a defence against the application of a sanction at the EU level. Schenker & Co. and thirty other companies had formed a cartel on the Austrian market for shipping services, the Spediteur-Sammelladungs-Konferenz (SSK). The companies participating to the cartel had secured a decision from the national competition authority of Austria according to which SSK was a minor cartel within the meaning of Austrian Cartel Law and could therefore be lawfully implemented.[312] However, the legality of the cartel was subsequently challenged before the EU Commission, from the perspective of EU law. The Commission held that the Austrian Authority was not competent to pronounce itself on the question of the compatibility of a domestic cartel with EU law, but that the effects of its assessment were limited to the national law dimension of competition law. For this reason, the Commission ruled that the pronouncement of the Austrian Authority could not have generated any legitimate expectations on legality of the cartel at the

[310] Continental Casualty Co v Argentine Republic, ICSID Case No ARB/03/9, Award of 5 September 2008, para 261(i); White Industries Australia Ltd v Republic of India, Final Award of 30 November 2011, para 10.3.17.
[311] Case C-681/11 Schenker & Co. and Others [2013] ECR I-0000
[312] von Danwitz, T. Ignorantia Legis Non Excusat, *Journal of European Competition Law & Practice* 2013: 389-390.

EU level.[313] *A contrario*, when the opinion on the legality of a certain conduct is provided by the authorities that are competent to render it, legitimate expectations ingenerated by those authorities *do have an impact on the culpability of the wrongdoer, and can even exclude culpability entirely*.[314]

239. This is not only the case in the context of the issuing of administrative sanctions, but also in general criminal law. The proper criminal law framework to deal with the scenario indicated above would be that of the mistake of law on the question of the legality of the conduct. While in general the principle governing this situation is the one that *ignorantia legis non excusat*, there are exceptions to its operativity. One of these exceptions is constituted by the fact that the person who erred on the legality of a certain conduct made an *inevitable* mistake. And:

> *"Amongst the objective circumstances that become relevant in determining whether or not the mistake was unavoidable are to be mentioned for instance the misleading instructions provided by competent authorities."*[315]

240. This holds true in civil law and in common law systems alike. For instance the US Model Penal Code provides that mistake of law, or ignorance of law, constitute a full defence when the defendant:

> *"acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous."*[316]

241. On the other side of the spectrum of culpability from innocent mistake on law, as just discussed, is the situation in which the investor is aware of the illegality of its conduct, and nevertheless proceeds with full intent to commit it.

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[313] Schenker & Co. and Others, p. 40-41 "*However, a person may not plead breach of the principle of the protection of legitimate expectations unless he has been given precise assurances by the competent authority (see Case C-221/09 AJD Tuna [2011] ECR I-1655, paragraph 72, and Case C-545/11 Agrargenossenschaft Neuzelle [2013] ECR, paragraph 25). It follows that legal advice given by a lawyer cannot, in any event, form the basis of a legitimate expectation on the part of an undertaking that its conduct does not infringe Article 101 TFEU or will not give rise to the imposition of a fine. As for the national competition authorities, since they do not have the power to adopt a negative decision, that is to say, a decision concluding that there is no infringement of Article 101 TFEU (Case C-375/09 Tele2 Polska [2011] ECR I-3055, paragraphs 19 to 30), they cannot cause undertakings to entertain a legitimate expectation that their conduct does not infringe that provision*".

[314] Schenker & Co. and Others, at 41.

[315] Fiandaca, E. (2014), *op.cit.,* 404.

[316] Model Penal Code, 2.04(3)(b).

Some elements may be indicative of the investor's awareness of the *contra legem* nature of its actions. Conduct aimed at *covering up* the crime committed is illustrative of this. In *Fraport v Philippines*, the Tribunal mentioned that the secret nature of the shareholding agreements showed that the investor knew from the beginning that its investment was illegal and that the illegality had to be hidden.[317] As posited by the Arbitral Tribunal:

> *"The Tribunal's concern here is (...) with the secret shareholding agreements. In the context of the internal Fraport documents, the secret shareholder agreements show that Fraport from the outset understood, with precision, the Philippine legal prohibition but believed that if it complied with it, the perspective investment could not be profitable. So it elected to proceed with the investment by secretly violating Philippine law through the secret shareholding agreement. These agreements evidence that Fraport planned and knew that its investment was not in accordance with Philipine law".*[318]

242. In between the two extremes indicated above (inevitable mistake as to the legality of a conduct and full intent to carry out a conduct that is known to be illegal), there lie a number of situations where the violation of the law of the Host State, while not fully intentional and not completely excused, can be indicative of the degree of intensity of the investor's culpability. As noted by Mariano de Alba, there might be circumstances under which the law of the host State may not be entirely clear, or may be evolving, and mistakes may be made in good faith at the moment of the acquisition of the investment.[319] In *Kim et Al v Uzbekistan*, for instance, the Tribunal considered as follows:

> *"What does an unclear, evolving or incoherent law suggest as to the seriousness of an act of noncompliance? Although the intentional violation of an unclear law would still be a serious act, the lack of clarity to a law potentially suggests a greater likelihood of acts that are accidental or in good faith as opposed to egregious violations."*[320]

[317] Kriebaum, U. (2010), *op.cit*., 325.
[318] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award of 16 August 2007, para 355.
[319] De Alba, M. «Drawing the Line: Addressing Allegations of Unclean Hands in Investment Arbitration» *Brazilian Journal of International Law*, 2016: 322 – 337.
[320] Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Award on Jurisdiction, 8 March 2017, para 406.

243. In this line of thought, in *MTD v Chile*, for example, the Tribunal spoke of a duty for the Host State to act coherently in the implementation of its laws and regulations, and this may include maintaining a legal system that is sufficiently clear and understandable. The Tribunal explained that:

> *"[It] is the responsibility of the investor to assure itself that it is properly advised, particularly when investing abroad in an unfamiliar environment. However, in the case before us, Chile is not a passive party and the coherent action of the various officials through which Chile acts is the responsibility of Chile, not of the investor."*[321]

244. And, ultimately, in *Kim v Uzbekistan* the Tribunal found by a majority that the violations of law imputed to the investor were not to be considered as grave as the respondent had alleged, and not indicative of a high level of culpability of the claimant, because:

> *"[T]he transactions in question took place in the context of a highly uncertain legal environment, in which the applicable legal regime was unclear, difficult for any reasonable investor to ascertain, subject to change and still evolving. (...) This uncertainty made compliance with the regulatory framework much more difficult for Claimants than it would have been in a more mature, and more stable, legal environment."*[322]

245. Once again, a point has to be specified: the idea proposed here is not that a mistake of law, or ignorance of law, should necessarily exempt the investor from any *liability*: its *responsibility* in the crime may not be questioned, and the principle of *ignorantia legis non excusat* would not be called into question. However, the subjective position of the investor, including the degree of awareness

[321] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award of 25 May 2004. This case, was quoted in the memorial of the claimant in Kim et al v Uzbekistan, in the following terms: *"Anderson is premised on the existence of a good faith exception, as it suggests that an investor who performs "the kind of due diligence that reasonable investors would have undertaken" may retain protection under the BIT in spite of a potential violation of domestic law. And MTD stands for the proposition that a host State has a duty to act coherently in the implementation and application of its laws and regulations. If the State promulgates a legal regime that is confusing or internally contradictory, a good faith violation of that legal regime "is the responsibility [of the Host State], not of the investor"* Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Award on Jurisdiction, 8 March 2017, para 401.

[322] Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Award on Jurisdiction, 8 March 2017, para 429.

as to the *contra* law nature of its conduct, can still serve to *modulate the culpability* of the investor *via à vis* the Host State in the context of a *Defence of Illegality*. Indeed, as also indicated previously in the context of the assessment of the conduct of the investor under the principles of agency law, culpability and responsibility are different notions. As explained by Husak:

> *"Concluding that ignorance of law is no excuse does not begin to settle the question of how ignorance of law affects culpability for the simple reason that not all considerations that affect culpability are excuses (...) even when ignorance of law does function as a defence, it may operate as a justification rather than as an excuse."*[323]

246. In cases like the one described above, arbitral Tribunals tend to recognise the need to strike a right balance in the assessment of the investor's level of culpability. Most recently, in *Kim et Al v Uzbekistan*, the Tribunal held for example that:

> *"[F]ocusing on the seriousness of non-compliance, both in terms of the seriousness of the law and the action taken by the investor, makes the good faith of the investor something that is considered as a factor in the overall assessment of the proportionality between the violation and the sanction".*[324]

247. However, this overall assessment of the conduct of the investor, based on its culpability, has so far been carried out in a layman manner which is not based on a proper criminal law analysis, as the terminology that is employed also demonstrates. In Fraport, for instance, the Tribunal spoke of a *certain leniency* that can be shown towards the investor when the mistake about the legality of the investment is a good faith one, but it did not articulate criteria or principles on which such *leniency* should be justified.

[323] Husak, D. (2010), *op cit.,* 137. See also Segev, R. «Justification, Rationality and Mistake: Mistake of Law is no Excuse? It Might be a Justification*!*» *Law and Philosophy* 2006: 31 – 79.

[324] Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Award on Jurisdiction, 8 March 2017, para 403. "*It does not matter that the Tribunal conducted this assessment to decide if the defence of illegality should determine that the Tribunal should decline its jurisdiction. These parameters are important to establish the respective conduct of the investor and of the Host State, whatever the purpose of that assessment".*

248. The *possibility for leniency* was quoted with approval by the arbitral Tribunal in the case of *Desert Line v Yemen*. There, the arbitrators held that even if the investor had failed to comply with the formal requirement for the establishment of an investment required under Yemenite law, its investment had nevertheless received the endorsement at the highest level of the State, including by the Vice Prime Minister. Lack of intent of the violation of the formal legal provision and the minor nature of the misconduct led the Tribunal to conclude that the investment should not have been, on those grounds, denied the protection that international law would otherwise have afforded to it.

249. The discussion in the previous pages regards the case of the violation of the laws of the Host State. If the crime that is contested is not the general violation of the laws of the Host State, but it is fraud or money laundering, the nature of the crime *implies* knowledge and intent by the investor.[325] In these cases, the investor would likely retain full culpability for the crime that it has committed, and a situation of repartition of blameworthiness is difficult to imagine. Indeed, when full intent, including the one to deceive, cannot be proven with regard to an alleged crime of fraud, the crime is not considered as having been committed in the first place. This situation also presented itself in the case of *Kim et Al v Uzbekistan*, also discussed above. There the Arbitral Tribunal first acknowledged that, also under Uzbek law, the crime of fraud requires the *mens rea* of full intent. It held:

> *"a specified intent by the person accused is required. In this instance, the accused must act "in order to induce third parties to buy/sell" and "with the intent to mislead other market participants[326]"*

250. It then went on to establish that such intent was not present in the case before it, and excluded the crime of fraud from its assessment.[327]

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[325] Heller, K. et Dubber M. (2010) *op.cit.*

[326] Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Award on Jurisdiction, 8 March 2017, para 427.

[327] Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Award on Jurisdiction, 8 March 2017, para 439: "*The deliberate act of entering a false price on the exchange is not equivalent to the intent to defraud. On the basis of the record before it, there is not a sufficient foundation on which the Tribunal majority can find that Claimants had an intention to mislead other market participants or to manipulate the market."*

3.2. Gravity of the Violation

251. When the question that appears before the Tribunal is violation of the laws of the Host State, an important element to consider is the *gravity* of the investor's conduct. The gravity of the conduct is in fact another one of the elements that are routinely taken into account in deciding the type and the *quantum* of the penalty that a criminal court applies to an offender. The gravity of the crime can in turn be addressed from two angles: a) the importance of the provision whose breach is invoked; b) the *intensity of the violation*.

252. There seems to be support in this methodology also in investment case law. In a very recent case whose judgment was delivered on March 8th, 2017, the arbitral Tribunal explained how to assess the gravity of violations of the laws of the Host State in the following terms:[328]

> *"The Tribunal believes that the gravity of the law itself is a central part of the examination but not the sole focal point. It is not only the law, but the act of noncompliance (or in some wordings, the violation) that is key. The seriousness of the act is a combination of both the importance of the requirements in the law and the flagrancy of the investor's noncompliance. The text or standing of the law – although central – does not in and of itself determine whether the legality requirement is triggered. Rather, the law must be considered in concert with the particulars of the investor's violation. An investor may violate a law of some import egregiously or it may violate a law of fundamental importance in only a trivial or accidental way. Seriousness to the Host State is to be determined by the overall outcome, which will depend on the seriousness of the law viewed in concert with the seriousness of the violation"*[329]

253. When the conduct in question is fraud, the first question, namely the importance of the provision which is violated, will always result in a positive assessment: fraud, as typical criminal conduct, always correspond to a *serious* breach of the laws of the Host State.

[328] The Tribunal did so, however, not with a view to carrying out an analysis on the merits, but rather to decide if a violation of the law of the Host State should dermine a declaratory of lack of jurisdiction by the arbitral Tribunal.
[329] Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Award on Jurisdiction, 8 March 2017, para 398.

254. In contrast, with respect to violations of other laws of the Host State, Tribunals have confirmed that minor violations of law are not to be accounted for as a ground for potentially depriving an investor of protection. In *Tokyo Tokeles v Ukraine*, for instance, the respondent State invoked a minor illegality committed by the investor in the registration process of one of its subsidiaries. The illegality consisted in the fact that the subsidiary had been registered under its full name, whereas that did not correspond to a legal typology under Ukrainian law. The Arbitral Tribunal explained that:

> *"to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the treaty. In our view, the Respondent's registration of each of the Claimant's investments indicates that the investment in question was made in accordance with the laws and regulations of Ukraine".*[330]

255. With regard to violations of the laws of the Host State in particular, it must be recalled that this dissertation is concerned with violation of laws that are assisted by criminal sanctions. As discussed earlier, it can be assumed that if the violation of a norm triggers the reaction of the system of criminal justice, then the norm must play an important role in the juridical system of the Host State. In principle, therefore, violations of a law assisted by a criminal sanction should always be considered as serious.[331]

256. However, it appears that the importance of the norm that is violated is one of the elements that Tribunals always take into account in their analysis; so that even in the context of criminal laws, including those prohibiting fraud and corruption, a grading based on the importance of the criminal provision that is

[330] Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para 86.
[331] In Vladislav Kim and others v. Republic of Uzbekistan, the Tribunal articulated in the following terms the criteria to verify the importance of a provision whose violation is alleged: "*What does the level of sanction provided in the law suggest as to the significance of the obligation to the State? A low level fine, for example, suggests an obligation that is less significant than obligations that involve forfeiture of assets or that are within the criminal code and provide for possible imprisonment. Similarly, a law which provides that a transaction is void (ab initio) suggests that the obligation is significant. A law that provides that the transaction is voidable, suggests – but does not necessarily indicate – less significance than a provision that declares the transaction void. Likewise, a law that allows for the State to waive the legal consequences of the wrong-doing suggests that the obligation – at least in some cases – is less significant. Finally, the possibility that the law provides that the illegal act may be cured through specified acts by the noncompliant party suggests an obligation of lesser significance.*" (para 406).

violated is possible and indeed necessary. In the *LESI and Astaldi v Algeria* case, for instance, the arbitral Tribunal decided that *only gross violations of the laws of the Host State* could trigger a *Defence of Illegality*. Approving LESI, the Tribunal in *Rumeli v Kazakhstan* similarly explained that:

> *"as determined by the Arbitral Tribunal in the Lesi case, such a provision (that investments must be made in accordance with the Law of the Host State) will exclude the protection of the investment only if they have been made in violation of fundamental legal principles of the Host Country."*[332]

257. In *Phoenix v Czech Republic*, similarly, albeit in an *obiter dictum*, the Tribunal pointed to certain provisions of the domestic forum whose violation would constitute a particularly serious breach, and would certainly exclude an investment from the protection that it would otherwise enjoy. To put it in the words of the Tribunal:

> *"nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs."*[333]

258. Most recently, other Tribunals have abandoned the categories of the higher or lesser level of the importance of the provision in absolute terms, to switch to a comparative approach based on proportionality. In *Kim et Al v Uzbekistan*, the Tribunal conceptualised this methodology by explaining that the successful invocation of a *Defence of Illegality* is a proportional response only when the violation compromises a critical interest of the State.[334]

259. The idea that norms whose breach is assisted by a criminal sanction are normally central provisions in the system of the forum State, therefore, does not mean that they should all be placed on the same footing as regards the gravity of

[332] Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award of 29 July 2008, para 168.
[333] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award of 15 April 2009, para 78.
[334] Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Award on Jurisdiction, 8 March 2017, para 398.

their violation. The model developed in this thesis at Chapters 8 and 9, for instance, distinguishes between more serious violations of criminal laws, that also correspond to a violation of *Transnational Public Policy* (such as corruption), and less serious violations, that do not result in this outcome (fraud). Also, within the breaches of *Transnational Public Policy*, as is seen further on, it is possible to distinguish levels of gravity. For instance, the violation of public policy is more serious in the event of breaches of the laws of the Host State that result in gross violations of human rights and *jus cogens*,[335] than it is in the case of corruption.

260. Speaking of the most serious violations of criminal law, while corruption and fraud are ordinarily invoked to substantiate a *Defence of Illegality*, violation by the investor of human rights provisions or of *jus cogens* norms has never been invoked as a line of defence by a Host State.[336] In the context of this examination of the kind of conduct that can appear before a Tribunal, it must be noted that if these grave violations were to be invoked, they would have to be strictly connected with the making of the investment.[337] According to Professor Dupuy, speaking with regard to the case of human rights:

> *"A party to a dispute invoking a human rights argument – be it the state or the investor, must demonstrate substantively that the human rights at issue effectively impact on the implementation of the investment at stake. This constraint is explained by the fact that the arbitrator's jurisdiction is specifically limited to the*

[335] On the relationship between human rights and jus cogens see Bianchi, A. «Human Rights and the Magic of Jus Cogens.» *European Journal of International Law*, 2008: 491-508. According to the author, "*[i]f a detailed inventory of the contents of [jus cogens] is difficult to draw, it is nevertheless hard to deny that human rights are contained within it. There is an almost intrinsic relationship between peremptory norms and human rights. Most of the case law in which the concept of jus cogens has been invoked is taken up with human rights."* (at 491).

[336] Dumberry, P. «When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration» *Journal of World Investment and Trade*, 2012: 349-372.

[337] This is confirmed, for instance, by Dumberry et Al, "*In our view, the situation is different when human rights violations are not directly related to the investor's investment examined by the tribunal. This would be the case, for instance, if violations were committed in the context of another (previous or concomitant) unrelated investment project in the country. In our view, a tribunal would lack jurisdiction over such a Defence since the investor's consent to arbitration (when it files an arbitration request) is limited to the specific investment to which the claim is related; it is not a "general" consent for anything involving the investor in the country*. Dumberry, P. et Al. «The Doctrine of "Clean Hands" and the Inadmissibility of Claims by Investors Breaching International Human Rights Law» *Transnational Dispute Management*, 2013: 1 – 15, 4. On the general relationship between international investment arbitration and human rights there is copious scholarship. See for instance Jacobs, M. «International Investment Agreements and Human Rights.» *INEF Research Paper Series*, 2010; Fry, J. «International Human Rights in Investment Arbitration: Evidence of International Law's Unity.» *Duke Journal of Comparative and International Law*, 2008: 77 – 150; Peterson, L. E et Gray, K. «International Human Rights in Bilateral Investment Treaties and Investment Treaty Arbitration.» Working Paper for the Swiss Ministry of Foreing Affairs, 2003.

settlement of disputes arising out of a given international investment."[338]

261. And again, even if this has not yet happened in the case law of international arbitral tribunals, one can imagine typical scenarios in which a violation of jus cogens or of human rights norm is connected to an investment. For instance, *investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.*[339]

262. Torture, genocide, slavery and trafficking of human organs are examples of contravention of the most fundamental laws of the Host State, and in breach of the fundamental values of the international community. Other situations would be characterised by a similar degree of gravity. As a way of exemplification, the case of the investor that has made an investment in which it employs child labour is indicative; or the one in which other fundamental human rights of the workers are breached. These include the prohibitions on forced, compulsory or indentured labour. The prohibition against forced and bonded labour, exploitative child labour and other slave-like practices as well as the freedom to association are also considered part of international human rights law.[340]

263. As it is apparent from the discussion above and especially from the cases that have been quoted, the importance of the laws whose violation is alleged is a question ordinarily considered by Tribunals in the assessment of investor's misconduct. However, this analysis is carried out only from a jurisdictional/admissibility perspective. In other words, to decide whether the Tribunal should decline jurisdiction (or declare the claim inadmissible) when faced with illegality by the investor. The question therefore becomes one of what kind of illegality, and what kinds of laws, if violated, authorise a Tribunal to dismiss the

[338] Dupuy, P M. «Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law» Dupuy, P. M. et Al. *Human Rights in International Investment Law and Arbitration*. Oxford: Oxford University Press, 2009: 45 – 62, 61.
[339] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award of 15 April 2009, para. 78.
[340] Reisman, M. «The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of its Threshold.» *ICSID Review*, 2000: 362 – 381, 377; Cleveland, S. «Human Rights Sanctions and the WTO» Francioni, F. *Human Rights and International Trade.* Oxford: Hart Publishing, 2001, 199 – 261.

investor's case at the preliminary level, and what other laws do not determine such drastic consequences.

264. The thesis advocated here is that distinguishing between the gravity of the violated provision is not a sound course of action for a jurisdictional/admissibility approach to the *Defence of Illegality*, but it is certainly viable for assessing at the merits the level of *culpability* of the investor with respect to the misconduct attributed to it. As seen, this approach is routinely employed in criminal law, and is premised on criminal law categories. In this sense, the parameter of the importance of the provision that is violated will be used at the end of this dissertation in Chapters 8 and 9 to explain how this may have an impact on the consequences that a Tribunal can draw *at the merits stage of the proceedings* in which investor's illegality is invoked (as opposed as the jurisdictional/admissibility phase). There, the Tribunal has a certain degree of flexibility in modulating its response to investor's misconduct and it is in that context that considerations of the gravity of the violation would be duly taken into account.

265. As regards the *intensity* of the violation, which is the second element to consider when assessing the *gravity* of the misconduct, criminal law categories can again come to the aid of arbitral Tribunals. While criminal law sentencing guidelines vary according to jurisdictions and to the typology of the crime, certain patterns are recurring. For instance, the number of the people involved; the amount of damage that is caused by the crime, the duration of the crime, the fact that the author tried to conceal its effects, are all elements that can be taken into account. For instance, if one imagines a situation in which the investor secured the investment by violating certain environmental law provisions of the Host State, the parameters indicated above constitute a starting point for the arbitral Tribunal to take carry out its analysis.[341]How many people from the investor's side have been involved in the crime? How complex has the criminal enterprise been? How many instances of breach of the norm have occurred? Also, has the crime continued over a long period of time? Has there been damage, and, if so, what has been the

[341] See for example Article 133 of the Italian Criminal Code on sentencing, that lists precisely these elements.

amount? These are all legitimate questions that a Tribunal could ask itself, at the appropriate phase of the proceedings: once again, the merits stage.

3.3. Condonation of the Crime

266. The previous pages have anticipated that when crimes imputed to the investor are unilateral in nature, blameworthiness of the Host State is difficult to envisage except for some exceptional cases. With respect to the case of violation of the laws of the Host State, a low level of culpability on the part of the investor, and a high level of culpability with regard to the Host State, essentially corresponds to the case of the unavoidable mistake of law, and is limited to the situation in which the Host State has wrongly induced the investor in believing that the investment was legal. Potentially, a situation in which the law of the Host State is absolutely obscure as to legality requirements of an investment would also fall into this category.

267. There are other circumstances that, from a criminal law angle of analysis, may also alter this balance of blameworthiness. These would be in particular circumstance that present themselves *not necessarily* during the phase of the commission of the crime, or before the commission of the crime, but that *may* also occur *after* a crime has been committed by the investor.

268. These circumstances not relating to the phase of commission of the crime, but to an *ex-post-fact* conduct, are nevertheless relevant for the overall assessment of the respective position of the parties and, as such, are among those that a Tribunal should take into account for the apportionment of the culpability between the Host State and the investor. Let us take the case when the Host State may not have been aware of the illegality of the investment at the time this was made, but has discovered it at a later stage and condoned the illegality. In *Kardassopulos v Georgia*, for example, the arbitral Tribunal considered the question of an investment made in violation of the laws of Georgia, which Georgia had tolerated for many years. The Tribunal excluded that Georgia could in any way rely on the investment's illegality, after having become aware of it, and after

having condoned it.[342] Similarly, in *SwemBalt v Latvia*, Latvian police officers removed a ship that was allegedly moored illegally at a Latvian port, and sold that at an auction, without paying the compensation that was due to the investor. When the investor challenged the legality of the actions by the Government before an arbitral Tribunal, the Respondent sought to justify its actions in consideration of the illegality of the mooring. The Tribunal rejected the Host State's argument and found that having waited for four months before taking action against the illegality, the Host State was deemed to have condoned it.[343]

269. As is the case for corruption, also in the event of violations of the laws of the Host State failure to investigate or prosecute may therefore have an impact on the repartition of the culpability between the investor and the Host State. Either because failure to prosecute may indicate condonation; or because failure to prosecute may indicate that the Host State attaches little importance to the provision violated by the investor, with the consequence of diminishing the gravity of the investor's offence. The Tribunal in *Kim v Uzbekistan* put the issue in dubitative form, but indicated that this is actually an element to consider in the assessment of the conduct of the parties. To use the words of the arbitrators:

> *"What does the specific decision of the Host State not to investigate or prosecute the particular alleged act of non compliance suggest as to the significance to the state of the obligation in the specific context?."*[344]

270. A passage from the decision of the Tribunal in Fraport provides a possible answer:

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[342] "*The Tribunal further observes that in the years following the execution of the JVA and the Concession by SakNavtobi and Transneft, respectively, Georgia never protested nor claimed that these agreements were illegal under Georgian law. In light of all of the above circumstances, the Tribunal is of the view that Respondent created a legitimate expectation for Claimant that his investment was, indeed, made in accordance with Georgian law and, in the event of breach, would be entitled to treaty protection*". Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18 – Decision on Jurisdiction, 6 July 2007, para 192.

[343] Swembalt AB, Sweden v. The Republic of Latvia, UNCITRAL, Decision of 23 October 200, para 34.

Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction of 8 March 2017, para 406.

> *"As a matter of law [...] the cumulative actions of a Host government may constitute an informal acceptance of a foreign investment that otherwise violates its law."*[345]

271. In addition to ex-*post-facto* condonation, acquiescence to a violation can also occur at the phase of the making of the investment. As an example, one could think of a situation in which the investor secures an investment by violating the laws of the Host State that require it to respect certain environmental law provisions, and that it does so with the knowledge of the Host State. The violation of the laws of the Host State, from the material perspective, is entirely imputable to the investor. Nor can it be said that without the cooperation of the Host State such laws could not have been violated. However, in a scenario like this, the violation has happened with the knowledge, and indeed the consent of the Host State.

4. Corruption, Fraud, Violation of the Laws of the Host State and Transnational Public Policy

272. The bilateral nature of the crime of bribery and the unilateral nature of fraud and of violations of the Host State is not the only difference between these two categories of crimes. Their status under principles of *Transnational Public Policy* (understood, here as "*Truly International Public Policy*"[346]) is another relevant trait that matters for their classification, and that has a direct bearing on the research question of how an investment Tribunal should deal with criminal

[345] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award of 16 August 2007, para 347.

[346] See Lalive, P. «Transnational (or Truly International) Public Policy and International Arbitration.» *ICCA Congress Series*, 1986: 258 – 318. On these definitions see also . Lalive, P. «Ordre Public Transnational (ou Réellement International) et Arbitrage International.» *Revue de L'Arbitrage,* 1986 : 329 – 373. Kahn, P. «A Propos de l'Ordre Public Transnational: Quelques Observations.» *Melange Fritz Sturm*, 1999: 1539 - 1555. In international commercial and investment arbitration, three different notions of public policy may become relevant, which are cursorily summarised as follows: domestic public policy; international public policy; transnational public policy. Domestic public policy comprises those principles that are relevant from the perspective of the internal relations of the forum State and are of particular importance for that State. International public policy is that part of the public policy of a State that "if violated, would prevent a party from invoking a foreign law or a foreign judgement or a foreign award". It emerges from this definition that international public policy, despite its name, has a purely domestic connotation: it is that part of domestic public policy that becomes relevant from the international perspective. Transnational public policy, on the other hand, has a purely international dimension and is sometimes described as "truly international public policy". It can be defined as the set of principles and rules that are considered as fundamental by the international community as such and that therefore must be guaranteed at the international level even beyond the will of the Parties.

conduct by the investor, and hence on the model developed at Chapters 8 and 9 of this dissertation. As noted in this regard by Professor Zachary Douglas:

> *"A plea of illegality to the effect that the investment has been procured by unlawful means raises two possible scenarios that must be distinguished. The first scenario is that the plea gives rise to one of the limited grounds of international public policy. The second is that the plea does not give rise to a ground of international public policy but instead rests upon a violation of the host State's laws".*[347]

273. While these differences will be discussed further below in the course of this dissertation, it is necessary for the classificatory purposes of this phase, to define briefly the notion of *Transnational Public Policy* in international arbitration, and how it relates to the crimes of corruption and fraud and violation of the laws of the Host State.

274. There are several definitions of *Transnational Public Policy*, offered by tribunals and commentators alike.[348] In general terms, this can be described as:

> *"[A] reflection of global consensus on fundamental economic, legal, moral, political, and social values. It is a collection of universal standards, shared norms, and general principles that are widely accepted by the international community."*[349]

275. Investment Tribunals, including those who have addressed illegality as a defence, have also come up with definitions of *Transnational Public Policy* that are in line with the notion identified above. In *World Duty Free*, for example, the arbitral Tribunal defined *Transnational Public Policy* as *an international consensus as to universal standards and accepted norms of conduct that must be*

[347] Douglas, Z. (2014) *op.cit.*,186.

[348] Forteau, M. «L'Ordre Public « Transnational ou Réellement International: l'Ordre Public International face à l'Enchevêtrement Croissant du Droit International Privé et du Droit International Public» *Journal Droit International*, 2011 : 3 – 49. Trari Tani, M. «L'Ordre Public Transnational devant l'Arbitre International» *Arab Law Quarterly*, 2011: 89-102. Jacquet J. M. et Al. *Droit du Commerce International*. Paris: Dalloz, 2014. Pryles, M. «Reflections on Transantional Public Policy.» *Journal of International Arbitration*, 2007: 1-8. Kessedjian. «Transnational Public Policy.» *ICCA Congress Series*, 2006.

[349] Sheppard, A. «Public Policy and the Enforcement of Arbitral Awards: Should there be a Global Standard.» *Transnational Dispute Management,* 2004: 1 - 48. Lalive, P. (1986) *op.cit*.

applied in all fora.[350] In a similar fashion, the Tribunal in *Inceysa* characterised *Transnational Public Policy* as a *series of fundamental principles that constitute the very essence of the State*, and that have the *essential function (...) to preserve the values of the international legal system against actions that are contrary to it*.[351]

276. It emerges from these definitions that *Transnational Public Policy* is an evolving notion, at times considered vague,[352] that changes in tandem with the changes of the values of society, including the international society. In general, a rule crystallises as a norm of *Transnational Public Policy* when it is possible to assess the existence of a minimum degree of convergence on that rule at the level of case law, both domestically and internationally, scholarly opinions and of course national legislation and international conventions. This methodology of identification of the rules of *Transnational Public Policy* was quoted with approval by the Tribunal in *World Duty Free*. According to it:

> *"Tribunals must be very cautious (...) and must carefully check the objective existence of a particular transnational public policy rule in identifying it through international conventions, comparative law and arbitral awards."*[353]

277. While the identification of what constitutes a rule of *Transnational Public Policy* can at times be challenging, there is essentially unanimous agreement that certain activities, being contrary to the *bonos mores* of the vast majority of countries, certainly are prohibited under a rule of *Transnational Public Policy*. For exemplification purposes, Professor Pierre Mayer mentions the norms that prohibit slavery, smuggling, drug trafficking, piracy and terrorism as the archetypical activities that are prohibited under *Transnational Public Policy*.[354] Before addressing the question as to whether corruption, fraud, and violation of the laws of the Host State are actions that are prohibited by a norm of *Transnational*

[350] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006, para 139
[351] Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award of 2 August 2006, para 254.
[352] Mayer, P. «Effect of International Public Policy in International Arbitration.» *Pervasive Problems in International Arbitration*, Mistelis, L. et Lew, J. Kluwer International, 2006: 61 – 80, 63.
[353] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006, para 141.
[354] Mayer, P. (2006) *op.cit*.

Public Policy, it is necessary to address what the role of *Transnational Public Policy* is in international arbitration. In this regard, it may be useful to note at the outset that its role in international commercial arbitration is not the same as the role played by it in international investment arbitration.

278. In the context of international commercial arbitration, *Transnational Public Policy* becomes relevant primarily from the perspective of the enforcement of arbitral awards that are rendered by Tribunals. Indeed, the New York Convention sets out a general presumption in favour of the finality and enforceability of an award rendered by an international Tribunal. However, contrariety of an award to domestic public policy (and, all the more so, *Transnational Public Policy*), is one of the enumerated grounds under which enforcement of an arbitral award may be refused. According to Article V(2)(b):

> *"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that (...) (b) The recognition or enforcement of the award would be contrary to the public policy of that country."*[355]

279. In international commercial arbitration, therefore, courts can review the compatibility of the award with *Transnational Public Policy* and, in case the award is not compatible with the public policy of the country where enforcement is sought, deny the enforcement of the award. For example, in the notorious case *Soleimany v Soleimany*, the English Court of Appeal refused the enforcement of an arbitral award that upheld a contract aimed at smuggling carpets out of Iran, because of the contrariety of such a contract to the UK rules of public policy.[356] The ability to refuse the enforcement of awards based on contrariety to *Transnational Public Policy* or, all the more so, *Transnational Public Policy*, determines that in commercial arbitration there exists a double layer of protection against norms that infringe the international legal order, including those of a criminal nature. The first layer is constituted by the actions that the arbitrators may

[355] Article V(2)(b), New York Convention. By the same token, UNCITRAL Model Law on International Commercial Arbitration empowers courts to set aside decisions that violate domestic public policy. See Articles 34(2)(b)(ii) & 36(1)(b)(ii) of the UNCITRAL Model Law

[356] Soleymany v Soleymany, [1998] 3 WLR 811.

take against the criminal conduct directly at the international level, in the context of the arbitral proceedings; the second is at the level of domestic courts, in the terms described above. This means, among other things, that international commercial arbitrators will be very aware of considerations of *Transnational Public Policy* while passing their award, because of their obligation to render, in principle, an enforceable award.[357]

280. This double layer of protection, on the other hand, does not operate in international investment arbitration, at least, as it is the case in the vast majority of situations, in investment arbitration run under the auspices of the ICSID Convention. In listing the grounds on which enforcement of an award may be refused, Articles 53 and 54 of the ICSID Convention does not include public policy.

281. However, *Transnational Public Policy* is still relevant from the perspective of the law that is applicable by the arbitral Tribunal. According to Article 42(1) of the ICSID Convention, for instance, Tribunals are required to apply to investment cases the *relevant rules of international law*. And, even though the rules of international law play a somewhat subsidiary role *vis à vis* the law of the Host State, it is still true that the laws of the Host State normally incorporate international law and that, in any event, those laws must conform with international law and international legal standards.[358] It is within this framework that international arbitral tribunals are mandated to apply *Transnational Public Policy* as part of the applicable law.

282. Either because, according to some scholars, like Professor Mayer,[359] *Transnational Public Policy* is a specific component of international law; (in this respect, the very definition of *Transnational Public Policy*, and the widespread degree of convergence of rules on which it is based, both at the domestic and international level, would mean that *Transnational Public Policy* can crystallise

[357] Gaillard, E. «Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules.» *ICSID Review*, 1995: 208 - 231.
[358] Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Ad hoc Committee Decision on the Application for Annulment, 16 May 1986, para 21.
[359] Mayer, P. (2006) *op.cit*.

into customary international law. Some of the examples indicated above, like the prohibition against piracy, have this status. This makes transnational public policy *a specialised part of public international law).*[360]

283. Or because, being part of the vast majority of the domestic laws of countries, rules of *Transnational Public Policy* end up being applied in investment arbitration under the rubric of laws of the Host State.

284. The lack of a double layer of protection, as is the case in international commercial arbitration, and the fact that in investment arbitration *Transnational Public Policy* is only relevant as a matter of applicable law, raises the question as to whether the arbitrators in an investment Tribunal need to give to public policy concerns any particular relevance[361] and address them from any different perspective than is the case with respect to international commercial arbitration. In particular, as noted by Cremades:

> *"[I]n investment arbitrations conducted under the Washington Convention there is no means of reviewing arbitral awards on grounds of public policy as there is in international commercial arbitration. Accordingly, public policy questions must be examined by the arbitral tribunal (when dealing with either jurisdiction or the merits), or they will not be examined at all."*[362]

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285. After this brief introduction about *Transnational Public Policy* in international commercial arbitration and international investment arbitration, the focus can shift on establishing whether there exist a rule of *Transnational Public Policy* that prohibits bribery, fraud and other violations of the laws of the Host States in investments. By way of anticipation, it can be mentioned already at this stage that while there is no doubt that such a rule against bribery exists, this is not

[360] Hunter, M. and Silva E. «Transnational Public Policy and its application, in Investment Arbitrations.» *Journal of World Investment & Trade*, 2003: 378 – 412.
[361] Raouf, M. A. «How Should Arbitrators Tackle Corruption Issues?» *Icsid Review*: 2009, 116 – 136, 129.
[362] Cremades, B. and Cairns, D. «Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud» Karsten, A. et Al, *Arbitration - Money Laundering, Corruption and Fraud, Dossier of the ICC Institute of World Business Law*. Paris: ICC Publishing, 2003: 65 – 77, 68.

so clear with respect to fraud. The position adopted in this dissertation is that a transnational public policy rule against fraud is, at best, *in the process of forming, but it is not yet formed*. It is appropriate to address bribery briefly first, as the prohibition against them under *Transnational Public Policy* is, as mentioned, uncontested.[363]

286. There is in fact a convergence of national laws, international criminal conventions, arbitral decisions and scholarly articles that bribery, in its manifestation as the use of public resources for a private gain, constitutes an affront to morality that displays its effects on the economy, society and also democratic dimension of the countries that are involved. This is because, as lamented by Professor Edmundo Bruti Liberati:

> *"[C]orruption is a serious criminal offence, which threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society."*[364]

287. While it is beyond the scope of this dissertation to survey in depth the convergence of scholarly positions, national and international legislation and judicial decisions that confirm the contrariety of bribery to *Transnational Public Policy*, it seems appropriate to at least quote the positions of those who have engaged in an accurate analysis of the subject, and have concluded that:

> *"[I]nternational interests and the general interest in a normal functioning of international trade appear to coincide and to justify the conclusion that there does exist a principle of truly*

[363] See for instance, Miles, C.: "*Notwithstanding this uncertainty, the prohibition on corruption has become central to international public policy and is indeed one of the few areas in which consensus can be found"*. Miles, C. «Corruption, Jurisdiction and Admissibility in International Investment Claims.» *Journal of International Dispute Settlement,* 2012: 329 – 369, 333.

[364] Bruti Liberati, E. «Inquires, Prosecutions and Penalties in Corruption Cases.» *5th European Conference of Specialised Services in the Fight Against Corruption*. Istanbul, 2000. See also Kofi Annan. In his foreword to the 2003 United Nations (UN) Convention against Corruption, he described corruption as "*an insidious plague that (…)undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish*".

international or Transnational Public Policy which sanctions corruption and bribery in contracts."[365]

288. Already in 2003, Professor Mark Pieth, the then chairman of the OECD Working Group on Bribery, recalled that even though corruption is still widespread in many regions of the world, an internationally agreed public order banning bribery is emerging. Fifteen years on, the condemnation of bribery has permeated not only legal instruments, but has met the support of the public at large and, as Professor Vinke has noted, it can be firmly stated that anti-corruption is here to stay and now belongs to the moral, economic and political principles common to all nations and to be respected in all circumstances.[366]

289. The same degree of convergence does not appear to exist with regard to norms that prohibit fraud in international business relations.[367] A brief analysis of national legislation, international conventions, judicial decisions and scholarly articles confirms this. Starting from domestic legislations, it appears that a discussion of the relationship between *Transnational Public Policy* and fraud is most often to be found in the context of domestic arbitral legislation. For example, the Australian International Arbitration Act of 1974 states that an award is in conflict with the public policy of Australia if it was induced or affected by fraud.[368]

290. The French Code of Civil Procedure, at Art. 1502(5), in authorising the refusal to recognize an arbitral award if it is contrary to *Transnational Public Policy*, includes the case of fraud. By the same token, the Indian Arbitration and

[365] Lalive, P. (1986), *op.cit*, 275-276. See also, LLamzon, A. and Sinclair, A. «Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct in Legitimacy: Myths, Realities, Challenges.» ICCA Congress Series 451 – 530, 519 - 520. "*Corruption of state officials is generally considered as incompatible with fundamental moral and social values and thus constitutes both a clear violation of 'international public policy' or 'transnational public policy' and also of the national public policy of most states. This has been recognized by a large number of judicial decisions and by international arbitrators alike in commercial arbitrations, applying numerous different national laws.*"

[366] Vinke, F. «Recent Anti-Corruption Initiatives and their Impact on Arbitration», *Special Supplement 2013: Tackling Corruption in Arbitration*, Paris: ICC Publishing, 2013: 5 – 14.

[367] Despite this, respondents in the context of illegality defences have attempted to portray fraud as prohibited by a principle of transnational public policy. For instance, in its memorial on jurisdiction and admissibility in Kim et Al v Uzbekistan, the Host State argued as follows: *"[i]n addition to violating numerous provisions of Uzbek law, Claimants' fraud on the market violated transnational public policy" as "the securities laws and regulations of other countries are for the most part universal in requiring truthful and accurate disclosures and prohibiting concealment, fraud of manipulation".*

[368] Australian International Arbitration Act of 1974, Art 7(a).

Conciliation of Act 1996, at paragraphs 34(2)(b)(ii), 48(2)(b) explains that *for the avoidance of any doubt, an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption*.[369] Similarly to India, the Act of 1996 Art. 36(3) of New Zealand states that an award is in conflict with the public policy of New Zealand if it was *induced or affected by fraud*;[370] Lastly, one can mention that the United Kingdom Arbitration Act of 1996, at paragraph, 68(2)(g), proves the ability to challenge an award *obtained by fraud or other conduct contrary to public policy*.[371]

291. In line with this, some commentators have concluded that "based on widespread conventions and extensive convergence of national laws (...) it is clear that there exist a strong and uncontested *Transnational Public Policy* against (...) fraud".[372] On the same line, investment arbitral Tribunals have at times being quick in recognising that norms that prohibit fraud have the status of norms of transnational public policy. The case of Plama v Bulgaria is instructive. In Plama, as it will be remembered, the Tribunal was concerned with the fraudulent misrepresentation of certain business information by the investor to the Host State, that were central to the securing of the investment.[373] The Tribunal decided that it would amount to a violation of Transnational Public Policy to give effect to an agreement procured by fraud and that, therefore, the claimant did not have any right to the international protection of its investment.[374]

292. However, it is subject of considerable debate whether positions that ascribe fraud to the category of violations of *Transnational Public Policy* should

[369] India Arbitration and Conciliation Act 1996, paras 34(2)(b)(ii) and 48(2)(b).
[370] New Zealand Arbitration Act, paragraph 36(3).
[371] UK Arbitration Act 68, paragraph (2)(g).
[372] Lamm, C., Pham, H. T. et Al. «Fraud and Corruption in International Arbitration.» Arias, A. et Fernández-Ballesteros, D. *Liber Amicorum Bernando Cremades*, 2010: 719 – 740, 719.
[373] As noted by the Tribunal: "*The investment in Nova Plama was, therefore, the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorize the transfer of shares to an entity that did not have the financial and managerial capacities required to resume operation of the Refinery" and "Bulgaria would not have given its consent to the transfer of Nova Plama's shares to [the claimant] had it known it was simply a corporate cover for a private individual with limited financial resources"*. Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award of 27 August 2008, para 135.
[374] "[*T]he investment was obtained by deceitful conduct in violation of Bulgarian law. The Tribunal is of the view that granting the ECT's protections to Claimant's investment would be contrary to the principle of nemo auditur propriam turpitedinem allegans invoked above. It would be contrary to the basic notion of international public policy – that an contract obtained by wrongful means (...) should not be enforced by a tribunal"*. Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award of 27 August 2008, para 143.

be endorsed unreservedly. While the provisions of law indicated earlier demonstrate that fraud is contrary to the public policy of several countries, other pieces of legislation cast doubt as to whether fraud is a behaviour that should be addressed under the rubric of public policy. For instance, the Belgian Judicial Code provides that an arbitral award can be set aside if it was obtained by fraud *or* if it is contrary to public policy.[375] The provision, on its face, seems to indicate that fraud is not one of those conducts that fall squarely into the category of behaviour banned under public policy.

293. If one moves the focus of the attention to the international conventions, the sheer number of instruments that have been adopted to criminalise bribery demonstrate the higher level of condemnation that this conduct has attracted, if compared to fraud. In addition to this, it is difficult to identify international instruments that criminalise fraud in a direct manner – most often, fraud is sanctioned indirectly, in the context of provisions that are aimed at deterring corruptive conduct. As seen previously, for example, the OECD Convention against bribery contains norms that require keeping *complete and accurate financial records to avoid off the book or secret accounts or transactions, non existent or deceptive descriptions of expenditures, and the use of false documentation.*[376] Whereas the conduct describes typically fraudulent behaviours, these are addressed in the context of the wider criminalisation of corruption in international business transactions.[377]

294. This state of affairs can be explained in consideration of the fact that *Transnational Public Policy* is a notion that has to be interpreted in a strict

[375] Belgian Judicial Code, Art. 1704(2)(a) & (3) (a)-(c).
[376] Lamm, C. (2010), *op. cit*, 717.
[377] Cremades, B. and Cairns, D. «Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud.» Arbitration - Money Laundering, Corruption and Fraud, Dossier of the ICC Institute of World Business Law, Karsten, A. and Berkeley, K. Paris: ICC Publishing, 2003, 65 – 77, 68 "*There is no doubt today that corruption and money laundering are not to be tolerated or condoned in international commerce or that the suppression of corruption and money laundering is an established part of international public policy to which international arbitrators must have regard. The place of fraud in international public policy is complicated by difficulties in definition, but certainly some manifestations of fraud, particularly those that might conceal illegal activities such as corruption and money laundering, are without doubt pr[o]scribed by international public policy."*

manner,[378] also considering the rather blunt effects that a violation of *Transnational Public Policy* may entail, and that will be discussed further on.[379]

295. The tendency to include fraud so easily into the realm of violations that constitute a breach of *Transnational Public Policy* may therefore derive from a certain tendency to expand the operative reach and scope of the notion. The case of *Inceysa v El Salvador*, that has been referred to above, is indicative of this tendency to push the definition of *Transnational Public Policy* to its boundary. In that case, the Tribunal provided a definition of *Transnational Public Policy* as follows:

> *"a series of fundamental principles that constitute the very essence of the State, whose function 'is to preserve the values of the international legal system against actions contrary to it'"*[380] .

296. On its face, this definition of *Transnational Public Policy* is not inconsistent with the restrictive approach mentioned above, that curtails the notion to the most fundamental values of the international community. At the time of applying it in practice, however, the Tribunal complemented its general definition of *Transnational Public Policy* by stating that also the principle of respect of domestic law (*meaning, with this, any law*), is a principle of international public policy, and therefore it is not possible to enforce any right on the basis of a contract that somehow entails a violation of domestic law.[381]

297. As noted provocatorily by Douglas, expansive positions such as that of the Tribunal in Plama,

> *"[W]ould entail that any breach of the host State's law is a failure to respect that law and hence a violation of international public policy. Exceeding the speed limit on the way to the signing of the*

[378] See International Law Association, Interim Report on Public Policy as a Bar of Enforcement of International Awards (2000) and London Conference and International Law Association Committee on International Commercial Arbitration
[379] Lalive, P. (1986), *op.cit.* See also Douglas, Z. (2014), *op.cit.,*181. "*Tribunals must exercise care in their recognition of grounds of international public policy given the draconian consequences that follow the application of this doctrine*"
[380] Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award of 2 August 2006, para 245.
[381] Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award of 2 August 2006, para 249

contact [would constitute a breach of transnational public policy].[382]"

298. When the norm that is transgressed constitutes a gross human rights violation, or a violation of *jus cogens*, on the other hand, it is certain that the breach also engages a violation of *Transnational Public Policy*. From the formal perspective of classifications, there is some doubt as to whether the categories of *jus cogens* and *Transnational Public Policy* can be considered as synonyms. According to some scholars, this is certainly the case. For Schwazenberger, for instance:

"International jus cogens and international public policy are synonyms, conveying the idea of rules of international la which may not be changed by consent of individual subjects of international law." [383]

299. Other scholars reject this view and think that the two concepts should remain separate, yet close.[384] The main rationale behind this position is that while *jus cogens* is necessarily based on a consensualist theory whereby only consent of the States can attribute to a norm *jus cogens* status, this is not the case for *Transnational Public Policy*, in which peremptory norms operate as a matter of necessity rather than being based on State consent.[385] Ultimately, it is not important for the purposes of this dissertation to resolve the theoretical debate regarding the coincidence, or else, between *Transnational Public Policy* and *jus cogens*. It is sufficient to note here that instances of gross violation of human rights and *jus cogens are also* violation of *Transnational Public Policy*, and of the most serious kinds as well. As noted by Vadi, for instance, *the prohibition of torture, genocide and slavery relate to public order and coincide with established elements of jus cogens*.[386]

[382] Douglas, Z (2014) *op. cit*., 181.
[383] Schwazenberger, G. «International Jus Cogens?» *Texas Law Review*:1964, 455 – 480, 455.
[384] Hameed, A. «Unravelling the Mystery of Jus Cogens in International Law» *British Yearbook of International Law* 2014, 52 – 102, 67.
[385] Vadi, V. *Analogies in International Investment Arbitration*. Cambridge: Cambridge University Press, 2015: 366.
[386] Vadi, V. «Jus Cogens in International Investment Law and Arbitration.» *Netherland Yearbook of International Law and Arbitration*, 2016: 357 – 388, 367.

CHAPTER 3

THE DISTINCTION BETWEEN JURISDICTION AND ADMISSIBILITY AND ITS IMPORTANCE FOR THE RESEARCH QUESTION

1. Introduction

300. The purpose of this Chapter is to clarify the notions of jurisdiction and admissibility, and to explain why the distinction between them, and with the merits phase of the proceedings, is important for the research question. Indeed, whereas this thesis assumes that the readers will be familiar, overall, with the general functioning of the system of investment arbitration and international commercial arbitration, the clarification of certain concepts within these systems is nevertheless necessary given the focus of the research question.

2. Jurisdiction and Admissibility – Autonomy of the Two Notions

301. Arbitral Tribunals have often shunned away from tracing the *line in the sand* between the notions of jurisdiction and admissibility, trying to avoid the question, rather than addressing it. A recent arbitral decision illustrates this state of affairs with clarity. In the dispute *Kılıç v Turkmenistan*, the Tribunal considered that it was *without jurisdiction* to entertain the case because of the investor's failure to comply with a certain requirement concerning the pre arbitration phase of the dispute. This decision was based in particular on the existence of a clause in the relevant BIT that required a perspective claimant to pursue the road of domestic justice before turning to an international tribunal. The investor sought annulment of the award before the *ad hoc* annulment committee at ICSID. With respect to the decision of the arbitral Tribunal to decline its jurisdiction over the case, the investor argued in particular that failure to comply with the domestic litigation requirement could, at most, cause the *inadmissibility* of the claim. The *ad hoc* annulment committee looked into the Tribunal's reasoning and the dissenting opinion of its members. It took note of their respective strengths and the possible objections to each. In the end, it decided not to take a position on the case. The

categories of jurisdiction and admissibility, in the opinion of the Tribunal, are so *porous* that it would be a stretch to consider either solution as mistaken.[387] The Tribunal simply noted that:

> *"[F]aced with the same question, other tribunals have decided differently on questions of jurisdiction and admissibility; it is not for the committee to favour one or the other of these positions."*[388]

302. The judicial restraint in this taxonomical exercise has often been justified by the consideration that the theoretical difference between jurisdiction and admissibility is immaterial when it comes to deciding what sort of approach the arbitral Tribunal should take *vis à vis* the preliminary objections of the respondent.[389] As a matter of fact, both objections as to the jurisdiction of a Tribunal and objections as to the admissibility of a claim, if upheld, have the consequence of preventing the Tribunal form hearing the dispute on the merits.[390] They fall, in both cases, into the broad category of preliminary objections and are both *gateway issues*, in the sense that they are a door and a diaphragm to the merits of a case. By way of example, in the case of *Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic*, an arbitral Tribunal held that:

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[387] Fontanelli, F. «The Hopeless Confusion of Admissibility and Jurisdiction in Investment Arbitration.» *International Investment Law and Arbitration*, Forthcoming.

[388] Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Decision on Annulment of 14 July 2015, para 166.

[389] Heiskanen. «Me´nage a` trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration.» *ICSID Review*, 2013: 1 -16. However, in at least one case, an Arbitral Tribunal expressed that admissibility cannot be used as a ground to dismiss a claim, since no mentions of admissibility is made in the major arbitral conventions. According to the Tribunal in Methanex v United States, in particular, "*There is here no express power to dismiss a claim on the grounds of "inadmissibility", as invoked by the USA; and where the UNCITRAL Arbitration Rules are silent, it would be still more inappropriate to imply any such power from Chapter 11*. (…) *It is unnecessary to develop these materials further. This Tribunal has no express or implied power to reject claims based on inadmissibility* (…). Methanex Corporation v. United States of America, UNCITRAL, Partial Award (Preliminary Award on Jurisdiction and Admissibility) of 7 August 2002, paras 124 and 126.

[390] Kreindler, R. and Gesualdi, F. «The Civil Law Consequences of Corruption Under the Unidroit Principles of International Commercial Contracts: An Analysis in light of international arbitral practice.» *The Impact of Corruption in International Commercial Contracts*, Bonnell, C. et Al. New York: Springer, 2015: 391- 409, 397 note 97. See also the position of the ICJ in the famous Mavrommatis case, according to which: "*the Court has not to ascertain what are, in the various codes of procedure and in the various legal terminologies, the specific characteristics of ... an objection [to the effect that the Court cannot entertain the proceedings]; in particular it need not consider whether "competence" and "jurisdiction", incompétence and fins de non-recevoir should invariably and in every connection be regarded as synonymous expressions. ... [Ultimately, the Court should not just assess] whether the nature and subject of the dispute laid before the Court are such that the Court derives from them jurisdiction to entertain it, but also whether the conditions upon which the exercise of this jurisdiction is dependent are all fulfilled in the present case*". Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3 (Aug.30), at 10.

> *"[T]here is no need to go into the possible - and somewhat controversial - distinction between jurisdiction and admissibility. Whatever the labelling, the parties have presented their case on the basis of the six objections raised by the Respondent."*[391]

303. In the *Lesi* case, the arbitral Tribunal commented on the question of the irrelevance of the distinction between jurisdiction and admissibility specifically in the context of ICSID proceedings and found as follows:

> *"[D]ans les procédures CIRDI, la distinction est sans portée pratique, à la différence de ce qui peut valoir dans d'autres procédures arbitrales; en effet, les recours à l'encontre des décisions rendues à propos de l'une ou de l'autre question ne sont pas différents, dans le système de la Convention, qu'il s'agisse de compétence ou de fins de non-recevoir."*[392]

304. A similar approach has been at times advocated in NAFTA arbitration. The *Mondev* Tribunal mentioned a common distinction between *issues going to the jurisdiction and questions of procedure in relation to a claim which is within jurisdiction*. It then went on to note that NAFTA *elides that distinction.*[393]

305. Similarly, Prof. Jack Coe, Jr, representing a position that is not uncommon among scholars, held that:

> *"The admissibility-jurisdiction distinction has not always been a matter of marked divisions; often procedure and predicates that qualify a claim as properly preserved and indicated may equally be seen as merely a way of describing the subject matter that has been entrusted to a tribunal. Moreover the distinction often seems inconsequential".*[394]

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[391] Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic, ICSID Case No ARB/03/13, Decision on Preliminary Objections, 27 July 2006, paragraph 54. See similarly Corona Materials LLC v. Dominican Republic, ICSID Case No. ARB(AF)/14/3, Award on Preliminary Objections of 31 May 2016, para. 191. The tribunal, commenting on a three-year limitation period for the launching of arbitration, did not qualify it as a limit of jurisdiction or admissibility, and simply made the pragmatic point that the '*Parties have plainly conditioned their consents to arbitration. If a claimant does not comply with the [time-limit], its claim cannot be submitted to arbitration*.'

[392] Consortium Groupement L.E.S.I.-DIPENTA v. République algérienne démocratique et populaire, ICSID Case No. ARB/03/08, Award of 10 January 2005, Part II, para. 2. Also in the ICSID case law, for a similar position see Joan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmi1 S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility of 24 September 2008, paras 63-65.

[393] Mondev (para 44)

[394] Coe, J. «The mandate of Chapter 11 tribunals—Jurisdiction and Related Questions» Weiler, T. NAFTA *Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects*. Brill, 2004: 215 – 246. In the opinion of Professor Coe, another angle seems to transpire, namely that questions related to the admissibility, as regards the

306. The view of the Tribunals indicated above were based on an assessment of the consequences that would have derived by the successful invocation of objections at the preliminary level of the proceedings: the Tribunal would be prevented from establishing the rights of the Parties in the merits.[395]

307. However, as will be expounded later on, the practice of investment arbitration Tribunals and international commercial Tribunals shows that a) the distinction between jurisdiction and admissibility is not irrelevant in practice [396]and b) the notions of admissibility and jurisdiction are well defined in international law as autonomous categories. The usual metaphor according to which admissibility and jurisdiction are two concepts that can only be seen *in twilight*, in the sense that the contours of each of them vanish in the midst of an uncertain boundary, is today superseded by judicial practice and the majority of scholarly opinions.[397] While the question of the practical importance between jurisdiction and admissibility is addressed in Section 3 of this Chapter, the issue of their reciprocal autonomy at the conceptual level is addressed below.

308. The distinction between admissibility and jurisdiction is well established as a matter of international law. Professor Ian Brownlie gave the following *operative* definition:

> *"[o]bjections to jurisdiction, if successful, stop all proceedings in the case since they strike at the competence of the tribunal to give rulings as to the merits or admissibility of the claim. An objection*

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subject matter with which they deal, can also be approximated to issues pertaining to the merits of the claim. This determines that issues that pertain to the admissibility of a claim may have the same effects as to jurisdictional objections, in terms of preventing the Tribunal to become cognizant of the substance of a certain dispute; on the other hand, as to the issues that are addressed in the context of and admissibility claim, these are sometimes similar to those that may be addressed during the dispute.

[395] See also in this regard Fontanelli, F (forthcoming), *op.,cit*.,: "*First, matters of jurisdiction and admissibility are conflated in the phase of the procedural objections. In this sense, the pragmatic stance of several tribunals is not to fixate on a distinction that might not reflect a difference: if upheld, a preliminary objection will prevent the review of the merits*."

[396] SGS Société Geénérale de Surveillance SA v Republic of the Philippines, ICSID Case No ARB/02/06, Decision on Objections to Jurisdiction (29 January 2004) para 149. Miles, C. (2014) *op cit*., at 41.

[397]This is the case also in the context of ICSID arbitration and UNCITRAL arbitration, despite the fact that the term "admissibility" does not feature either in the ICSID Convention or in the UNCITRAL Convention and that the lack of any explicit reference to this notion has meant at times that Tribunals did not consider admissibility as a matter to address at all. See also the position of the Tribunal regarding the absence of "admissibility" in the ICSID Convention in Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9 (formerly Giordano Alpi and others v. Argentine Republic) Decision on Jurisdiction and Admissibility of 8 February 2013, para. 572.

to the substantive admissibility of a claim invites the tribunal to reject the claim on a ground distinct from the merits."[398]

309. Going by the definition of Professor Brownlie, admissibility stands somewhere in between jurisdiction and merits: certainly, the first question to ask is whether the Tribunal has jurisdiction; only once this question has been answered in the affirmative, can one decide if the conditions for the admissibility of the claim have been met. On the other hand, if the Tribunal does not have jurisdiction over a certain matter, the consequence will be that no question of admissibility will arise.[399]

310. The International Court of Justice in the case *Oil Platforms* has addressed the question from a similar angle and has explained that:

"Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits."[400]

311. The examples made above allow to distil a general definition of what constitutes admissibility and what constitutes jurisdiction. Jurisdiction is a question that concerns the existence of adjudicative powers of a Tribunal with respect to a certain dispute; admissibility, on the other hand, concerns the discrete question as to whether, with respect to one or more aspects of a claim over which a Tribunal has established its jurisdiction, it is possible for the Tribunal to actually exercise such adjudicative powers and examine the case.[401]

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[398]Brownlie, I. *Principles of Public International Law*. Oxford: Oxford University Press, 2008, 479.

[399]Professor Gerald Fitzmaurice, in his seminal work on The Law and Procedure of the International Court of Justice, adopted this view by explaining that: *"[…] an unsuccessful jurisdictional plea leaves open the possibility that a finding on the ultimate merits may still be excluded through a decision given against the substantive admissibility of the claim*." Fitzmaurice, M. «The Law and Procedure of the International Court of Justice» *The British Yearbook of International Law*: 1958: 1 – 30, 12-13.

[400]*Oil Platforms (Iran v. USA)*, Judgment, ICJ Rep. 2003, 161, paragraph 29.

[401]*Waste Management, Inc. v. Mexico, ICSID Case* No. ARB (AF)/98/2, Dissenting Opinion of Judge Keith, 2 June 2000, para. 58. It is also interesting to recall the position of Prof. Park, according to whom admissibility is "*A term used to describe constraints on the right to file claims in cases clear subject to arbitration. Admissibility might relate to whether a claim is ripe enough (or too stale) for adjudication, or arbitral preconditions (such as mediation) or the passage of time bars.* Park, W. *Arbitration of International Business Disputes: Maturity and Methodology Arbitration of International Business Disputes*. Oxford : Oxford University Press, 2012, 49.

312. Ultimately, a few practical examples may be useful to further clarify these concepts. If one takes the example of international investment arbitration,[402] for instance, the question of jurisdiction is normally decided assessing its various articulations: jurisdiction *ratione personae* (the Tribunal will only have jurisdiction if the claim arises between the Host State and a citizen of a country that has concluded a BIT with the host State); jurisdiction *ratione voluntatis* (the Tribunal will only have jurisdiction over a claim if the Parties have undertaken to subject that claim to arbitration, for example by means of incorporating a dispute resolution clause in a BIT); jurisdiction *ratione materiae* (Tribunals can only exercise their jurisdiction over transactions that qualify as investments, and not over any other transaction that has some other economic value); jurisdiction *ratione temporis* (only those investments that are covered by the temporal application of the Treaty – that is, that are concluded after the Treaty has come into force, are attracted into the jurisdiction of the Arbitral Tribunal).

313. Against this framework, jurisdiction is the first layer that separates a Tribunal from becoming cognizant of a certain claim. Admissibility therefore operates to create a second layer. The second layer could consist of a number of circumstances. Professor Michael Waibel identifies a few of them. These may concern the question of whether a party has sufficient standing to bring a claim, for instance whether the party has a *specific interest* to bring the claim; the question of the *lis alibi pendens* (whether namely the dispute is already pending before another international jurisdiction), the question that a certain claim has already been addressed in another forum and constitutes *res iudicata*, and so on.[403] For the purpose of the present analysis, it is a question subject to considerable debate whether the appearance of criminal conduct in the making of an investment constitutes a bar to jurisdiction or whether it still allows the Tribunal to exercise its jurisdiction, but it mandates that the claim be declared inadmissible.

[402] A definition is of the distinction between admissibility and jurisdiction is provided by the Arbitral Tribunal in the case Waste Management: "*International decisions are replete with fine distinctions between jurisdiction and admissibility. For the purpose of the present proceedings it will suffice to observe that lack of jurisdiction refers to the jurisdiction of the Tribunal and inadmissibility refers to the admissibility of the case. ... Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective whether it is appropriate for the tribunal to hear it. If there is no title of jurisdiction, then the tribunal cannot act*." Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3, Dissenting opinion of Judge Keith, 30 April 2004, para 58.

[403] Waibel, M. «Investment Arbitration: Jurisdiction and Admissibility» *Legal Studies Research Paper Series*, 2014, 1 – 81, 7. See also Park, W. (2012) *op. cit*., 77.

314. The question of the precise identification of the dividing line between jurisdiction and admissibility is also relevant in the context of international commercial arbitration, where it raises similar problems to investment arbitration. As a matter of fact, conceptually speaking, also in international commercial arbitration a Tribunal would have to establish whether it has jurisdiction over a certain matter and, once it is satisfied that this is the case, decide whether or not it can entertain the claim in the merits. By way of example, one can imagine a commercial contract that incorporates a clause that confers jurisdiction over possible disputes related to the interpretation or application of the contract to an arbitral Tribunal and provides that arbitration will have to be commenced after 30 days of the exhaustion of attempts to find a negotiated solution. If arbitration is commenced before the time limit indicated in the arbitration clause, the claim will normally be considered inadmissible, notwithstanding the jurisdiction of the Tribunal over the matter. In the context of international investment arbitration, this position has been recently endorsed by the US Supreme Court in the case *BG Group PLC v Republic of Argentina*.

315. The Court was confronted with set-aside proceedings regarding an award rendered by an Arbitral Tribunal constituted under the UK-Argentina BIT. The Arbitral Tribunal had found that the question of the respect of a local law requirement indicated by Article 8 of the UK-Argentina BIT (that arbitration proceedings could only be initiated after 18 months of litigation before the Courts of Argentina) was a question related to the admissibility of a claim. In particular, that even though the investor had not respected the requirement set out under Article 8, the claim still had to be considered as admissible, in consideration of the fact that Argentina had passed domestic legislation that would have prevented the requirement from being met in any event. Argentina tried to have the order vacated by the District Court that denied it.[404] Controversially, the Court of Appeal held that the question regarded not admissibility, but jurisdiction and that therefore it could be subject to a *de novo* review. The Supreme Court reversed the decision of

[404]BG Group PLC v Republic of Argentina, 572 US (2014).

the Court of Appeal and confirmed that compliance with a domestic litigation requirement is a matter of admissibility, and not jurisdiction, and as such is not subject to the review of courts, being reserved to the determination of the arbitral Tribunal.[405]

2.1. The Inadmissibility of Investment Claims

316. It has been mentioned earlier that the notion of admissibility does not appear in the texts of institutional rules that discipline international and commercial arbitration, such as ICSID and UNCITRAL, so that the question is legitimate as to whether an arbitral Tribunal would be in a position to dismiss a case on the basis that it is not admissible.[406] The question is particularly important when one considers that institutional rules of other Tribunals, such as the International Court of Justice, the European Court of Human Rights or the International Tribunal for the Law of the Sea all have provisions that mention admissibility as a ground on which to base a preliminary objection. One therefore has to consider whether this is a case of *ubi lex voluit dixit, ubi noluit, tacuit*. This is for example the position that some international arbitral Tribunals have adopoted with respect to the issue. For instance, in *Methanex v United States*, the Tribunal held that *there is no express power to dismiss a claim on the grounds of inadmissibility; and where the UNCITRAL Arbitration Rules are silent, it would still be inappropriate to imply any such power.*[407]

317. Other Tribunals, however, have not only identified the distinction between jurisdiction and admissibility, but have also applied it in practice. As regards the recognition of the distinction between the notions of jurisdiction and admissibility, in the case *Ioan Micula et Al v Romania,*[408] the Tribunal explained that an objection to jurisdiction goes to the ability of the Tribunal to hear the case, while an objection that goes to the admissibility of a claim aims at the claim itself,

[405]For a critical appraisal, see Rosenfeld, F. «Arbitral praeliminaria - reflections on the distinction between admissibility and jurisdiction after BG v Argentina.» *Leiden Journal of International Law*, 2016, 137 – 153.
[406] Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9 (formerly Giordano Alpi and others v. Argentine Republic) Decision on Jurisdiction and admissibility of 8 February 2013, para. 572.
[407] Methanex Corporation v. United States of America, UNCITRAL, Partial Award (Preliminary Award on Jurisdiction and Admissibility) of 7 August 2002, para 124.
[408] Joan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmi1 S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility of 24 September 2008, para 63-64.

and presupposes that the Tribunal has jurisdiction; in the case of *Generation Ukraine Inc. v Ukraine*, the Tribunal discussed denial of benefit clauses and reached the conclusion that these would not operate as a bar to jurisdiction, but rather would impinge on the admissibility of the claim.[409]

318. Operatively, Tribunals have dismissed claims at the level of admissibility. In *Burlington Resources v Equador*, the Arbitral Tribunal held that not having complied with the clause that required a six months cooling off period before commencing arbitral proceedings against the respondent was not an issue of jurisdiction, but rather one of admissibility of the claim.[410] As mentioned earlier, also questions of criminality have at times being recognised as issues impinging on the admissibility of a claim – or – at least, issues *having the potential* of impinging upon the admissibility of a claim.[411] In *World Duty Free v Kenya*, the arbitral Tribunal dismissed the claim brought by the investor at the level of jurisdiction, finding that the investor had committed an act of corruption. However, in its reasoning, it held more generally that *the claimant is not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of ordre public international and public policy under the contracts' applicable laws*.[412]

319. Even if the Tribunal opted for a jurisdictional exitus to sanction the misconduct of the investor, the reference to the claim being not legally maintainable could have meant two other different things: either that the claim should have failed on the merits, or that it should have failed before the merits, at the level of admissibility.[413] *Plama v Bulgaria* is another case where an issue of criminality, in this case fraud, was apparently addressed as a matter of *admissibility*. In that case the Tribunal argued that the Claimant's investment could not enjoy the protection of the Energy Charter Treaty, because it had been procured through fraud, in the form of concealment of the real identity of the

[409] Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award of 16 Sepember 2003, para 15.7.
[410] Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5 (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)), Decision on Jurisdiction of 2 June 2010.
[411] Newcombe, A. (2011), *op.cit*., 197.
[412] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006, para 188.
[413] Newcombe, A. (2011), *op.cit*., 197.

investor.[414] It then proceeded to deny that protection, according to most commentators by declaring the claim inadmissible.

320. Since the notion of admissibility is ordinarily employed by international investment Tribunals even in the absence of textual connections with the applicable treaties and arbitral rules, the next question concerns the identification of its legal basis. Two answers are possible in principle, one based on the implied powers of arbitral Tribunals, the other on some more textual-oriented interpretation of certain institutional arbitration rules.

321. As regards the first option, a dissenting opinion by Sir Gerald Fitzmaurice rendered at a time when the Statute of the International Court of Justice still did not have any indication about the notion of admissibility, helps shed some light:

> *"In the general international legal field there is nothing corresponding to the procedures found under most national systems of law, for eliminating at a relatively early stage, before they reach the court which would otherwise hear and decide them, claims that are considered to be objectionable or not entertainable on some a priori ground. The absence of any corresponding 'filter' procedures in the Court's jurisdictional field makes it necessary to regard a right to take similar action, on similar grounds, as being part of the inherent powers or jurisdiction of the Court as an international tribunal".*[415]

322. The possibility to declare a claim inadmissible, therefore, would be the expression of a general power of international arbitral Tribunals, implied in their jurisdiction.

323. As regards the second option, that however only operates in the context of certain institutional arbitration rules, there would be a textual angle to argue that admissibility is within the options that an arbitral Tribunal can resort to when addressing a claim. The Tribunal in *Rompetrol v Romania* faced this issue in the

[414] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award of 27 August 2008, paras 125 and 139.
[415] Sir Gerald Fitzmaurice, Dissenting opinion, Nortliern Cameroons, I.C.J. Reports 1963, pp. 105 and 106 f.

context of the ICSID Convention.[416] The Tribunal identified in the text of Article 41 of the ICSID, titled objections to jurisdiction, the provision that would allow to address a case at the level of admissibility. The Article reads as follows:

> *" The Tribunal shall be the judge of its own competence. Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute".*

324. According to the Tribunal, the text of the provision is so drafted as to cover not merely objections that a dispute is not within the jurisdiction of the Centre, but also any objection that the dispute is *for other reasons, not within the competence of theTribunal*.[417]

3. The Importance of the Distinction between Jurisdiction and Admissibility for the Purposes of the Research Question

325. The distinction between jurisdiction and admissibility in investment arbitration is important in practice, and its importance is central to the research question of this thesis. Deciding whether a Tribunal should address criminality by the investor at the merits stage of the proceedings, or rather at their preliminary level and, within this, at the jurisdictional or admissibility stage, is something that may change dramatically the course of litigation between the parties, and its outcome.

326. Logically, the first crucial distinction appears with respect to addressing criminality at the jurisdictional or admissibility level, on the one hand, as opposed to the merits phase of proceedings, on the other.

[416] The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision of 2008, para 112.
[417] The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision of 2008, para 112.

327. The distinction is conceptually easy. Both a successful objection going to the jurisdiction of a Tribunal and a successful objection aiming at the admissibility of a claim would prevent the Tribunal from confronting itself with the merits of the dispute. In this sense, criminality would constitute a *gateway issue* and would not allow the Tribunal to investigate the overall conduct of the parties to the crime. On the other hand, if the arbitrator is in a position to address criminal conduct at the merit phase of the proceedings, it is more likely that the outcome of the arbitration will somehow try to take into account the overall behaviour of the parties. This is an application of the general principle whereby Tribunals should assess holistically the conduct of the parties in deciding to what an extent there have been violations of the standards of protection provided for by the relevant BITs.[418]

328. In the context of that holistic assessment, the taxonomy of criminality proposed in this dissertation would come into play. By way of example, if the arbitrators establish that the investor has secured its contract through corruption, but that, at the same time, the Host State retains a significant level of culpability with regard to the corruptive conduct, the merits phase of the proceedings would be the stage at which the balancing of these considerations should be made. In general terms, the merits phase of the proceedings is the phase at which it would be possible to apply an assessment based on reciprocal culpability that takes into account the conduct of both parties.

329. The practice of international commercial arbitration (in which, as we will see, due to a strict application of the *Doctrine of Separability*, Tribunals have a greater chance to pronounce on the merits of a claim tainted by criminality) provides interesting examples. For instance, if normally the consequence of criminality in securing a contract is that the contractual rights will not be enforceable, this does mean that restitutionary remedies would always be precluded to the parties. On balance, arbitral Tribunals at the merits stage of proceedings have however shown reluctance to grant full restitution to the parties

[418]Muchhinksy, P. «Caveat Investor? The Relevance Of The Conduct Of The Investor Under The Fair And Equitable Treatement Standard,» *International and Comparative Law Quarterly*, 2006: 527 – 557.

that have performed a contract procured by some form of criminality. Professor Richard Kreindler, for instance, mentions an ICC case in which, at the merits stage,

> *"the arbitral Tribunal dismissed a claim for full restitution under two maintenance contracts and ordered the contractor to reimburse to the principal only the balance between the total consideration it received under the maintenance contract and the commission it paid to an intermediary to (illegally) secure the contracts.*[419]

330. If instances of criminality are on the other hand invoked as a jurisdictional bar or as a bar to the admissibility of the claim, the arbitral Tribunal could not strike any balance in the conduct of the parties, and the Respondent may end up in a significantly stronger position than the Claimant, despite being equally culpable. Especially in crimes that cannot be perfected unless there is a level of cooperation between the Host State and the investor, as is the case for corruption, the respondent that has extorted, or solicited the bribe, or that has simply accepted it, would effectively be shielded from any assessment of its culpability.

331. This position, albeit slowly, is starting to make its way in scholarship as well. Michaela Halpern for instance, commenting on *World Duty Free v Kenya*, noted that:

> *[Arbitrators] were too quick to dismiss WDF's claims as they did not consider the surrounding circumstances and did not apply the proper balancing test needed in situations such as in World Duty Free*[420]*. (...)In cases such as this, a consideration of balancing is preferable to following strict policy and concluding with an unfairly asymmetrical decision. The lack of balancing the respective roles of the corrupt actors is particularly perplexing given that the Tribunal even acknowledged that the bribe was "solicited by the Kenyan President and not wholly initiated by the Claimant. There is a danger in applying categorical rules when a nuanced analysis would be more appropriate"*[421].

[419] ICC Case No 11307, Final Award, 2003, in *Yearbook of Commercial Arbitration*, 2008 24, paragraph 34
[420] Halpern, M. (2016) *op.cit*., 308.
[421] Halpern, M. (2016) *op.cit*., 309.

332. Tribunals are aware that the merits phase of the proceedings is the stage at which an accurate analysis of the conduct of both parties, including its criminal dimension, can occur. The International Court of Justice has explained for example that "*the proceedings on the merits will place the Court in a better position to adjudicate with a full knowledge of the facts*."[422] Similarly, in *Letco v Liberia*, Professor Pierre Lalive explained:

> *"Neither the letter nor the spirit of the various documents put forward by the Parties, as support for their respective positions on the jurisdiction of the Tribunal... could properly be appreciated, save after a full consideration of the actual subject matter of the Application at the merits"*[423]

333. Criminality, in particular, is an incidental fact in investment arbitration, but it is strictly intertwined with the relevant facts of the case in dispute at the merits.

334. Aware of this circumstance, Tribunals have at times decided to join the jurisdictional phase and the merits phase of proceedings – so that the enquiry on the competence of the Tribunal to entertain a claim would benefit from the standard of analysis that is normally applied during the merits.[424] This is a procedural option that is specifically attributed to an arbitral Tribunal under certain rules, such as those contained in the ICSID Convention.[425] Joining objections to jurisdiction to the merits phase of the proceedings is certainly useful in allowing a Tribunal to become cognizant in full of those facts and evidential issues that can have a bearing on the question of its jurisdiction, including the issues pertaining to criminal conduct by the investor.

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[422] Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain), ICJ, Judgment of February 5, 1970.
[423] LETCO v. Liberia 2 ICSID Rev–FILJ 188 (1987) at 190–1.
[424] Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Ad hoc Committee Decision on the Application for Annulment, 16 May 1986, 390; Klöckner v. Cameroun 1983, 2, ICSID Report, 1318; Atlantic Triton v. Guinea 1986, 3, ICSID Report, 39; SOABI v. Senegal 1984, 2 ICSID Report 180-189, pp. 189
[425] Article 42 ICISDI (1)The Tribunal shall be the judge of his own competence. (2). Any objection by a party to the dispute that is not within the jurisdiction of the Center, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to merits of the dispute.

335. However, joining jurisdictional objections to the merits phase of the proceedings when criminal conduct is discussed is not the same as saying that investor misconduct is treated at the merits phase of the proceedings. The differences between dismissing a claim at the jurisdictional phase or at the merits phase still persists when objections to jurisdiction and merit issues are treated, from the procedural perspective, at the same time. And, above all, this procedural expedient does not neutralize the effects that derive from a decision that the Tribunal has no jurisdiction to entertain a claim, as opposed to a decision that the investor's claim cannot be sustained, or can be sustained only in part on the substance. For example, the assessments of the reciprocal level of culpabilities cannot happen with respect to a claim that is dismissed for illegality at the jurisdictional level. The only advantage that would derive from the merging of the jurisdictional and merits phases would concern *the level of awareness* of the arbitral Tribunal about the contribution of the Host State to the criminal conduct; but such contribution would still remain unsanctioned if the arbitral Tribunal decides that the misconduct by the investor does not allow the claim to proceed to the merits.[426]

336. An example will help clarify this scenario. In *Metaltech v Uzbekistan*, the arbitral Tribunal had to deal with instances of corruption in which the investor was involved. Even before the allegations regarding corruption had emerged during the arbitral proceedings:

> *"The Tribunal decided to join the Respondent's objections to jurisdiction and admissibility to the merits on the ground that they were closely related to the merits. At the same time, it bifurcated the proceedings between jurisdiction and liability, on the one hand, and quantum on the other, because damage quantification (if applicable) could be easily heard in isolation from the rest of the case"*[427]

[426] On this aspect see also Kulkarni, S.: «Enforcing Anti-Corruption Measures Through International Investment Arbitration.» *Transnational Dispute Management* , 2009, 1 – 51, 29. "*This procedure of joining the jurisdictional objections to the merits cannot be a sure shot solution to deal with the issue of corruption but can surely be of adequate assistance to the arbitral tribunal to make an in depth analysis of the facts and the incidents that occurred during the whole process of making the investment*". See also Alisher, U. «Sharing Responsibilities on Corruption Allegations in Investor-State Arbitration The Contribution of Metal-Tech v. Uzbekistan» *The Nagoya Journal of Law and Politics*, 2016: 43-83.

[427] Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award of 4 October 2013, para 117.

337. During the proceedings, it became evident to the Tribunal that Metaltech had been bribing Uzbek officials to gain certain advantages in the operation of its investment. In order to do so, it had entered into sham agency agreements that were only the vehicle for corruption.[428] The Tribunal therefore turned its eye to Article 8(1) of the applicable BIT, according to which its jurisdiction was limited to disputes concerning *investments*. It then went to analyse the definition of *investment* according to Article 1(1) of the BIT, and found that the notion of investment had a legality requirement built into it, because *Article 1 (1) of the BIT defines investments to mean only investments implemented in compliance with local law.*[429] It therefore went to conclude that, due to the criminal conduct in which the investor had engaged:

> *"The present dispute does not come within the reach of Article (8 1) and is not covered by Uzbekistan's consent. This means that this dispute does not meet the consent requirement set in Article 2(5 1) of the ICSID Convention. Accordingly, failing consent by the host state under the BIT and the ICSID Convention, this Tribunal lacks jurisdiction over this dispute"*[430]

338. In Metaltech, therefore, despite treating the question of the investor's corruption jointly with the merits phase of the proceedings, the Tribunal still dismissed the claim at the jurisdictional level. The Tribunal may have been more aware of the circumstances surrounding the illegality that affected Metaltech's conduct, due to a full-blown investigation conducted in tandem with the investigation on the merits of the case. But, ultimately, criminality was still treated as a bar to the Tribunal's jurisdiction. In particular, the Tribunal never allowed the investor to make its claim on the issue of liability, nor on limitation of liability in light of the Host State's conduct and degree of culpability.

339. In this regard, some scholars have noted that the Metaltech Tribunal's approach was:

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[428] Metaltech v Uzbekistan, para 117, para. "*For all these reasons, the Tribunal comes to the conclusion that the December 2000 Contract cannot be regarded as a genuine agreement and must be deemed a sham designed to conceal the true nature of the relationship among the parties to it*."
[429] Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award of 4 October 2013, para 373.
[430] Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award of 4 October 2013, para 373.

> *"no more than a discussion of jurisdiction issues under the camouflaged umbrella of merits phase (sic), therefore, it should be distinguished from handling corruption issue with illicit treatment of host State in merits phase (sic)*[431] *and that, for this reason, Metaltech should be considered not materially different from way of dismissing the claim on jurisdiction grounds"*

340. In addition to the preliminary phase and merits phase divide, which has been discussed thus far, the jurisdiction/admissibility divide also becomes critical from the perspective of deciding when to address criminality in arbitral proceedings.

341. The first practical implication pertains to the question of the finality of a Tribunal's decision. Arbitration laws in the vast majority of countries provide that an award by an arbitral Tribunal may be challenged when it is alleged that the arbitrators are mistaken as to the scope of their jurisdiction. On the other hand, review of an arbitral Tribunal's decision over alleged mistakes on questions of admissibility is not normally possible.[432]

342. For example, in international commercial arbitration,

> *"if an Arbitral Tribunal declines to entertain the merits of a dispute because it agrees with an objection to its jurisdiction, then certainly domestic courts could exercise their control function over that decision. If, however, the Tribunal decides that it has jurisdiction, but that it cannot entertain the merits of a claim owing to the fact that this is inadmissible, then it would be wrong for the domestic courts to review this decision: the Parties have decided that the dispute should in fact be addressed by the arbitral Tribunal. In cases like this, the difference between jurisdiction and admissibility becomes crucial"*[433].

343. There is also an important question in the distinction between jurisdiction and admissibility that relates to procedure. Issues of admissibility often

[431] Alisher, U (2016) *op.cit*., 63.
[432] Pinsolle, I. «Difficulties Arising out of a Contractual Definition of the Arbitrators' Mandate.» *International Business Law Journal*, 2002: 238 - 250, 241.
[433]Paulsson, J. «Jurisdiction and Admissibility, Global Reflections on International Law, Commerce and Dispute Resolution», *Liber Amicorum in honour of RoberBriner*, ICC Publishing, 2005, 601 – 617, 617.

touch upon questions that are close to the merits of a certain dispute. Some Tribunals and scholars have gone as far as equating issues of admissibility with issues of merits. [434] They have held that even though issues concerning admissibility are normally treated alongside questions going to the jurisdiction of a Tribunal, they should more properly be addressed when the Tribunals turns to deciding the substance of the case. In *Chevron v Ecuador*, for example, the UNCITRAL Tribunal posited that:

> *"An objection to the admissibility of a claim does not, of course, impugn the jurisdiction of a tribunal over the disputing parties and their dispute; to the contrary, it necessarily assumes the existence of such jurisdiction; and it only objects to the tribunal's exercise of such jurisdiction in deciding the merits of a claim beyond a preliminary objection. Under the UNCITRAL Arbitration Rules, that is an exercise belonging to the merits phase of the arbitration, to be decided by one or more awards on the merits"*[435]

344. Even though equating admissibility and merits is not tenable theoretically, it is true that whether a claim is admissible or inadmissible is something that can be addressed more closely with the merits stage of the proceedings, and with the full-blown standard of analysis that is proper to it.[436] This would therefore still allow, at least to a certain degree, the Tribunal to take into account the conduct of the parties; on the contrary, the question of the jurisdiction of the Tribunal can also be decided without entering at all into the merits aspects of a certain dispute, and this is in fact what normally happens. Indeed, a respondent who *wishes to avert the Tribunal's gaze from its own malfeasance* has *considerable strategic incentive to challenge the Tribunal's jurisdiction*".[437]

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[434] Zeiler, G. «Jurisdiction, Competence and Admissibility of Claims in ICSID Arbitration Proceedings.» *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Binder, C. et Al Oxford: Oxford University Press, 2009: 76.

[435] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23, para 4.91. See also Methanex v. USA, UNCITRAL (NAFTA), First Partial Award, 7 August 2002, para. 107, 123-126.

[436] Fontanelli, F. (forthcoming), *op.cit*., […]*This view [the equation of admissibility and merits] is pragmatic, but it overlooks the relevance of general principles and the 'inherent jurisdiction' that international courts have to preserve the integrity of their judicial function by declining to exercise an existing jurisdiction in specific circumstances.*

[437] Miles, C (2012) *op. cit*., 338.

345. Other differences between the two notions pertain to other pathologies that may affect the claimant's ability to bring its claim before the Tribunal. Defects that go to the admissibility of a dispute are cured more easily than defects that pertain to the existence of the Tribunal's jurisdiction. For example, a claim that is not yet ripe for arbitration, due to the existence of a requirement to conduct conciliations or negotiations between the parties, becomes so ripe after these attempts have been conducted unfruitfully, or after the expiry of a certain date. Jurisdictional defects, on the other hand, are more difficult to overcome, even though, as the Tribunal in *Urbaser SA v and Consorcio de Aguas de Bilabo Biskaia* explained, *there is no principle preventing jurisdictional defects from being cured* in general.[438]

346. Lastly, whereas a Tribunal could not raise *motu proprio* issues that concern the admissibility of a claim, it must positively establish the existence of its jurisdiction before entertaining any dispute. As a consequence, the circumstance that a certain question is related to the admissibility, as opposed to the jurisdiction of the Tribunal, also has a bearing on the Tribunal's approach to the evidentiary assessment of the matter. For example, in *Hochift v Argentina*, the Arbitral Tribunal held:

> *"[I]n the ICJ, for example, rules on admissibility include such matters as the rules on the nationality of claims and the exhaustion of local remedies. The ICJ may have jurisdiction to decide whether State A had injured corporation B in violation of international law; but it may be that the claim actually filed is inadmissible because it has been brought by the wrong State, or because local remedies have not yet been exhausted. But if no objection is raised on such grounds, the Court will not raise the matter proprio motu."*[439]

347. In addition to the case-specific issues canvassed in the previous pages, the decision as to when address criminality also has important implications at the level of general policy. The fight against criminal misconduct in international investments has become a priority of the international community. The numerous

[438] Urbaser SA and Consorcio de Aguas Bilbao, ICSID Case NO ARB/07/26, Award of 8 December 2016, para 118.
[439] Hochtief AG v. Argentina, ICSID Case no. ARB/07/31, Decision on Jurisdiction of 24 October 2011, para 5.

anti-corruption initiatives are only one example of this fight. An investment Tribunal should therefore not turn a blind eye to the systemic implications that a certain decision may have on the fundamental goals pursued by the international community. This is not to say that Tribunals should decide on policy, as opposed as law: but that when a Tribunal engages in an assessment of the desirability of a certain approach, it should consider where that approach positions itself at the level of policy.

348. In this regard, the proponents of a robust *Defence of Illegality* in international arbitration, that entails dismissing all claims tainted by criminality at the level of jurisdiction, believe that this is instrumental to fighting criminality. In essence, the ideas is that an investor should beware of engaging in illegal conduct, lest its otherwise legitimate claims may not even be heard by a Tribunal. This would be a strong incentive to behaving legally and abiding by the law. However, one should also engage in an analysis from the other side of the equation, namely from the perspective of the Host State. Could the perspective of impunity that derives from an overly robust *Defence of Illegality* constitute an incentive for a Host State to engage in criminal conduct? Put it differently, what is the effect that derives from the knowledge that criminality would essentially represent a shield from a potential thorough investigation by the Tribunal on the question of breach of substantive norms of protection owned to the investor? Chapter 10 addresses these questions in details.

CHAPTER 4

THE DOCTRINE OF SEPARABILITY

1. Introduction

349. After clarifying a few aspects with respect to jurisdiction and admissibility in investment arbitration, the other fundamental principle that needs clarification is that of separability – or autonomy, of the arbitration clause. Separability, as a matter of fact, constitutes one of the fundamental principles on which the model developed in Chapters 8 and 9 of the thesis relies. It constitutes the international commercial arbitration component of the hybrid model, at the crossroads between international commercial arbitration and criminal law, developed to deal with criminality that affects an investment.

350. The *Doctrine of Separability* is one of the mechanisms that have enabled international commercial arbitration to become a viable and, above all, effective method of dispute resolution.[440] Some scholars have described the purpose of the *Separability Doctrine* as salutary, and essential for the preservation of arbitration as an alternative to the jurisdiction of ordinary courts in the settlement of international commercial claim.[441]

351. The operational principle behind the *Doctrine of Separability* is simple and the meaning of the doctrine is encapsulated in its name: the contract concluded by the parties and the agreement to arbitrate any potential dispute stemming therefrom are considered as separate and autonomous, and their respective fates are *decoupled*. According to a famous expression used by Judge Schwebel, this means that when the parties conclude a contract that contains an arbitration clause, they

[440] Francescakis, P. «Le Principe Jurisprudentiel de l'Autonomie de l'Accord Compromissoire» *Revue de l'Arbitrage*, 1974, 45 – 78, 67.
[441] Bermann, G. «The "Gateway" Problem in International Commercial Arbitration» *Yale Journal of International Law*, 2012, 1 – 48.

conclude not one, but two agreements, so that the destiny of each agreement does not depend on the fate of the other.[442]

352. In practical terms, this means that even in circumstances when the contract concluded by the parties is illegal (including due to its being tainted by criminality), and hence potentially sanctioned by nullity, the nullity of the contract does not affect the agreement to arbitrate the dispute stemming from the contract itself.[443] For example, in the event that a commercial contract were aimed at corruption, the contract would be null and void on the basis of virtually any applicable law. The agreement to arbitrate any dispute related to the null and void contract, on the other hand, would remain valid and would enable an arbitral Tribunal to become cognizant of, and establish its jurisdiction over the case. When the invalidity of the main transaction derives from the claimant's criminal conduct, in particular, the *Doctrine of Separability* means that arbitrators "*do have jurisdiction and have to decide the merits of the case and take any illegality resulting from the criminal activity into consideration when they decide the case*".[444]

353. If the *Doctrine of Separability* were not applicable, the nullity of the contract would in fact extend to the agreement to arbitrate. The arbitral Tribunal could only be left with the option of declining its jurisdiction. Because if the jurisdiction of arbitral Tribunals rests on the consent of the parties, the nullity of the contract stipulated by them would swipe away also their consent as regards arbitration. In this regard, scholars have noted that, since arbitration is a creature of consent, the *Separability Doctrine* relies upon the notion of a distinct basis of consent to the authority of the Tribunal, that is independent of the consent to be bound by the main contract.[445]

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[442] Mayer, P. «Les Limites de la Séparabilité de la Clause Compromissoire» *Revue de l'Arbitrage* 359 - 368.; Dimolitsa, A. «Autonomie et Kompetenz - Kompetenz» *Revue de l'Arbitrage*, 1988 : 359 - 374.
[443] Klein, F. E. «Du Caractère Autonome de la Clause Compromissoire, Notamment en Matière d'Arbitrage international.» *Revue critique de droit international privé*, 1961, 499 - 522.
[444] Philip, A. «Arbitration, Corruption, Money Laundering and Fraud: The Role of the Tribunals.» Dossier of the ICC Institute of World Business Law: Arbitration - Money Laundering, Corruption and Fraud, 2003: 147-148.
[445] Douglas, Z. (2014) *op.cit*., 158.

354. After a time when the *Doctrine of Separability* was not followed, it has now become a cornerstone principle of international arbitration.[446] This does not mean, obviously, that a Tribunal will turn a blind eye to instances of corruption or other criminal conduct affecting the substantive agreement, but that it will address those at the merits stage of proceedings.[447]

355. Despite the wide operation of the *Doctrine of Separability* in international commercial arbitration, there may nevertheless be instances where a defect going to the root of an agreement between the parties affects both the main contract and the arbitration clause. Essentially, there appears to be two situations in which this may happen.

356. One is the case in which the illegality affects directly the autonomous agreement to arbitrate. Continuing with the example of corruption, this would mean that criminal conduct was necessary to get the parties specifically to agree to the compromissory clause in the main contract. In this case, the nullity would not be referring to the main contract, but it would inficiate the compromissory clause regarding the mechanisms for resolving disputes that arise under the contract. In this case, the *Doctrine of Separability* would not be useful to insulate the arbitration agreement from the consequences of its invalidity: the arbitration agreement would be affected by the nullity that specifically refers to it and the parties' agreement, on which the arbitral Tribunal would have to base its jurisdiction, would be lacking.

357. Even if this scenario can happen in theory, however, in practical terms it is a very rare occurrence. It would be extremely strange if the parties to a contract had decided to resort to some form of illegality, say, corruption, specifically to conclude the compromissory clause. And, even when this were to be case, evidence would be very difficult to gather. In *World Duty Free v Kenya*, for example, the investor had paid a substantive bribe to government officials to secure

[446] Martin, T. A. «International Arbitration and Corruption: An Evolving Standard.» *International Energy and Mineral Arbitration, Mineral Series*, 2003: 1 – 15. Raeschke-Kessler H. & Gottwald D. (2008) *op.cit*.
[447] Mayer, P. «L'Autonomie de l'Arbitre International dans l'Appreéciation de sa Propre Compétence.» *Collected Courses of the Hague Academy of International Law*, 1989: 319 - 326.

a contract, in which an ICSID arbitration clause was included for purposes of dispute resolution. Whereas it was possible to demonstrate with ease the existence of corruption with respect to the main contract, no evidence was adduced as to any corruption affecting specifically the arbitration agreement. According to the Tribunal:

> *"the bribe was no separate agreement or otherwise severable from the contract, but nevertheless no evidence was adduced (…) to the effect that the bribe specifically procured [the arbitration agreement]."*[448]

358. The second situation would present itself when *the ground upon which the main contract is invalid is identical to the ground upon which the arbitration agreement is invalid*.[449] Amongst all authorities, this case was explained with the most clarity by Lord Hoffman in the famous case *Fiona Trust*. The judge referred to the case of a contract whose signature by one of the parties had been forged: in this case, the consent of the parties would clearly be lacking both with respect to the main contract, and with regard to the compromissory clause.

359. A dubious case of applicability of the *Doctrine of Separability* concerns the case of an inexistent contract, in which the arbitration clause would also be deprived of its object. According to Sanders, for example:

> *"[l'autonomie de la clause]ne saurait justifier la compétence de l'arbitre dans l'hypothèse où le contrat est inexistant, et en conséquence, la clause compromissoire dépourvue d'objet".*[450]

360. Admittedly, however, this is not a position universally shared by scholarship.[451] Also as regards case law, positions diverge. In the case *Ducler*, for

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[448] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006, para 174.
[449] Lord Hoffman, Fiona Trust Holding Corp v Privalov [2007] UKHL 40.
[450] Sanders, P. «L'Autonomie de la Clause Compromissoire.» in *Hommage à Frederic Eisemann : une Initiative de la Chambre de Commerce Internationale*, Eisemann, F. Paris : International Chamber of Commerce, 1978: 31 - 50. See also Gout: « *il ne faut pas dire que le contrat n'est pas valable, il faut dire qu'il ne s'est pas formé, qu'il n'existe pas. Dans un tel cas, le principe de l'autonomie de la clause compromissoire ne peut pas aller jusqu'à permettre de la faire jouer ».* Gout, A. P. «L'autonomie de la Clause Compromissoire en Matière d'Arbitrage Interne» *Revue de l'Arbitrage*, 1999: 358 – 361, 360.
[451] See for example Fouchard, P. Gaillard, E. and Golmand, B, *Traité de l'arbitrage commercial international*, Paris, Litec, 1996, 226: "*qu'écarter l'autonomie de la convention d'arbitrage au motif que l'une des parties allègue*

example, the Paris Court of Appeal explained that *the arbitration clause is completely separable (...) from the main agreement, the inexistence or nullity of which have no effect on it (...)*"[452] The position has been confirmed by the French Court of Cassation in *Omexen v Hugon*.[453] The Italian Court of Cassation, on the other hand, determined that the inexistence of the contract also has an impact on the arbitral clause.[454] While this problem is not relevant for the purposes of this dissertation, and therefore needs not be discussed in any further length here, it is worth noting that the formulation of Article 6.9 of the new ICC Rules confirms the validity of the French position, when providing that:

> *"Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void".*[455]

2. The Status of the Doctrine of Separability as a General Principle of International Arbitration

361. The *Doctrine of Separability* has not always been part of the landscape of arbitration, including international arbitration, and the principle of autonomy of the compromissory clause *vis à vis* the main commercial transaction encapsulated in the contract took time to be recognised. Part of this situation can be explained by the fact that *domestic legislations* were for a long time pervaded by anti-arbitration sentiments. This was the case in France, where the Napoleonic Code had outlawed the enforcement of arbitral clauses.[456] In England, the situation was not dissimilar and, in general, in common law, the affirmation of the *Doctrine of Separability* has

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l'inexistence du contrat principal, alors que la distinction entre nullité et inexistence est souvent malaisée, que la notion d'inexistence est difficile à cerner et en tout cas d'application exceptionnelle, serait prendre le risque de donner prise aux manœuvres dilatoires que la consécration du principe d' autonomie a pour but empêcer".

[452] Paris Court of Appeal, Siemens v Ducler, *Revue de l'Arbitrage*, 1990, 675.

[453] Omexen v Hugon *Revue de l'Arbitrage*, 2006, 103.

[454] Cassazione Sezioni Unite 412/2007.

[455] ICC Rules 2017, 1st March

[456] Samuel, P. «Separability in English Law - Should an Arbitration Clause Be Regarded as an Agreement Separate and Collateral to a Contract in Which it is Contained.» *Journal Internal Arbitration*, 1986, 95 – 109.

been slow and met with significant resistance.[457] For example, in a decision dating back to 1746, *Kill v Hollister*, a court found that arbitral clauses are clauses whose purpose is to oust an ordinary court's jurisdiction, and, as such, they are incapable of specific performance.[458] Their autonomy from the main contract to which they attach was therefore denied. In the landscape of international commercial arbitration things were not different either. The famous international arbitration case decided by Judge Lagergren in 1963, mentioned previously, is a case in point, also in consideration of the fact that the question of separability arose in the context of accusations of criminal conduct between the Parties.

362. The claimant, a well connected and influential engineer from Argentina, entered into an agency agreement with a British company, the respondent, to sell equipment to the Argentinean Government. The contract provided that the claimant would receive a significant commission in exchange for his services of mediation with the Argentinean Government. Despite the initial agreement, over the course of several years the claimant failed to make any sales whatsoever, leading the respondent to retain another agent in the intervening period, to whom it paid £1 million. The following year, the claimant surprisingly sold approximately £28 million worth of electrical equipment to the Argentine government and demanded his previously agreed upon commission, which the respondent refused to pay. During the course of the ensuing ICC arbitration, the respondent conceded that its sole reason for retaining the claimant was *the quite remarkable degree of influence which he had with the political appointees of the Peronista Government of the time*.

363. The Arbitrator before whom the case was brought refused to hear the case and to entertain its jurisdiction over the matter of the claimant's compensation. The Arbitrator found that the agency agreement between the Parties aimed at procuring the various contracts was tainted by corruption and explained that:

> *"[T]here exists a general principle of law recognized by civilized nations that contracts which seriously violate bonos mores or*

[457] Svernlov, C. «What Isn't, Ain't the Current Status of the Doctrine of Separability.» *Journal of International Arbitration*: 1991, 37- 49.
[458] Kill v. Hollister, 95 Eng. Rep. 532, 532 (K.B. 1746)

international public policy are invalid or at least unenforceable and that they cannot be sanctioned by the courts or arbitrators (...) such corruption is an international evil; it is contrary to the good morals and to an international public policy common to the community of nations".[459]

364. With this, he refused to hear the case because:

"Parties engaging in a venture involving "gross violations of good morals and international public policy (...) must realise that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunal) in settling their disputes"[460]

365. As mentioned earlier, this approach has now changed and separability is today a cornerstone principle of arbitration. A modern formulation of the principle is encapsulated in Article 16(1) of the Model UNCITRAL Law of 2006, according to which an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. More specifically,

"[a] decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause[461]*".*

366. The Model Law testifies to the developments that presented themselves virtually in every country,[462] that reversed the idea that the arbitration clause could not be separated from the main contract on which it insisted.

367. For instance, at the level of domestic jurisdiction, nowadays Article 1447 of the French Code of Civil Procedure[463] provides that an arbitration agreement is independent of the contract to which it relates and it shall not be affected if such contract is void. The provision codifies judicial developments well

[459] ICC Award No. 1110 of 1963, para 16.
[460] ICC Award No. 1110 of 1963, para 23.
[461] Article 16(1) of the Model UNCITRAL Law of 2006
[462] In terms of domestic jurisdictions, one can see for example England, Arbitration Act ss.7 and 30; Sweden, Arbitration Act ss.2 and 3; Switzerland, PIL Articles 178(3) and 186.
[463] For an interesting debate over the question of separability in France see Mayer, P. (1988) *op. cit*.

established in terms of case law. The French Court of Cassation , in the famous *Gosset* case, had explained that:

> *"In international arbitration, the arbitration agreement, whether entered separately or included in the legal instrument to which it relates, is always, save in exceptional circumstances (...) in complete legal autonomy, which excludes the possibility that it might be affected by the invalidity of the [main] act.*[464]

368. The position of the French Code of Civil Procedure is mirrored by Article 808(2)[465] of the Code of Civil Procedure of Italy, that similarly provides that:

> *"The validity of the arbitral clause must be assessed autonomously from the contract to which it is attached; however, capacity to enter into the contract includes capacity to stipulate the arbitral clause."*

369. Similar principles are also encapsulated, limiting the analysis to the Western World, in Portugal, in Article 21(2) of the Portuguese law on arbitration of 1986 and in Spain, in Article 22(1) of the law of 2003[466] and in Belgium, in Article 1697(2) of the Belgian Law.[467] In the Netherlands, the arbitration law provides that the arbitration agreement must be considered as a separate agreement from the main contract.[468]

370. The Swiss Arbitration Law, (The Federal Statute on Private International Law) at Article 178(3) indicates that the arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the

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[464] See Cour de Cassation, May 28, 2002, Bull. civ. I, No. 146 (reaffirming Gosset); Cour de Cassation April 4, 2002, Bull. civ. II, No. 68 (extending Gosset to domestic arbitration); see also Cour de cassation Octoebr 25, 2005, Bull. civ. I, No. 378;. See also Paris Court of Appeal, 17 January 2008, Sci Tilia C/ Systeme U Nord Ouest, "*La clause compromissoire présente par rapport à la convention principale dans laquelle elle s'insère, une autonomie juridique, qui exclut qu'elle puisse être affectée par l'inefficacité de cet acte; que par suite, l'éventuelle nullité de l'offre pour indétermination du prix est sans incidence sur la validité de la clause compromissoire »*

[465] Article 808(2) Code of Civil Procedure: "*The validity of the compromissory clause must be assessed autnomously from the contract to which it refers; however, power to enter into the contract includes power to agree on the compromissory clause.*"

[466] Poudret, J. F. et Al. *Comparative Law of International Arbitration*. Zurich: Sweet & Maxwell, 2007: 136.

[467] Keutgen, G. and Dal, G. A. *L'Arbitrage en Droit Belge et International*. Bruxelles: Bruylant, 1981: 30.

[468] Article 1053, Dutch Code of Civil Procedure.

arbitration agreement concerns a dispute which had not as yet arisen.[469] Even before the enactment of this Statute, Courts in Switzerland had recognised the principle by stating that, for instance, an arbitration agreement would not be affected by the circumstance that the main agreement between the two parties had been revoked.[470] In Germany, even before the entry into force of a law in 1997 that formalised the *Doctrine of Separability*, Courts had been applying it rather widely.

371. In UK law, after the initial reluctance to recognise the autonomy of arbitration clauses (as part of the general suspicion towards arbitration as a mechanism of dispute resolution), things began to take a different turn in line with a number of judgments rendered by the highest courts in the country. In 1942, for example, the House of Lord explained in *Heyamn v Darwins* that even in the event of termination of a main contract, the arbitration clause contained therein would still survive.[471] The Court specified that the arbitration clause would not survive in the event the contract was non-existent *ab initio*. Even though this position was a restrictive and qualified interpretation of the *Doctrine of Separability*, it still paved the way for a broader recognition of the principle in the years to come. And indeed, just two years later, the UK Court of Appeal was confronted with the question of the illegal nature of a re-insurance contract. It found that on the basis of the *Doctrine of Separability*, an arbitral Tribunal would have jurisdiction to pronounce over the matter even if the contract was to be considered as null *ab initio.*[472] This position is now sanctioned in Section 7 of the Arbitration Act of 1996 which provides that:

> "*unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (…) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement*.[473]

[469] Cordero-Moss, G. *International Commercial Arbitration: Different Forms and Their Features.* Cambridge: Cambridge University Press, 2013: 350.
[470] Poudret, J. F. (2007) *op.cit.*,136.
[471] Heyamn v Darwins [1942] AC 356 HL.
[472] Harbour Assurance v Kansa [1993].
[473] Section 7, 1996 Arbitration Act.

372. In US law, the *Doctrine of Separability* was established for the first time in 1967, by the US Supreme Court in the case *Prima Paint Corp v Flood & Conklin Mfg Co*, and has been confirmed in a number of cases ever since. [474]

373. In parallel with the emergence of the *Doctrine of Separability* as a principle of domestic arbitration, its scope started to extend to international arbitration. Today separability is applied without exception to cases brought before international arbitral commercial Tribunals, not least because of its incorporation into the arbitral rules of major arbitral institutions, as discussed below. For example, in the ICC case 6248, the arbitral Tribunal described the *Doctrine of Separability* in terms that confirmed its stability as a matter of law and generally wide application:

> *"The validity of an arbitration agreement cannot be contested on the ground that the main contract may not be valid. This principle of severability has long been recognized not only generally, but also specifically with respect to main contracts, which were found void on the ground of a violation of good moral and public policy. It follows from the now dominating doctrine of severability that this Arbitral Tribunal has jurisdiction in the present matter".* [475]

374. Even international tribunals other than investment or commercial arbitral tribunals, like the European Court of Human Rights, have recognised the central role of separability in consent based mechanisms of dispute resolution.[476]

375. Scholarship has aligned to this view. According to Luzzato, today the principle of autonomy is so widely recognised that it can be characterised as a general principle of international arbitration law.[477] Similarly, Dimolitsas held that separability is a general principle of international arbitration.[478] According to Fouchard, Gaillard and Goldman, separability is a genuinely transnational rule of

[474] Prima Paint Corp v Flood & Conklin Mfg Co, 388 US 396 (1967).
[475] ICC Case No. 6248, Yearbook Commercial Arbitration XIX (1994) at p. 126
[476] European Court of Human Rights, Stran Greek Refineries and Stratis Andreadis v Greece Dec. 9, 1994, Series A, No. 301-B; (1996) Review of Arbitration 283, 292, where the Court held that the unilateral termination of a contract does not take effect in relation to certain essential clauses of the contract, such as the arbitration clause. To alter the machinery set up by enacting an authoritative amendment to such a clause would make it possible for one of the parties to evade jurisdiction in a dispute in respect of which specific provision was made for arbitration.
[477] Draetta, U. et Al. *The Chamber of Arbitration of Milan Rules: A Commentary*. Milan: Jurispub, 2012: 185
[478] Dimolitsa, A. (1988), *op cit.*, 223.

international commercial arbitration".[479] Henry Motuslky indicated that the Doctrine of Separability is symptomatic of the emergence of an international legal order. And, other scholars, like Professor Douglas, maintain that the Doctrine of Separability is incorporated in the transnational principles that sustain international arbitration.[480]

376. If one wanted to resort to the language of the Statute of the International Court of Justice, the *Doctrine of Separability* could be considered as a *general principle of law common to civilised nations*[481]. And indeed, in the context of investment arbitration, the Tribunal in *Inceysa v Salvador* so expressed itself:

> *"[w]ithout attempting to define what the general principles of law are, the Tribunal notes that, in general, they have been understood as general rules on which there is international consensus to consider them as universal standards and rules of conduct that must always be applied and which, in the opinion of important commentators, are rules of law on which the legal systems of the States are based"*[482]

377. In addition to being a general principle of law, separability is also a principle of *Transnational Public Policy*.

378. Before explaining why this is the case, it must be clarified that the possibility to qualify the *Doctrine of Separability* as a principle of *Transnational Public Policy* is not affected by the debate as to whether separability is a substantive, as opposed to a procedural rule of international law. There is some trace of this debate in scholarship, which recognises generally that "*the line of demarcation between the substantive and the procedural can sometimes be*

[479] Sanders, P. (1978), *op. cit*., 31.
[480] Douglas, Z. (2014), *op. cit*., 158. See also Solimene, F. «The Doctrines of Kompetenz-Kompetenz and Separability and their Contribution to the Development of International Commercial Arbitration.» *The International Journal of Arbitration, Mediation and Dispute Management*, 2014: 249 – 255, 253, according to whom: "*Today, the principle of the separability is widely applied and recognised as a general principle included in leading institutional arbitration and in arbitration statutes evidenced in practice and by leading writers on the topic*."
[481] Article 38 Statute of the International Court of Justice.
[482] Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award of 2 August 2006, para. 227.

fussy".[483] With regard in particular to separability, unlike the perhaps more intuitive position whereby this principle is procedural in nature, in as much as it can result in procedural decisions, as opposed to decisions on the merits, some scholars have held that:

> *[S]eparability can be seen as a principle of substantive law which enlarges the effective range of the procedural law principle of competence-competence. Working in tandem, the two doctrines prevent attempts to thwart the parties' true intent, which is usually to have all disputes under the contract resolved by arbitration. They also promote the arbitral process generally.*[484]

379. As mentioned, however, the qualification of the *Doctrine of Separability* as a substantive or procedural rule does not affect its status under international law as a principle of *Transnational Public Policy*. If separability is a substantive rule, then for sure it can be part of *Transnational Public Policy*; there is no question that a substantive rule can be a principle of *Transnational Public Policy*, and in fact, for the most part, public policy, including in its international dimension, is made of substantive rules. However, also rules that govern proceedings can rise to the status of *Transnational Public Policy*, when they crystallise principles of procedural justice shared among nations, and by the international community. Principles of procedure in international arbitration do not depart from this consideration. In the context of the Commentary to the Model Law on International Commercial Arbitration, the UNCITRAL Commission noted for example that:

> *"[i]t was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural aspects".*[485]

[483]Mantilla-Serrano, «F. Towards a Transnational Procedural Public Policy» *Arbitration International*: 2004, 333–354, 335.
[484] Lee, J. T. T. «Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore», *Singapore Academy Law Journal*, 1995: 421 – 437, 424. Broches, A. *Commentary on the UNCITRAL Model Law on International Commercial Arbitration,* The Netherlands*:* Kluwer Law, 1990 at para 76.
[485] Broches, A. *Commentary on the UNCITRAL Model Law on International Commercial Arbitration,* The Netherlands*:* Kluwer Law, 1990 at para 297.

380. The International Law Association also recognises that procedural norms can become a part of public policy, and of *Transnational Public Policy*, in their international projection. The Interim Report prepared by the Committee on International Commercial Arbitration of the International Law Association on Public Policy as a Bar to Enforcement of International Arbitral Awards specifies that "*substantive public policy goes to the recognition of rights and obligations by a tribunal or enforcement in court in connection with the subject matter of the award, as opposed to procedural public policy, which goes to the process by which the dispute [is] adjudicated*."[486]

381. Procedural *Transnational Public Policy* is no less important than substantive *Transnational Public Policy,* especially in consideration of the fact that rules of procedure are oftentimes aimed at safeguarding absolutely central values of the forum, or, for what is relevant here, of the community of nations. This parity in terms of importance can be observed in particular at the level of the sanctions that can be inflicted for breach of procedural *Transnational Public Policy* in the context of arbitral proceedings. Just like substantive public policy constitutes a bar to the enforcement of arbitral awards, procedural public policy can prevent the recognition and enforcement of arbitral decisions that have been adopted in breach of principles such as the right to be heard, right to present one's case fully, the equality of arms, the duty to notify the commencement of the arbitration, and so on. All rules that have a clear procedural connotation;[487]

382. Once ascertained that also procedural rules can attain the level of public policy and that procedural public policy is not subaltern to substantive public policy, when is it that a procedural rule becomes *Transnational Public Policy*? As noted by Mantilla Serrano:

> *"[w]hen the great majority of nations has agreed – as that agreement is evidenced by international conventions and/or by the similarity of arbitrations laws – to abide by the same*

[486] Sheppard, A. «Interim Report prepared by the Committee on International Commercial Arbitration of the International Law Association on Public Policy as a Bar to Enforcement of International Arbitral Awards», *Arbitration International* , 2003: 217 – 248, 217.
[487] Mantilla-Serrano, F. (2004) *op.cit*., 335.

principles with respect to international arbitration procedure, we can fairly say that there exist a "transnational" procedural public policy".[488]

383. With regard to international arbitration in particular, Cairns notes that:

"Transnational public policy is the 'common core' of the international public policy of many states, which by its very nature also reflects fundamental principles of public international law. It is the amalgam of the public policy of multiple forums, but is the public policy of no individual forum. It embodies the transnational consciousness and solidarity of international commercial arbitration. Accordingly, transnational public policy is an expression of international arbitral practice, implicitly accepted by any party to an international arbitration agreement".[489]

384. These definitions are fitting with respect to the *Doctrine of Separability*, given its wide recognition and application, detailed in the preceding pages. And indeed, scholars have referred to separability as *Transnational Public Policy*. Professor Douglas, for example, maintains that the *Doctrine of Separability* "is incorporated in the transnational principles that sustain international arbitration".[490]

385. It could be argued that the mere fact that separability is ordinarily applied by international arbitral tribunals and is recognised in the arbitration laws of a number of countries is not enough to raise it to the level of *Transnational Public Policy*. This, on the basis of the consideration that not every singe general principle of law, widespread as its application is, is a norm of *Transnational Public Policy*. Especially if one adheres to restrictive conceptions of *Transnational Public Policy*, this categories would be reserved to norms that correspond to the most fundamental values that the international community seeks to promote – and a procedural rule like separability might seem, *prima facie*, not to follow in this

[488] Mantilla-Serrano, F. (2004) *op.cit*., 335.
[489] Cairns, D. «Transnational Public Policy and the Internal Law of State Parties» *Transnational Dispute Management*, 2009, 1 – 18, 2.
[490] Douglas, Z. (2014), *op. cit*., 158. See also Solimene, F. «The Doctrines of Kompetenz-Kompetenz and Separability and their Contribution to the Development of International commercial arbitration Arbitration.» *The International Journal of Arbitration, Mediation and Dispute Management*, 2014: 249 – 255, 253, according to whom: *Today, the principle of the separability is widely applied and recognised as a general principle included in leading institutional arbitration and in arbitration statutes evidenced in practice and by leading writers on the topic*.

category. However, it must be remembered that the reason why the *Doctrine of Separability* established itself was to guarantee the very survival and the viability of arbitration as an effective method of dispute resolution. But for separability, any party wanting to escape the jurisdiction of an arbitral Tribunal would simply have to allege the invalidity of the underlying contract or of the transaction to which the agreement to arbitrate referred to. *The value that separability pursues, therefore, is that of allowing international arbitration to exist as a mechanism of dispute resolution*. This underlying value to the notion of separability certainly corresponds to a principle of *Transnational Public Policy*.

386. And, in fact, other rules that are similarly aimed at avoiding that arbitration may be frustrated as a means of dispute resolution have attained the status of *Transnational Public Policy*. One can consider the so called "internal law principle", that prevents a State from invoking its international law to avoid contractual obligations that it may have undertaken to submit a dispute to international arbitration. Cairns notes, in this regard, that " *[t]here is a well established principle of transnational public policy that a State party cannot improperly invoke its own internal law to avoid its contractual obligation to arbitrate*".[491]

387. By the same token, the enforceability of arbitral awards, as disciplined by international conventions, corresponds to a principle of *Transnational Public Policy*, once again connected with the need to maintain and preserve the vitality of international arbitration as a viable and effective means of dispute resolution. For example, Ozumba, speaking of the public policy exception to enforcement of arbitral awards, explains in the following terms that the very enforcement of arbitral awards corresponds to a principle of public policy:

> *"Interpretation and application of the public policy exception in most jurisdictions is usually on the side of enforcement. This is*

[491] Cairns, D. «Transnational Public Policy and the Internal Law of State Parties» *Transnational Dispute Management*, 2009, 1 – 18, 2.

termed in international arbitration parlance as the pro-enforcement bias. Pro-enforcement is itself a public policy."[492]

388. If the preservation of effectiveness of arbitral awards (by guaranteeing their enforcement) is a principle of public policy, then all the more so is the preservation of arbitration as such as a mechanism of dispute resolution, achieved by the *Doctrine of Separability*.

3. The Application of the Doctrine of Separability to International Investment Arbitration

389. Some scholars believe that the *Doctrine of Separability* developed in international commercial arbitration, as described above, cannot be applied to investment arbitration, due to some structural differences between these two forms of dispute resolution. For instance, according to Professor Bernardo Cremades,

"In international commercial arbitration the established doctrine of the separability of the arbitration agreement from the main contract insulates the jurisdiction of the arbitral tribunal from corruption affecting the main contract. When corruption affects the main contract, the substantive rights of the parties are involved and the matter must be dealt with on the merits. Only if the corruption directly affects the execution or performance of the arbitration agreement does an issue as to jurisdiction arise.

This analysis, based on the separation of the arbitration agreement from (the potentially null and void) substantive rights under the main contract, sits very uneasily in the framework of investment arbitration. Firstly, in a treaty-based arbitration there are not two contracts, but a treaty (containing substantive and procedural rights) and an arbitration agreement. Secondly, no action by the investor will have the effect of making the BIT invalid or null and void"[493]

390. The analysis by Professor Cremades does not seem persuasive. In international commercial arbitration, separability operates with regard to two

[492] Ozumba, O. «Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency? » 2010, Available at: http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car13_8_127246631.pdf
[493] Cremades, B. (2005), *op. cit*., 203- 220.

"elements": the substantive agreement that memorialises the rights and the duties of the parties, and the agreement to subject any dispute that may occur with regard to the substantive agreement to arbitration. If these two "elements" are transposed to the international investment arena, the substantive agreement corresponds to the specific investment contract entered into by the investor with the Host State; the agreement to subject the dispute to arbitration corresponds to the dispute resolution clause contained in the applicable BIT – which constitutes an open offer made by the Host State to the investor to sort out any dispute by means of arbitration - and by the investor's acceptance of that offer.

391. Professor Cremades' statement according to which: *in a treaty-based arbitration there are not two contracts, but a treaty (containing substantive and procedural rights) and an arbitration agreement* is therefore incomplete: in treaty based arbitration there is also normally a contract that contains the substantive rights and duties of the parties with regard to the specific investment made by the investor in the Host State, and that is protected by the applicable BIT. For example, if company's X investment in country Y concerns the construction of infrastructures, the rights and duties of the parties with respect to the building of the infrastructure will be memorialised in an investment contract; in the same vein, if the investment consists in the setting up of a production plant, or in the purchase of assets, or in the exploitation of certain resources, the terms of the agreement will be memorialised in a contract. In addition, even if an investment contract did not exist in a specific case, as noted by Steingruber:

> "*In investment arbitration the principle of autonomy and independence must be applied not only when there is an existing investment contract containing an arbitration clause, but also in cases where the Host State consent is expressed in a national investment law of in an investment Treaty. When the foreign investor expresses its consent to arbitration after a dispute has arisen, the situation is comparable to the one of a submission agreement, where it is generally self evident that it is an autonomous agreement.*"[494]

[494] Steingruber, A . M. Consent in International Arbitration, Oxford Univerisity Press. 5.103

392. The agreement to arbitrate, also, which is perfected by the investor's acceptance of the State's open offer to arbitrate, is a contract. Professor James Crawford, in discussing Republic of Ecuador v Occidental, held that:

> "*the separate agreement to arbitrate an investment claim under a BIT is a contract, and not a Treaty.*[495]"

393. And, in more general terms, Prof. Steingruber notes in his work on consent in international arbitration that "*many scholars – and public international lawyers, explain investment arbitration based on an investment treaty with the juridical figure of the contract*".[496]

394. It is beyond the point, also, to state, as Prof. Cremades does, that *no action by the investor will have the effect of making the BIT invalid or null and void.* This may well be the case, but, as explained, the BIT is not the international investment arbitration equivalent of the substantive contract in international commercial arbitration; rather, the contract concerning the investment protected under the Treaty is. In the example made above, therefore, the question is not whether the BIT applicable between company X and State Y is tainted by any form of illegality, but rather whether the investment contract is. And the transactions encapsulated in the investment contract can certainly be affected by illegality, including of a criminal nature, as discussed at length in Chapter 3 of this dissertation.

395. Other scholars have correctly framed the terms of the equivalence of these legal categories in international commercial and investment arbitration. For instance, Alexis Mourre, commenting on the strict application of the notion of severability in international commercial arbitration notes as follows:

> *"It is therefore preferable to apply the principle of severability strictly, and to adopt an approach according to which claims based on fraud, although they may not be admissible, and hence, not decided on the merits, are nevertheless arbitrable. The same*

[495] Crawford J, Speech given at the Freshfields Lecture on International Arbitration London, 29 November 2007.
[496] Steingruber, A . M. (2015) *op.cit*., 5.53.

> *reasoning can in our view be adopted in public international law arbitrations. The case would be that the investment contract giving rise to a BIT or ICSID arbitration has been obtained by corrupting the representative of the state or of a public entity. In such cases, the alleged corruption cannot affect the validity of the treaty upon which the consent to arbitrate is based".*[497]

396. A recent arbitral case explains the contours of this equivalence in practical terms, and is therefore worth quoting in this context. In *Plama v Bulgaria*, the Tribunal was faced with a claim brought under the Energy Chater Treaty concerning breach by Bulgaria of the standards of protection of an investment made under the Treaty. The investor, however, had committed some illegality in the making of the investment (misrepresentation and fraud), and the Respondent State attempted to raise a *Defence of Illegality* to the effect of disabling the jurisdiction of the Tribunal. The Tribunal, in rejecting the defence, made the following analysis:

> *"[t]he alleged misrepresentation relates to the transaction involving the sale of the shares of Nova Plama by EEH to PCL and the approval thereof given by Bulgaria in the Privatization Agreement and elsewhere. It is not in these documents that the agreement to arbitrate is found. Bulgaria's agreement to arbitrate is found in the ECT, a multilateral treaty, a completely separate document. The Respondent has not alleged that the Claimant's purported misrepresentation nullified the ECT or its consent to arbitrate contained in the ECT. Thus not only are the dispute settlement provisions of the ECT, including Article 26, autonomous and separable from Part III of that Treaty but they are independent of the entire Nova Plama transaction; so even if the parties' agreement regarding the purchase of Nova Plama is arguably invalid because of misrepresentation by the Claimant, the agreement to arbitrate remains effective."*[498]

397. Even more recently, on 30 August 2018, the arbitral Tribunal in Chevron v Ecuador framed the relationship between the agreement to arbitrate and the BIT in terms of separability. It held:

[497] Mourre, A. (2014), *op.cit.*, 99.
[498] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jusridiction of 8 February 2005, para 130.

> *"The Parties' consent is contained in the separate Arbitration Agreement subject to international law between the Claimants and the Respondent, that was formed upon the Claimants' written acceptance (by their Notice of Arbitration) of the Respondent's standing, general offer to arbitrate contained in Article VI of the Treaty. Under international law, the Parties' Arbitration Agreement, made pursuant to Article VI(2) of the Treaty, is legally autonomous, or "separable", from other provisions of the Treaty.*[499]*"*

398. In terms that are even more explicit for the purposes of the present thesis, the Tribunal in *Malincorp v Egypt* recognised the full applicability of the principle of the autonomy of the arbitral clause of commercial arbitration, also to investment arbitration, and used this basis to rule out that the investor's illegality could deprive the Tribunal of its jurisdiction. It held:

> *"The solution derives, first, from the principle of autonomy of the arbitration agreement, a principle so fundamental that it also has its place in investment arbitration. According to that principle, defects undermining the validity of the substantive legal relationship, which is the subject of the dispute on the merits, do not automatically undermine the validity of the arbitration agreement. Thus, an arbitral tribunal is competent to decide on the merits even if the main contract was entered into as a result of misrepresentation or corruption. Only defects that go to the consent to arbitrate itself can deprive the tribunal of jurisdiction. In the present case, there is nothing to indicate that the consent to arbitrate, as distinct from the consent to the substantive guarantees in the bilateral Agreement, was obtained by misrepresentation or corruption or even by mistake. The allegations of the Respondent relate to the granting of the Concession. However, it is not the Contract that provides the basis for the right to arbitrate, but the State's offer to arbitrate contained in the Agreement and the investor's acceptance of that offer. The offer to arbitrate thereby covers all disputes that might arise in relation to that investment, including its validity."*[500]

[499] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23, Second Partial Award of 30 August 2018, para 785. The footnote to the passage quotes, in turn: "*S. Schwebel, International Arbitration: Three Salient Problems (1987), "Part 1: The Severability of the Arbitration Agreement", p. 60ss. See also Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para 212, CLA-67, RLA-350; Concurring and Dissenting Opinions of Howard M. Holtzmann with respect to Interlocutory Awards on Jurisdiction in Nine Cases Containing Various Forum Selection Clauses (Cases Nos. 6, 51, 68, 121, 140, 159, 254, 293 and 466), 5 November 1982, 1 Iran-US Claims Tribunal Reports 284, p. 292"*

[500] Malicorp Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/08/18, Award of 7 February 2011, para 119.

399. If set in the proper terms, the equivalence between the legal categories of international investment arbitration and international commercial arbitration for purposes of applying the *Doctrine of Separability* is evident. Once the fundamental incompatibility predicated by some is overcome, other considerations militate in favour of the application of the *Doctrine of Separability* also to international investment arbitration.

400. The first consideration concerns the procedural rules applicable to international investment arbitration. In particular, if one excludes the specificities of the system created by the ICSID Convention, that deals with investment arbitration only, investment-State disputes are also conducted on the basis of UNCITRAL Rules. These are the most commonly used set of rules for international commercial arbitration.[501] According to Article 23(1) of the UNCITRAL Rules on International Commercial Arbitration, *an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause*. By the same token, if one looks at the LCIA Rules, Article 23(2) says that *an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail (of itself) the non-existence, invalidity or ineffectiveness of the arbitration clause.*[502] Also LCIA Rules provide the procedural framework of several investment arbitrations.

401. In this regard, as is noted generally by a scholar,

> *"The doctrine[s] of separability […], which evolved within the laboratory of commercial arbitration, [is] thus applicable to investment treaty arbitration by the express terms of the same*

[501] Douglas, Z. *The International Law of Investment Claims*. Cambridge, Cambridge Univerisiry Press: 2009, 31–2.
[502] See generally Art. 6.4 of ICC Rules of Arbitration ; JAMS Rules, Art. 17.1 ; UNCITRAL Arbitration Rules Art. 2.1; 15.2 ; AAA International Arbitration Rules, Art. 15.2 ; LCIA Arbitration Rules, Art. 23.1 ; Swiss Rules of International Arbitration, Art. 21.221.2 ; WIPO Arbitration Rules, Art. 36(B)).

> *arbitration rules, laws and conventions that govern the procedure (...).*[503]

402. In addition to being directly applicable to investment arbitration by virtue of the express provisions of certain arbitration rules, the *Doctrine of Separability* is also applicable due to its status as a general principle of law under Article 38 of the Statute of the International Court of Justice, discussed in the previous pages. This is confirmed, for instance, by Douglas, according to whom separability applies to investment arbitration because of its

> *"[...]incorporation of transnational principles that sustain international arbitration more generally".*[504]

403. Under this guise, the *Doctrine of Separability* operates as a proper source of norms in international law. Indeed, also in international investment arbitration, the *normative* power of general principles, and their ability to create binding rules is ordinarily invoked. The Tribunal in the case *AMCO*, for instance, applied the rule of the compensation of damages in the components of *damnum emergens* and *lucrum cessans* because it felt that this was a general principle of law. In calculating the relevant heads of damages, it opined: *full compensation of prejudice, by awarding to the injured party the damnum emergens and the lucrum cessans is a general principle of law which can be considered as a source of international law.*[505]

404. While the reasons for the application of the Doctrine of Separability to international investment arbitration have been identified, there are some considerations that have to be made regarding the way in which the Doctrine operates in international commercial arbitration and in international investment arbitration, respectively, due to the specificities in which consent to arbitration is manifested in each of these two modalities of dispute resolution. The jurisdiction of an international commercial Tribunal that has to pronounce over a future dispute

[503] Douglas, Z. (2014) *op.cit*., 158.
[504] Douglas, Z. (2014) *op.cit*., 158.
[505] Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, 504.

regarding a contract is normally derived from a compromissory clause that is contained in the contract, and is negotiated at the same time when the contract encapsulating the main commercial transactions is negotiated.[506] This means, essentially, that there is no time difference and no separation between the perfecting of the substantive contract that encapsulates the commercial transaction, and the perfecting of the consent to submit a potential future dispute to international arbitration.

405. This does not happen in international investment arbitration, in which the expression of consent by the parties happens in a different manner.[507] Also in investment treaty arbitration, the BIT normally contains a clause that provides for arbitration in the event that a dispute regarding a certain investment occurs between the parties.[508] However, consent to arbitration does not occur by simply entering into an investment agreement.[509] To the contrary, the inclusion of a compromissory clause in a BIT constitutes a unilateral offer by the Host State to arbitrate any dispute that may arise with respect to a certain investment under the Treaty; consent to arbitration, however, is only perfected *when the private investor files its notice of arbitration under the BIT*.[510]

[506] Ousmane, D. *Le Consentement des Parties à l'Arbitrage International*. Paris: Presses Universitaires de France, 2010: 85. See also generally Limbach, F. *Le Consentement Contractuel à l'Epreuve des Conditions Générales. De l'Utilité du Concept de Déclaration de Volonté*. Paris, 2004. The alternative course of action would be to submit a dispute that already exists to arbitration, through a compromis.

[507] Fox, H. «States and the Undertaking to Arbitrate.» *International and Comparative Law Quarterly*, 1988: 1 – 29, 1; Blysckack, P. «State Consent, Investor Interests and the Future of Investment Arbitration: Reanalyzing the Jurisdiction of Investor-State Tribunals in Hard Cases» *Asper Review of International Business and Trade Law*, 2009: 99 – 170.

[508] Since the very beginning, cases have been brough to ICSID on the basis of clauses contained in investment treaties. See for example Holiday Inns v. Morocco, Lalive, The First 'World Bank' Arbitration, 51 British Year Book of International Law 128 (1980), Adriano Gardella v. Ivory Coast, 1 ICSID Reports 287; Kaiser Bauxite v. Jamaica, 1 ICSID Reports 301, 303/4; AGIP v. Congo, 1 ICSID Reports 313; Benvenuti & Bonfant v. Congo, 1 ICSID Reports 340/1; Amco v. Indonesia, 1 ICSID Reports 392; Klöckner v. Cameroon, 2 ICSID Reports 10, 13; SOABI v. Senegal, 2 ICSID Reports 179, 204, 272; LETCO v. Liberia, 2 ICSID Reports 347, 350/1; Atlantic Triton v. Guinea, 3 ICSID Reports 17; Vaccum Salt v. Ghana, 4 ICSID Reports 329; Mobil Oil v. New Zealand, 4 ICSID Reports 147, 158.

[509] Generally see Pascual Vivess, F. «Consent to ICSID Arbitration: Recent Conventional and Arbitral Practice.» *Transnational Dispute Managemet*, 2011: 1 -18.

[510] Newcombe, A. and Paradell, L. *Law and Practice of Investment Treaties: Standards of Treatment*. New York: Kluwer, 2009, 180. See also Cremades, B. (2005) *op.cit*., 208: "*Like international commercial arbitration, investment arbitration requires the parties' 'consent in writing'. In international commercial arbitration this consent is expressed in a mutual and contemporaneous exchange of promises between the parties in the form of a written arbitration agreement. In contrast, the State parties in a BIT make an open offer of arbitration to investors from the other State. The investor's acceptance of that offer, and so the formation of the arbitration agreement, does not arise until the investor commences arbitration."*

406. In *Lanco International v The Argentine Republic*, for instance, the Tribunal explained as follows:

> *"In the case before us the consent of the Argentine Republic arises from the ARGENTINA-U.S. Treaty, in which the Argentine Republic has made a generic offer for submission to ICSID arbitration. (...)*
>
> *The written consent by the Argentine Republic is set forth in the ARGENTINA-U.S. Treaty; as concerns the investor (...) such consent was set forth in its letter of September 17, 1997, and in the request for arbitration, which was filed with ICSID on October 1, 1997".*[511]

407. This situation determines a series of consequences, some of which are also specifically relevant for the purposes of the application of the *Doctrine of Separability*.

408. First, in order for consent to arbitration to be perfected, also from the perspective of the investor, some conditions precedent must occur – the most notable of which is that the investor must have made an investment in the Host State. Without an investment made in the Host State, consent to arbitration cannot exist, since there would be no grounds for the investor to bring suit against the Host state. The unilateral offer to arbitrate could not be accepted by an investor who has not entered into a transaction that can be qualified as investment.

409. Second, since consent to investment arbitration is not perfected until the time the private investor commences proceedings under the investment treaty, the unilateral offer made by the Host State with respect to the arbitration of certain claims can be revoked until such proceedings are commenced. This question was expressly addressed in the context of the negotiation of the ICSID Convention. In a report prepared by Aaron Broches, the father of the Convention, it was explained that a unilateral offer by a Host State:

> *"Would not be binding on the State which had made it until it had been accepted by an investor. If the State withdraws its unilateral*

[511] Lanco International Inc. v. The Argentine Republic, ICSID Case No. ARB/97/, Preliminary Decision on Jurisdiction, 8 December 1998, *International Law Materials*, 2001: 457, 471.

> *statement [of consent] by denouncing the Convention before it has been accepted by any investor, no investor could later bring a claim before the Centre. If, however, the unilateral offer of the State has been accepted before the Denunciation of the Convention, then disputes arising between the State and the investor after the date of denunciation will still be within the jurisdiction of the Centre".*[512]

410. This remains the case not only in ICSID arbitration, but also in the case of investment arbitration based on other rules. Investor-State arbitration requires the consent of the parties to the dispute regardless of which arbitration procedure is employed. Arbitration under the UNCITRAL Rules, for example, is only permitted "[*w]here parties have agreed that disputes between them (...) shall be referred to arbitration under the UNCITRAL Arbitration Rules*." An investor must always perfect a State's treaty-based offer of consent in order to form an arbitration agreement that will provide the basis for investor-state proceedings.

411. Third, and this is the relevant aspect from the perspective of the *Doctrine of Separability* – in light of what has been explained above, the substantive economic transaction between the parties, on the one hand, and the agreement to arbitrate, on the other hand, are not perfected at the same time in investment arbitration. There may be a considerable amount of time, years, or even decades, before the investor accepts the unilateral offer to arbitrate made by the Host State. This may in fact never happen at all, if a dispute between the parties never arises and if, even if it does, it is not brought to arbitration. This is quite a different situation from the one described in international commercial arbitration, where the main contract and the dispute resolution provisions are normally negotiated at the same time.

412. International investment arbitration therefore provides, theoretically, an even more fertile legal framework than international commercial arbitration for the application of the *Doctrine of Separability*. In international commercial arbitration, the *Doctrine of Separability* is a *legal fictio* and serves the purpose of untying juridically two agreements – the one on the substance and the one on dispute

[512] ICSID, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Documents Concerning the Origin and the Formulation of the Convention, 1968, at 1009-1010 (1968).

resolution, that are from the material and temporal perspective strictly connected. In international investment arbitration, on the other hand, the two agreements are materially and temporally separate and resorting to a *fictio iuris* is not necessary to pronounce the autonomy between the investment tainted by illegality and the consent to arbitration.

413. However, this theoretical clarity about the applicability of the *Doctrine of Separability* in international commercial and investment arbitration is not always followed in practice; on the contrary, it appears that in practice, oftentimes exactly the opposite happens.

414. Arbitral Tribunals in international commercial arbitration have given precedence to the *Doctrine of Separability* when faced by transactions affected by criminality, and hence to the preservation of the chosen modalities of the settlement of a dispute, and to party autonomy. This stance in international commercial arbitration pursues a very specific objective. That of preserving arbitration as a viable mechanism of dispute resolution, which would not be the case if the parties could frustrate the jurisdiction of the arbitral Tribunal by simply invoking the illegal conduct of one of them.

415. In international investment arbitration, the *Doctrine of Separability* has not so far found the success that it has had in international commercial arbitration; as shall be seen later, despite the ease with which, for the reasons explained earlier, the doctrine could be applied, criminality in investment arbitration has been addressed in a variety of manners, not always compatible with, and at times diametrically opposed to, the *Doctrine of Separability*.

416. One of the reasons why this has happened is that a supposed *additional layer of incompatibility* (in addition to the alleged structural incompatibility discussed just a few pages ago) exists between international commercial arbitration and international investment arbitration that prevents in general the *migration* of legal principles developed in one field, to the other. According to this line of thought, given the differences in nature, purpose and ethos between international

commercial arbitration and international investment arbitration, the former does not constitute a valid *tertium comparationis* from which to borrow, in an exercise of legal comparison, to address problems that may present in the latter. In this sense, the two systems of arbitration would be reciprocally impermeable, and this impermeability should always dissuade the legal operator from considering commercial arbitration as a model for investment arbitration, even in circumstances in which, as seen, the *Doctrine of Separability* would be applicable to investment arbitration by specific procedural rules and as a general principle of law. The Chapter that follows addresses this question, and shows that the alleged structural incompatibility between investment arbitration and commercial arbitration should not be extremised, and is in any event irrelevant, with respect to the question of the utilization of the *Doctrine of Separability* developed in international commercial arbitration also into investment arbitration.

CHAPTER 5:

COMPARATIVISM IN INTERNATIONAL INVESTMENT ARBITRATION

1. Introduction

417. At this level of the dissertation, it has been established that the *Doctrine of Separability* is not structurally incompatible with the legal categories that govern international investment arbitration and would apply to investment arbitration by way of reference to the specific procedural rules that govern international investment arbitration - that are oftentimes the same as in international commercial arbitration - and also as a general principle of law under Article 38 of the Statute of the International Court of Justice.

418. In this sense, the *Doctrine of Separability* developed in international commercial arbitration can positively cross-fertilise international investment arbitration, to provide solutions for problems that emerge therein, such as the question of how to address criminal conduct by an investor. However, as

mentioned at the end of the previous Chapter, doubts have at times been raised as to the viability of an exercise of borrowing legal concepts developed in international commercial arbitration into international investment arbitration.

419. According to Nigel Blackbaby, for example

> *"The physiological differences must therefore be recognised and appropriate precautions taken. Although the same actors participate in both types of arbitration, they should be wary of all too readily transferring concepts from one to the other as this may pollute some of the essential qualities (...) of commercial arbitration. (...)! So beware, there is a danger in putting the sharks and the dolphins together in the same aquarium at the zoo".* [513]

420. This is only a manifestation of a more general restraint in cross-fertilisation between different fields of law. According to Professor Treves, for instance, who made the case for international law in general:

> *"[I]n international law, every Tribunal is a self-contained system (unless otherwise provided). Consequently, there are no general rules by which to sort out questions of coordination and conflict. These questions are to be solved within each self contained system".* [514]

421. Ideas that no cross-fertilisation between international commercial and international investment arbitration should occur are based, in addition to an alleged structural incompatibility between the two models, also on the consideration that international investment arbitration is a system of its own, autonomous and self-standing. Scholars have spoken of an *autopoietic*, *self-referential and normative closed system of law*[515] and they have for this warned

[513] Blackbaby, N. «Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark» Lew, J. and Mistelis, L. *Pervasive Problems in International Arbitration*. New York: Kluwer, 2006: 215 – 233, 233.
[514] Treves, T. «Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice», *International Law and Politics*, 1999: 809 – 821, 809.
[515] Schill, W. *The Multilateralization of International Investment Law*, Heidelberg: Cambridge University Press, 2009: 281. On the autonomy of international commercial arbitration see Fouchard, P. «L'Autonomie de l'Arbitrage

against the easy *boundary-crossing* and borrowing from other fields of law, including international commercial arbitration, to devise solutions in international investment arbitration.

422. *Addressing these comments requires primarily looking at investment arbitration through the lenses of legal comparativism*. In comparative law terms, the question may be phrased as follows: can international commercial arbitration constitute a valid *tertium comparationis* for international investment arbitration, so that solutions developed in the context of the former can actually be borrowed by the latter? The need to address this problem from a comparative method of analysis derives from considerations that concern the nature of international investment law, of international investment arbitration, and of the research question of this thesis in particular. In light of this, this Chapter discusses the reasons why comparativism in general is a viable methodology to address legal problems in investment arbitration. The next Chapter discusses whether international commercial arbitration constitutes a good model for investment arbitration, in the exercise of the legal comparativism.

2. The Viability of the Comparative Method in Investment Arbitration

423. As Professor Reinish explains,

> *"Investment arbitration is very much a child of public international law dispute settlement where the law is scarce and where the line between "finding" and "making" the law is frequently blurred. International courts and tribunals often have to inquire extensively into establishing the existence of a particular rule of law.*[516]

424. If investment Tribunals have to inquire extensively into establishing the existence of a particular rule of law, and if positive law in investment arbitration is generally scarce, then comparativism is a necessary approach in this

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Commercial International» *Revue de l'Arbitrage*, 1965, 99 – 110; Oppetit, B. «Philosophie de l'Arbitrage Commercial International» *Journal du Droit International*: 1993, 811 – 827.

[516] Reinish, A. «Investment Arbitration – The Role of Precedent in ICSID Arbitration» Klausegger, Ch. Et Al al. *Austrian Arbitration Yearbook.* 2008: 1 – 23, 12.

area of law.[517] And, in addition to being necessary, there are reasons why comparativism is also desirable in investment arbitration.

425. For example, from a general perspective, international investment law presents several analogies of *end goals*, and several contiguities, with other branches of law. For instance, with international trade law, in as much as it requires the delicate balancing of economic and non-economic interests;[518] also, with administrative law, because putting limits to what Governmental authorities can do *vis à vis* an investor, and, more generally, to the exercise of their regulatory powers, is a form of judicial review of decisions made by public authorities.[519] It is not surprising in this regard that some authors have described the system of international investment arbitration as indicative of the emergence of global administrative law.[520]

426. Obviously, public international law is also very close *ratione materiae* to investment arbitration. Some have rendered this concept by speaking of investment law as law with a hybrid foundation that grafts private international law dispute resolution mechanisms, such as commercial arbitration, onto public international law treaties and legal categories.[521] According Laird and Askew for example investment arbitration is the fruit of germination where international commercial arbitration procedure and substantive obligations arising under public international law intersect.[522] The hybrid nature of investment law, and its contiguity with several other areas of law, therefore makes it appropriate that the

[517] See Giorgetti, C. speaking of international tribunals in general: *"Cross-fertilisation among different international courts is an important method used by international courts to fill in gaps in their statutes and rules of procedures, as well as to strengthen their conclusions in line with other international courts and tribunals"* Giorgetti, C. «Cross-Fertilisation of Procedural Law Among International Courts and Tribunals: Methods and Meanings» Sarvarian et Al, *Procedural Fairness in International Courts and Tribunals*, 2015: 223 – 242., 224.
[518] Di Mascio, N. and Pauewlyn, J. «Non Discrimination in Trade and Investment Treaties: Two Worlds Apart or Two Sides of the Same Coin» *American Journal of International Law*, 2008: 48 – 89.
[519] Simma, B. «Foreign Investment Arbitration: A Place for Human Rights.» *International and Comparative Law Quarterly*, 2011: 573 – 596, 756.
[520] Van Harten, G. et Al. «Investment Treaty Arbitration as a Species of Global Administrative Law.» *European Journal of International Law*, 2006: 121 – 150.
[521]Roberts, A. «Clash of Paradigms : Actors and Analogies Shaping the Investment Treaty System.» *American Journal of International Law*, 2013: 45 - 94. Douglas, Z. «The Hybrid Foundations of Investment Treaty Arbitration» *British Yearbook of International Law*. 2003: 151 - 289, 155 "*The analytical challenge presented by the investment treaty regime for the arbitration of investment disputes is that it cannot be adequately rationalized either as a form of public international or private transnational dispute resolution*."
[522] Laird, I. and Askew, R. «Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System.» *Journal of Appellate Practice and Process*, 2005: 285 – 302.

gaze of the researcher is set on those fields of law that at various levels constitute its source and paradigm and account for the hybridity: public international law, administrative law, trade law, private international law, commercial arbitration.[523]

427. The hybrid nature of investment law and the fact that it shares certain goals with other areas of law are however not the only reason that make comparativism an appropriate methodology in the investigation of this field of law. The novelty of the system of investment protection, including the dispute settlement mechanisms, also legitimises legal comparation. In consideration of the fact that international investment law is a relatively modern creation, and has not had the benefit of the consolidation of its principles, it is unavoidable that an analysis of investment law does not shy away from the principles that have been developed in more mature fields contiguous to investment law.[524] Recourse to comparison and analogy is necessary to fill the gaps and resolve the ambiguities that the system of investment arbitration presents due to its young age.[525] This is not a peculiarity of international investment law of course, but of all the new fields of law that constitute somehow unchartered territory: for example, the same pattern has presented itself in international criminal law, that, while now developing as a more mature system, has drawn in equal terms from principles of criminal law and principles of public international law to endow itself of a coherent framework to address the various issues that presented themselves, including from a procedural perspective.[526]

428. Another reason why legal comparativism is appropriate in international investment arbitration derives from the consideration that the law here tends to

[523] See generally, Batens, F. *Investment Law within International Law, Integrationist Perspectives*. Cambridge, Cambridge University Press: 2014.
[524]Vadi, V. «Critical Comparison – The Role of International Law in Investment Treaty Arbitration.» *Denver Journal of International Law*, 2010: 68 – 90.
[525]Roberts, A. (2013) *op.cit*., 45. See also Giorgetti, C. (2014) *op.cit*, 224. "*Cross-fertilisation among different international courts is an important method used by international courts to fill in gaps in their statutes and rules of procedures, as well as to strengthen their conclusions in line with other international courts and tribunals"*.
[526] This process has not been entirely uncontested. International Criminal Tribunals have at times seen themselves as self-contained systems, and have refused to look through comparative lenses at other fields of law and their application by other courts. See for instance Appeals Chamber of the International Criminal Tribunal for the Bormer Yugoslavia Tadic, Case No IT-94-l-AR72, ICL 36 (ICTY 1995) (2 October 1995). "*International law, because it lacks a centralized structure, docs not provide for an judicial system operating an orderly division of labour among a number of tribunals, certain aspects or components of jurisdiction as a power could be centralized or central in one of them but not the others. In international law, every tribunal is a self-contained*".

suffer from considerable fragmentation.[527]International investment law is often criticised,[528] and occasionally praised,[529] for lack of a *jurisprudence costante*. And while it is undeniable that a certain shift towards defragmentation has taken place over the last few years,[530] the fact that a number of scholars are still advocating the creation of a supranational court of investment arbitration, to guarantee homogeneity in the system, shows that diverging decisions by international arbitration tribunals are still perceived as a problem, and one of the causes of the backlash against international investment arbitration.[531] A way to overcome the perceived lack of homogeneity in international investment arbitration has been precisely that of turning the eye to other fields of the law where problems that are similar to those addressed in international investment arbitration have been addressed with a greater degree of consistency and predictability, and where the theoretical speculation is more mature.[532]

429. Tribunals have considered that recourse to the comparative method can constitute a way to harmonise the decisions in international investment arbitration and perhaps even overcome the crisis of legitimating that has derived from this fragmentation. For instance, by assessing the frequency, and hence the legitimacy, of certain solutions. This is done on the assumption that what is common, tends to be just. For example, from the perspective of dispute resolution, comparativism *establishes parameters for international adjudication about the legitimacy of a given State measure*.[533] Arbitral Tribunals have resorted to comparative reasoning when they held for example that *a rule cannot be said to be unfair, inadequate,*

[527]Aaken, A. «Fragmentation of International Law: The Case of International Investment Protection.» *Finnish Yearbook of International Law*, 2008: 91-130. Treves, T. «Fragmentation of International Law: The Judicial Perspective» *Agenda Internacional*, 2009, 213-253, 214: "*The term «fragmentation» designates the breaking up, the reduction to fragments, of something that was a whole. It implies the factual premise, that indeed, before it was fragmented, something unitary existed and the value judgment that fragmenta- tion is bad while unity is good*".
[528] Schill, S. W. «W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law.» *European Journal of International Law*, 2011: 875 – 908.
[529] Irene, M. «The Costs of Consistency: Precedent in Investment Treaty Arbitration.» *Columbia Journal of Transnational Law*, 2013: 418 – 480.
[530] Schill, W. (2011) *op.cit*., 884.
[531] Waibel, M. *The Backlash Against Investment Arbitration: Perceptions and Reality:* Cambridge: Cambridge University Press, 2010.
[532] Kauffman-Kohler, G. «Arbitral Precedent: Dream, Necessity or Excuse?—Freshfields Arbitration Lecture 2000.» *Arbitration International*, 2007: 357 – 378.
[533]Vadi, V. (2016), *op.cit*., 18.

inequitable or discriminatory when it has been adopted by many countries around the world"[534].

430. As will be clear from the discussion that precedes, beyond a merely *geographical comparison*, that has as its focus the solutions that are adopted in other jurisdictions, *a comparison across various and different fields of law has also happened*. Comparative references to both domestic legal systems and other international legal regimes (as compared to analysis of rules and principles from outside international investment law as part of the applicable law) are frequently found in tribunals' decisions. And in fact, the exercise in which contemporary comparativists are involved is not only one that focuses on the differences and similarities with solutions adopted in domestic jurisdictions; the focus is slowly shifting towards comparing systems of norms and procedures adopted within one system, including also the supranational one.[535] In this logic, as will be seen further on, comparativism can draw from the model of international commercial arbitration to analyse, develop, cross-fertilise and at times even directly transplant into international investment arbitration.[536]

431. This use of comparativism in investment law is not confined to the theoretical analysis of the general framework principles that characterise the system, but is a method routinely employed by tribunals in deciding practical disputes, at a micro-level of analysis. In some cases, comparativism has been used in a rather loose manner, to provide mere inspiration in the interpretation of

[534] Schill, S. W. The Multilateralization of International Investment Law, Heidelberg: Cambridge University Press: 2009, 34. "*Once investment treaty standards are identified as specific public law concepts, a more refined comparative public law analysis can concretize the meaning of those concepts in specific contexts. This involves, for example, assessing to what extent domestic and international legal systems handle liability for representations made by government officials, what kind of limits the protection of property imposes on the tax legislator, or how the tensions between the protection of cultural heritage and the right to property are resolved in other public law systems. Ideally, this comparative public law approach results in the determination of general principles recognized in the principal public law systems that can be used as a source of international law in interpreting the standards contained in international investment treaties*".

[535] Resimann, M. «Beyond National Systems: A Comparative Law for the International Age.» *Tulane Law Review*, 2001: 1103 – 1119, 1119. See also Vadi, V. (2010), *op.cit*., 79: "*Comparativists have highlighted that the traditional focus of comparative law on national systems is old fashioned and they have argued that comparative law should integrate the most important transnational regimes.*"

[536] Ebere, S. and Xheraj B. «Nine Years Later: Investment Treaty Arbitration's Contribution to International Commercial Arbitration», *The American Review of International Arbitration*: 2014, 85-104; Fietta, S. and Upcher, J. «Public International Law, Investment Treaties and Commercial Arbitration An Emerging System of Complementarity? » *Arbitration International*: 2013, 187- 222.

investment treaties; in other cases, comparativism has been used in a more structured, and methodologically developed manner; in any event, the list of examples of use of comparativism in investment arbitration cases is extensive.[537] To mention a notable one, in the *Enron Corporation* case, the Arbitral Tribunal was confronted with the need to give substance to the notion of *necessity*, as a circumstance precluding wrongfulness in the conduct of a State.[538] Owing to the debt crisis faced by Argentina around year 2000, the country decided to adopt a number of measures, including expropriations and nationalisations, that were deemed illegal as a matter of international investment law, but whose wrongfulness might have been precluded in light of the critical situation that had struck the Argentinean population. Considering that there was not a specific definition of the notion of necessity in investment law, the Tribunal decided to draw it from general public international law, only to find that the necessity test had not been met in the circumstances of the case.[539]

432. In *Continental Casualty*, on the other hand, the Tribunal referred to a standard of necessity different from that applicable in public international law, and drew a comparison from international trade law. The WTO approach is more flexible than the pure public international law one, and generally takes into account a number of factors, including the comparative importance of a measure's objective, its predicted effectiveness at achieving that objective, and the availability of alternative measures. WTO tribunals generally are also more deferential to the rights of governments to set their own policy priorities.[540] In this

[537] Vadi, V. (2010), *op.cit*., 82 note 79.

[538] Article 25 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Conduct provides as follows: "*Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an es- sential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity*".

[539] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic), Award of 22 May 2007, paras. 322 - 345, esp. 334. Schill, W. and Yun-I, K. «Sovereign Bonds in Economic Crisis: Is the Necessity Defence Under International Law Applicable to Investor-State Relations?» *Yearbook On International Investment Law & Policy*, 2010: 485 – 512, 489.

[540] Mitchell, A. D. and Henckels, C. «Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law», *Chicago Journal of International Law*, 2013, 93 – 164.

case, Argentina did pass the test of necessity and its conduct was not considered in breach of the standards of treatment required by international investment law.[541]

433. Despite this difference in outcome, that shows the importance of identifying with attention the relevant parameters for comparison, the examples indicated above show that comparativism and analogies in international investment arbitration are a standard method whereby Tribunals reach decisions. Also in *Mondev International*, the Arbitral Tribunal made a comparison with European Union law to give substance to the notion of *right to a court* under international investment law, with specific respect to the question of whether the minimum standard of treatment under NAFTA had been respected.[542] Overall, when it comes to beefing up substantive notions and standards of treatments in investment law:

> *"Instead of primarily relying on prior arbitral decisions, an approach that is little helpful in particular when disputes concern novel circumstances, (...) tribunals should use a comparative method that draws on domestic and international law regarding the concept of the rule of law".*[543]

434. Comparativism is not a normal approach only from the perspective of substantive standards, but also as regards dispute resolution and procedural rules. Indeed, the extensive use of comparative analysis in international litigation has given rise to considerable cross-fertilisation of rules among courts and Tribunals, including those that apply and interpret different areas of law *ratione materiae*. According to Professor Giorgetti,

> *"Cross-fertilisation among different international courts is an important method used by international courts to fill in gaps in their statutes and rules of procedures (...) In doing so, international courts routinely reference customary international law, general principles of law and rules developed in other international judicial and arbitral practice".*[544]

[541] Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award of 5 September 2008, paras. 189-230, esp. 192.
[542] Mondev Int'l Ltd. v. United States, ICSID-NAFTA Ch. 11, Case No. ARB(AF)/99/2, Award of 11 October 2002, para. 144.
[543] Schill, S. W. «Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law.» *International Law & Justice Working Paper*, 2006: 1- 39, 29.
[544] Giorgetti, C. (2015) *op.cit*., 224.

435. Several examples can be made in this regard, of which two are presented here.

436. The question as to whether the costs of legal representation in international investment arbitration should also be borne by a winning respondent, or rather entirely paid for by the losing claimant, is a case in point. Here, two paradigms compete with one another: the system of international commercial arbitration, and that of judicial protection of human rights under international law. In one investment case, for example, one arbitrator held that:

> *"[t]he judicial practice most comparable to treaty-based investor-state arbitration is the judicial recourse available to individuals against states under the European Convention on Human Rights" where "states have to defray their own legal representation expenditures, even if they prevail".*[545]

437. In other cases, international commercial arbitration was used as a comparison to conclude that a losing claimant should also bear the costs of the respondent who successfully defends its position before an investment Tribunal, if not all, at least in part.[546] The Tribunal, in discussing costs, decided that *the Tribunal's preferred approach to costs is that of international commercial arbitration and its growing application to investment arbitration.*[547]This approach was justified in the *Cement Case* by identifying its rationale, namely to *compensat[e] the Respondent for having to defend a claim that had no jurisdictional basis and discourage others from pursuing such unmeritorious claims*"[548]

438. Also in the context of arbitral procedure, the Arbitral Tribunal in *Methanex* run a comparative analysis using as terms of reference public

[545] International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Separate Opinion of Thomas Wälde, 26 January 2006, para. 141.
[546]ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award of 2 October 2006, para. 532.
[547] EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, ICSID Case No.ARB/05/13, Award of 8 October 2009, para 528.
[548] Europe Cement Investment & Trade S.A. v. Republic of Turk., ICSID Case No. ARB(AF)/07/2, Award of 13 August 2009, para 185.

international law, domestic laws of a number of countries, and WTO procedural law in order to decide whether to allow the submission of *amicus* briefs.[549] In particular, the Methanex Tribunal compared the solutions adopted by the ICJ, WTO Appellate Panels and the Iran-US Claims Tribunal to conclude that allowing an *amicus* brief was not equivalent to extending the substantive scope of the arbitration to a third party, and hence determined for the admissibility of such briefs.

439. Ultimately, not many fields of law use comparative law as extensively as international arbitration[550]. And, as Professor Lalive notes:

> *" an international arbitration should be decided by a truly 'international' arbitrator, i.e. someone who is more than a national lawyer, someone who is internationally-minded, trained in comparative law and inclined to adopt a comparative and truly international outlook"*[551]

440. This approach remains valid also as regards the distillation of general principles of law applicable to international investment arbitration, as would be the case for the *Doctrine of Separability*. As noted by one scholar:

> *"There are (…) cases where investment treaty tribunals develop (…) sophisticated and ambitious ways to use comparative law in order to develop general principles* and this has been done "*in the sense of Article 38 (1) (c) ICJ Statute, a source of international law that must be taken into account as 'relevant rules of international law applicable in the relations between the parties' in the interpretation of IIAs pursuant to Article 31 (3) (c) of the Vienna Convention on the Law of Treaties".* [552]

441. For this reason, it appears appropriate that this dissertation also employs a comparative method in investigating its research question. If one considers comparativism as *an intellectual activity with law as its object and*

Methanex v. USA, UNCITRAL (NAFTA), Decision on Amici Curiae, 7 August 2002, paras. 29 – 34.

[550] Vadi, V. (2010), *op.cit*., 68.

[551] Lalive, P. «On the Neutrality of the Arbitrator and of the Place of Arbitration.» *Recueil De Travaux Suisse Sur L'Arbitrage International*, 1984: 23 – 33, 27.

[552] Schill, S. Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law Forthcoming, Jean d'Aspremont and Samantha Besson (eds.), The Oxford Handbook on the Sources of International Law (Oxford University Press, 2017)

comparison as its process,[553] the next questions is therefore what legal systems need to be compared in order to provide an answer to the analysis presented here. The chapters that follow address this aspect.

[553]Zweiger, K. and Kotz, H. *Introduction to Comparative Law*. Oxford: Oxford University Press, 1998, 12.

CHAPTER 6:

INTERNATIONAL COMMERCIAL ARBITRATION AS THE TERTIUM COMPARATIONIS FOR INTERNATIONAL INVESTMENT ARBITRATION

1. Introduction

442. Once established that comparativism is ordinarily used in international investment arbitration to provide solutions at all level of analysis, the next question would concern the identification of the system (or, the systems) of law which provides an appropriate *tertium comparationis*, and from which notions and legal solutions can be borrowed. The previous Chapter has shown, using procedural and substantive examples, that the selection of different models of comparison can lead to very different outcomes. As regards allocation of costs, for instance, using a public law-based model would determine the sharing of costs between the winning and the losing party; on the other hand, solutions shaped on international commercial arbitration would determine that the losing party is responsible for covering the costs of the winner as well. The identification of the correct system of law from which analogies can be drawn, especially when different fields of law provide for different solutions, becomes therefore critical.

443. For this dissertation, however, the question is not so much that of identifying *in general* what the best reference models are for international investment arbitration. The scope of investigation is more limited. Indeed, the *Doctrine of Separability*, that it is postulated should be used to resolve the research question of this dissertation, already applies to investment arbitration as a general principle of law under Article 38 of the Statute of the ICJ and because it is recalled in the arbitration rules used ordinarily in investment arbitration. More generally, several principles and rules that govern investment arbitration have been developed in the laboratory of international commercial arbitration, so that the two mechanisms of dispute resolution share a most evident common matrix.

International commercial arbitration, in this regard, already constitutes the obvious and natural point of reference for investment arbitration on many aspects.

444. For this Chapter, therefore, the specific question to resolve is as follows: are there systematic hindrances in the relationship between international commercial arbitration and international investment arbitration why international commercial arbitration should not be a model for international investment arbitration, to a point that casts doubts on the viability and legitimacy of the application of the *Doctrine of Separability* to international investment arbitration?[554]

445. In order to answer these questions, a first preliminary distinction has to be drawn between comparison at the macro-level and comparison at the micro-level. In investment law, by macro-comparison scholars mean the process of comparing the system of investment arbitration with other systems of law, in general terms, and specifically *as regards their ethos and principles of general functioning.*[555] For instance, as mentioned earlier, international investment arbitration can be compared with other methods of dispute resolution, such as international commercial arbitration, or international adjudication before international courts (as opposed to arbitral Tribunals) or to adjudication before the European Court of Human Rights. Similarly, the arbitral system of investment protection can be compared to forms of judicial review that occur in administrative law and, in general, to paradigms that are typical of public law, as opposed to private law.[556]

446. At the level of micro-comparison, the focus is less on the general principles and the ethos, and more on the specific legal institutions that are typical of a certain field of law. For example, retroactivity in investment arbitration has

[554] See Blackbaby, N. (2006), *op.cit*., 215 – 233, 233. "*The physiological differences must therefore be recognised and appropriate precautions taken. Although the same actors participate in both types of arbitration, they should be wary of all too readily transferring concepts from one to the other as this may pollute some of the essential qualities (…) of commercial arbitration. (…) ! So beware, there is a danger in putting the sharks and the dolphins together in the same aquarium at the zoo".*

[555] Vadi, V. (2017), *op. cit.*, 175.

[556] Van Harten, G. and Loughlin M. «Investment Treaty Arbitration as a Species of Global Administrative Law» *European Journal of International Law:* 2006, 121 – 150. Reinisch A, and Malintoppi, L. «Methods of Dispute Resolution.» In *The Oxford Handbook of International Investment Law*, Muchlinksi et Al, 2008: 691 – 719. Tomuschat, C. «The European Court of Human Rights and Investment Protection» Binder, C. *International Investment Law for the 21st Century*. Oxford: Oxford University Press, 2015: 637 – 656.

been contrasted with retroactivity as applied by other international Tribunals and in particular those competent for the protection of human rights;[557] the modalities for the calculation of damages in investment law have been compared with the modalities for the definition of the quantum in international commercial arbitration;[558] the discussion on the principle of national treatment in investment law has been enriched by the debate on the genesis of this principle in the context of World Trade Law, and specifically as regards the GATT;[559] World Trade Law has also provided a fertile field for comparison in respect of the notion of non discrimination in investment law and also as regards the application of the most favoured nation clause.[560]

447. Methodologically, comparison at the macro-level is in a sense a preliminary exercise that has to be carried out to establish if cross-fertilisation between two systems can happen at the level of individual legal institutions. Before deciding whether the act of borrowing specific notions from one field of law into another is warranted, it is necessary to decide whether the permeability between the two systems is justified at the level of general principles. As noted by Vadi, for example:

> *"Micro-comparison help investment lawyers address (...) questions by focussing on specific legal issues (...). Macro-comparisons help investment law scholars and practitioners address these questions by identifying the best analogue first at a general level and then investigating more specific issues at a later stage. Macro-comparisons focus on large scale themes and questions, analogising entire legal systems. While the two scales of analysis are theoretically separate, they are concretely intertwined.*[561]

[557] Gallus, N. «*The Temporal Scope of Investment Protection Treaties*. London: British Institute of International and Comparative Law» 2008: 20-21.
[558] Gotanda, J. «Assessing Damages in International Commercial Arbitration: A Comparison with Investment Treaty Disputes» Bjorklund, A. *International Investment Law, Emerging Jurisprudence of International Investment Law*. London: British Institute of International and Comparative Law, 2008: 77 – 88.
[559] Tabet, S. «Application de l'Obligation de Traitement National et de Traitement de la Nation la Plus Favorisée dans la Jurisprudence Arbitrale en Matière d'Investissement Nouveaux Problèmes à la Lumière de la Jurisprudence de l'OMC» Walde, T. et Al. *New Aspects of International Investment Law*. Brill, 2004: 353 – 389. Kurtz, J. «National Treatment, Foreign Investment and Regulatory Autonomy: The Search for Protectionism or Something More» Walde, T. et Al. *New Aspects of International Investment Law*. Brill, 2004: 312 – 352.
[560] Di Mascio, N. (2008) *op.cit.*, 48; Hamida, B. W. «MFN Clause and Procedural Rights: Seeking Solutions from WTO Experience.» *Transnational Dispute Management*, 2009.
[561] Vadi, V. (2016) *op.cit.*, 179.

448. In the pages that follow, international investment arbitration will therefore be compared with international commercial arbitration at the level of macro-analysis: as mentioned at the beginning of this Chapter, this is done to ascertain that there are no structural incompatibilities in terms of general principles between these mechanisms of dispute resolution, that would render cross-fertilisation between them inappropriate as regards the specific legal institution constituted by the *Doctrine of Separability*. The focus of the analysis that follows will be on the clash of paradigms that is said to characterise and essentially exhaust the relationship between international commercial arbitration and international investment arbitration: the private paradigm, on the one hand, and the public paradigm on the other[562]. *In particular, that while international commercial arbitration is said to have an eminently private structure and ethos, international investment arbitration appears to be a creation of public law, and further general and public interests*[563]. This is a question of particular importance to the comparativist and the international lawyer and this divide becomes more important than any other. It becomes crucial, therefore, also for purposes of answering the research question addressed in this work. According to Schill, for example:

> *"International investment law is less characterized by the much discussed common law–civil law divide, but by a division of epistemic communities along different lines, namely those joining the field from private commercial law and arbitration, and those coming from public international law and inter-state dispute settlement"*.[564]

449. Obviously, the more this clash of paradigms is found to be deep, the more likely it is that structural incompatibilities will emerge that prevent cross

[562] Roberts, A. (2013) *op.cit*., 45.
[563] Burdeau, G. «Nouvelles Perspectives pour l'Arbitrage dans le Contentieux Économique Intéressant les Etats», *Revue de l'Arbitrage*, 1995 : 2 - 37; Paulsson, J. «International Arbitration is Not Arbitration» *Stockholm International Arbitration Law Review*, 2008 : 1 – 20. On the definition of public law and its implications it appears appropriate to quote John Henry Merryman & Rogelio Pérez-Perdomo "*Public law had, from this point of view, two major components: constitutional law in the classic sense — the law by which the governmental structure is constituted — and administrative law — the law governing the public administration and its relations with private individuals. In private legal relations the parties were equals and the state the referee. In public legal relations the state was a party, and as a representative of the public interest (and successor to the prince) it was a party superior to the private individual.* Merryman, H. J. and Pérez-Perdomo, R. *The Civil Law Tradition: An Introduction To The Legal Systems Of Europe And Latin America*: Stanford, Stanford University Press, 2007, 93.
[564] Schill, S. W. (2011) *op.cit*., 85.

fertilisation from international commercial arbitration to international investment arbitration. Some for instance have held that:

> *"the international investment regime, consisting of mostly bilateral investment treaties and ad hoc investor-state arbitrations, should be seen as a multilateral system that seeks not only to protect investors and promote economic growth, but that should also protect "democratic accountability and participation," promote "good and orderly state administration," and protect "rights and other deserving interests".*[565]

450. If one should agree that the purpose of investment arbitration is to protect *democratic accountability and participation,* commonalities with the privity of commercial arbitration would reach the vanishing point, and the prospect of cross fertilisation with a legal system governed by private law principles would be reduced enormously. And in fact, according to some, the fact that certain features of an essentially private mechanism of dispute resolution have at times been liberally transposed and used in international investment arbitration is one of the reasons that are at the basis of the legitimacy crisis that this model of dispute resolution suffers.[566]

451. And indeed, those who mark the depth of the differences between international commercial arbitration and international investment arbitration on the dividing line between private law and public law, point to:

> *"the increasing recourse in comparative analysis to systems of public rather than private law, including in the growing development of general principles of public law by investment treaty tribunals"*[567]

[565] Alvarez, J. «Beware: Boundary Crossings» Kahana, T. and Scolnicov, A. *Boundaries of State, Boundaries of Rights*. Cambridge: Cambridge University Press, 2016: 43 – 94, 50.
[566] Hepburn, J. «The UNIDROIT Principles of International Commercial Contracts and Investment Treaty Arbitration: a Limited Relationship», *International and Comparative Law Quarterly*, 2015: 905 - 933. Franck, S. D. «The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions», *Fordham Law Review,* 2005: 1558- 1581.
[567] Schill, S. Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law Forthcoming, Jean d'Aspremont and Samantha Besson (eds.), The Oxford Handbook on the Sources of International Law (Oxford University Press, 2017).

452. In concluding this introduction, it can be anticipated already here that the private/public divide that straddles large part of the discussion about the comparability of international commercial and investment arbitration,[568] *is of no hindrance to the application of the Doctrine of Separability to investment arbitration*. This is because a) the private/public divide, while generally relevant in describing the reciprocal features of these two models of dispute resolution, should not be extremised. Both commercial and investment arbitration deal with public and private interests in an integrated manner; b) the private/public divide, even so characterised, is only relevant with regard to certain aspects of the commercial/investment arbitration relationship, and this is not the case with regard to the applicability of the *Doctrine of Separability*.

2. The Dialogy between Private and Public as a Classical Barrier to Cross Fertilisation

453. Before venturing to assess the relevance of the clash between private and public in international arbitration, this paragraph elaborates on how this dialogy is traditionally considered as a barrier to cross fertilisation. It will emerge that, *if the clash between private and public were really to play a significant role in the relationship between international commercial and investment arbitration, this may hinder the borrowing of notions developed in one model, onto the other*.

454. One indicative case of how the public/private dialogy can constitute a barrier to cross-fertilisation is constituted by the transposition of public international law principles into matters regulated by private law. In the famous ICJ case between Australia and France, over the question of the legality of certain nuclear tests carried out by France in the South Pacific, the International Court of Justice found that the unilateral declaration made by France about its intention not to carry out any further specific nuclear test was legally binding on France, and determined an obligation to

[568] Maupin, J. A. «Public and Private in International Investment Law: An Integrated Systems Approach», *Virginia Journal of International Law*: 2014, 1 – 66. Mills, A. «Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration», *Journal of International Economic Law*: 2011, 469 -503.

refrain from carrying out any further activity of that nature.[569] This judgement set the principle of the binding nature of unilateral declarations made by States in international law. The Court based its conclusion on the preeminent role of the principle of good faith in this field of law. According to the Court, in particular:

> *"One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected".*[570]

455. This judgment by the International Court of Justice is quoted by the Center for Transnational Law of the University of Cologne, Transnational Database, as one of the guidelines to interpret the notion of good faith in the context of commercial contracts, and, more specifically, to interpret in a uniform manner the notion of good faith in *lex mercatoria.*[571]Among the sources for the clarification of the notion of good faith, the Database also mentions the work of one of the authors who have most contributed to the distillation of general principles of public international law, Professor Bin Cheng.[572]

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[569]Nuclear Tests (Australia and New Zealand v France), 1974, ICJ Rep 267, 43-50. Today unilateral declarations are generally considered legally binding as a matter of international law, and the decision of the ICJ in the nuclear case has been confirmed on a number of occasions. See for instance Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali) (Judgment 1986) ICJ Rep. 554, 573-74. On the binding nature of unilateral declarations made by States following the Australia v France case see, among others, Stern, B. «L'affaire des Essais nucléaires français devant la Cour Internationale de Justice.» *Annuaire Français de Droit International* , 1974: 299-333.

[570]Nuclear Tests (Australia and New Zealand v France), 1974, ICJ Rep 267, 46.

[571]Berger, P. «Lex Mercatoria Online: the CENTRAL Transnational Law Database at www.tldb.de» *Arbitration international*, 2014: 83 – 94, 84 .The database also quotes another decision from the International Court of Justice providing guidance on the notion of good faith, according to which: "*The Court has also to deal with the contention of Honduras that Nicaragua is precluded not only by Article IV of the Pact of Bogota but also "by elementary considerations of good faith" from commencing any other procedure for pacific settlement until such time as the Contadora process has been concluded. The principle of good faith is, as the Court hasobserved, "one of the basic principles governing the creation and performance of legal obligations*" (Nuclear Tests, ICJ. Reports 1974, p. 268, para. 46; p. 473, para. 49); *it is not in itself a source of obligation where none would otherwise exist*. (ICJ Nicaraguas v Honduras, 1998, 69).

[572]Cheng, B. *General Principles Of Law as Applied by International Courts and Tribunals*. Cambridge: Cambridge University Press; 1987: 106.

456. On the basis of the references made by the Transnational Database, therefore, it would appear that the principle of the binding nature of unilateral declarations developed in public international law could apply, and be automatically transposed, also to the field of commercial law and that therefore, unilateral declarations would also be sufficient to create binding obligations on private parties making them in a commercial context, as long as certain formalities regarding the making of the promise are respected.

457. Now, this conclusion could be true with respect to certain systems of law; for example, the Italian and the French Civil Codes have provisions disciplining the making of unilateral promises and their effects. According to Article 1987 of the Italian Civil Code, in particular, the unilateral making of a promise does not determine binding legal effects, *save for the cases provided for by the law*. Article 1988, in turn, contains the discipline of the cases in which a unilateral promise has binding legal effects upon the Party making it, by providing that:

> *"[t]he Party that, making a declaration to the public, promises a certain service to those who find themselves in a certain situation of carry out a certain activity, is bound by that promise as soon as it is made public*."

458. Under Italian law, a promise made to the public is therefore binding on the party making the offer, and has full legal effect. The parallel with public international law, in which a declaration publicly made by a State is binding on that State is therefore valid and standing. If one turns their eyes to common law, however, things are different. Under English law, for example, the mere making of a unilateral promise is not enough to create a legal and enforceable obligation upon the Party making it. The other necessary requirement is that of the *consideration.*[573] In commercial contracts under common law, consideration is defined in the following terms:

> *"A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one*

[573]See generally Scanlon, T. M. «Promises and Contracts.» *The Theory of Contract Law: New Essays*, Benson, P. Cambridge: Cambride University Press, 2001: 86 – 117.

party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other".

459. In order for a promise to have some binding legal effect under English, it is necessary that there be mutual consideration between the parties, and that, therefore, both Parties suffer some detriment, and gain some advantages, from the promise. In order for a promise to be enforceable, therefore, there must be some degree of mutual exchange of benefit and loss between the parties.[574]In a contract of sale, for example, the consideration given for the promise to transfer title to the property can be either a promise to pay the purchase price, or actual payment. The loss of property on the party that sells goods is also consideration, on their side.

460. If one looks at these differences between common law and civil law through the lenses of legal comparativism, it is apparent that the notion of enforceable promises under English law, and the notion of contract more generally, is modelled on a strictly commercial notion, based on mutual economic gains. In civil law systems, on the other hand, the contract has a broader role to play in society, and is less tied to a merely commercial dynamic, which explains why consideration is not a necessary requirement.[575]

461. The requirement of consideration in English law also applies to unilateral promises. Even though the exchange of benefits may not be actual, there would still exist what has been called *nominal consideration*: for example, the promise could be made "*in the hope that the act will be performed*"[576] In general terms, however, a unilateral promise made without consideration, namely a promise that does not determine a mutual exchange of benefit and detriment between the Parties, be them actual or perspective, is not enforceable under English law.[577] In order to address some of the potential drawbacks and injustice that could stem from this situation, equity (as opposed to common law) has come up with the institute of promissory estoppels. Promissory estoppel concerns certain situations where a party

[574] Attorney-General for England and Wales v R [2002] 2 NZLR 91 at [94].
[575] Harris, D. and Tallon D. *Contract Law Today: Anglo-French Comparisons*. Oxford: Clarendon Press, 1989: 386.
[576] Barr Ames, J. «Two Theories of Consideration» *Harvard Law Review*: 1899, 515-531. Lerner, P. «Promises of Rewards in a Comparative Perspective», *Annual Survey of International and Comparative* Law, 2004, 53 – 102.
[577]Offord v Davies (1862) 12 CBNS 748.

to a contract promises something which is at variance with the original terms of contract and where the other party to the contract alters his/her behaviour in reliance of that promise.[578]

462. The effect of promissory estoppel under English law is therefore that of making certain unilateral promises binding and legally effective even in the circumstances when they are no supported by consideration, as explained earlier. However, the applicability of the doctrine of promissory estoppel is subordinate to the occurrence of certain conditions, that prevent it from being a general doctrine applicable to all unilateral promises. First, it is necessary that there be some contractual relationship between the two parties. Second, one party to that contract has to make a clear promise that it will not fully enforce its legal rights under the contract. Third, the party making the promise intends the promise not to fully enforce its legal rights to be relied upon, and the promise actually is relied upon. Fourth, it must be inequitable for the promisor to revoke its promise, under the circumstances of the contract between the two parties[579]. Ultimately, therefore, in order for promissory estoppel to be invoked under English law, and in order to give effect to a promise that has no consideration, a pre-existing contractual relationship must exists between the parties, that must meet the requirement of consideration.[580]

463. This is clearly not the case envisaged by the ICJ. Scholars have wondered whether common law in the field of unilateral promises is therefore at odds with public international law and with the position of the ICJ as regards the binding nature of any public declaration, regardless of whether it has consideration. The answer has been in the negative, for the most part. Simply, the notion of good faith and of unilateral promises as developed in public international law has a different scope of application than in the law of international commercial contracts and international commercial arbitration and the two notions are not

[578] Snyder, D. «Comparative Law In Action : Promissory Estoppel, The Civil Law, And The Mixed Jurisdiction», *Arizona Journal of International and Comparative Law*: 1998, 695 – 671.
[579] Chen-Wishart, M. *Contract Law*. Oxford: Oxford University Press, 2006: 175. See the leading case Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd. (1955).
[580] Treitel, G. *Law of Contract*, Sweet & Maxwell: 2016, 23.

interchangeable.[581] The notion of good faith in public international law is infused with certain values and pursues certain aims, most of which are in the public interest and in the broad interests of society. The notion of good faith in commercial law pursues other aims and is not, at least in certain jurisdictions, decoupled from strictly economic considerations. In civil law system, where the notion of contract is not compartmentalised to areas of commercial law, but plays a larger role in society, this is not the case; but if one looks at common law, things are quite different. Indeed, the UK, to make an example, is still very reluctant to accept the role of the good faith doctrine in commercial transactions in the first place, and in more general terms. The words of Lord Bingham in *Interfoto Picture Library Ltd. v Stiletto Visual Programmes, Ltd*. are for example eloquent:

> *"English Law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness' [such as the "estoppel" institute".*[582]

464. This reasoning is in line with that of Lord Ackner in *Walford v. Miles* who considered *good faith inherently repugnant to the adversarial position of the parties when involved in negotiations*. In conclusion, therefore, it appears that the notion of good faith as developed in public international law cannot serve as an interpretative model to the notion of good faith in international commercial transactions.

465. In cases when the private/public divide is deep, such as in the example indicated above, cross fertilisation has to be a very careful exercise and the transpositions of legal notions from one field into the other may be unwarranted in some cases.

[581] «Commercial Arbitration and InvestmentArbitration, Fertile Soil for False Friends» Binder, C. *International Investment Arbitration for the 21st Century: Essays in Honour of Christoph Schreuer*. Oxford: Oxford University Press, 2009: 782 – 793.
[582] Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1987] EWCA Civ 6

3. International Commercial Arbitration and International Investment Arbitration: Two "Different Beasts"?

466. In light of what has been indicated above, it is necessary now to assess how different international commercial and international investment arbitration are from the perspective of the private/public divide. International commercial arbitration and international investment arbitration have a different genesis. The former derives from what has been aptly described as *the aversion of businessmen to courts of law.*[583] As early as the middles ages, merchants in European nations had realised that ordinary courts could not provide an adequate form of redress in circumstances of claims arising from commercial transactions. One reason for this was that ordinary courts of law were exercising justice over specific fields and these did not include commercial transactions, but were normally limited to land and real estate matters. Another reason was that obligations entered into between traders operating in different countries were often considered as non-enforceable by domestic courts. Since international transactions constituted a large part of the portfolio of merchants, a large part of the rights that they were entitled to had no protection before the courts of the land. In addition, even in those cases when courts of law could actually exercise their jurisdiction, court justice was slow and cumbersome, and it did not provide for the sort of quick determination of rights and obligations that is necessary in the context of business transactions.[584]

467. Hence the idea to entrust the settlement of international commercial disputes to a mechanism alternative to court justice and more in line with the needs of international trade. This mechanism provided for the choice of independent arbitrators by the parties to a dispute, whom had to be well-versed into issues of trade, able to guarantee impartiality, rapidity in the decision-making process and, most of all, able to take into due account the needs of the parties to a dispute. The consideration that preserving the economic relationship between two traders, albeit in dispute, was a preeminent interest of the system of international trade was always very firmly present in the arbitrators' minds.

[583] Macassey, L. «International Commercial Arbitration: Its Origin, Development and Importance» *Transactions of the Grotius Society Problems of Peace and War, Papers Read before the Society in the Year 1938*: 1938: 179-202.
[584] Macassey, L. (1938), *op cit*.

468. Through the centuries, the original premises on which international commercial arbitration was born evolved, adapted to the new challenges of business transactions, to the enlarged size of the market and to the new ensuing needs of the parties to a claim, but their original essence has remained essentially unaltered. Even if it is not the scope of this work to account for the historical development of international commercial arbitration and reasons of brevity require to take leaps that are hundreds of years long, it is worth mentioning the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Award, as the apex of the evolution of the system of international commercial arbitration. The Convention, in recognising the binding force of awards rendered by arbitral tribunals and in limiting the review of the decisions of arbitral tribunals by domestic courts, guarantees the portability of arbitral awards, and gives coherence to a system of justice alternative to court justice. This is in a sense the accomplishment of the original mandate that was laid at the basis of international arbitration.

469. International investment arbitration is a much more recent creature.[585] Its surge is connected with the development and increase of Bilateral Investment Treaties, at the beginning of the 1990s, concluded between States to grant recognition and protection to investments made by their nationals in the territory of a foreign Host Country.[586] This in turn was a consequence of the need to promote economic relationships between countries. As identified by the Arbitral Tribunal in *Saluka*:

> *"The protection of foreign investments is not the sole aim of [the system of investment arbitration], but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations.*[587]

470. Investment treaty arbitration allows a claimant investor to bring suit against a Host State for breach of the substantive standards of protection of the

[585] The "start date" is sometimes identified with the award in Southern Pacific Properties (Middle East) Ltd. v. Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 27 November 1985.
[586] Gaillard, E. «L'Arbitrage sur le Fondement des Traits de Protection des Investissements.» *Revue de l'Arbitrage*, 2003. Alvarez J. et Al. *The Evolving International Investment Regime: Expectations, Realities and Opinions*. Oxford: Oxford University Press, 2011.
[587] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Award of 17 March 2006, para. 300.

investment as guaranteed by the Treaty (or, at times, for breach of contract), before an arbitral Tribunal constituted by agreement between the Parties. The rationale here is twofold: on the one hand, to insulate the protection of the investors' rights from justice administered by the courts of the host State, that may be biased towards that State; on the other hand, to shield the protection of foreign investments from the uncertainties and political vagaries of diplomatic protection, and bring it more in line with a system informed by the principles of proper, objective adjudication. [588]

471. Even though these two methods of dispute resolution address different categories of disputes, from several perspectives they share many similarities. These will be better addressed below, in the context of the characterisation of the private/public debate in investment arbitration and commercial arbitration.

3.1 The Private-Public Debate Ethos in International Investment Arbitration and International Commercial Arbitration - the Traditional View

472. Even though the derivation of international investment arbitration from international commercial arbitration is not disputed, a significant part of the debate in the field of modern international investment law concerns the perceived divide between these methods of dispute resolution, and their alleged impermeability, on the line of the differentiation between private law and public law, or, in even more general terms, between private interests and public interests.[589]

473. According to those who see international commercial arbitration and international investment arbitration as two separate and largely incompatible models, international commercial arbitration addresses disputes that are eminently private in

[588] Francioni, F. «Access to Justice, Denial of Justice and International Investment Arbitration» *European Journal of International Law*, 2009: 729 - 747; Paparinsky, M. «Limits of Depoliticisation in Contemporary Investor-State Arbitration» *Select Proceedings of the European Society of International Law:* 2010, 271-282. See also, in case law: Republic of Italy v. Republic of Cuba, Republic of Italy v. Republic of Cuba, Interim Award of 25 March 2005, para 25.
[589] Mills, A. «The Public-Private Dualities of International Investment Law and Arbitration.» *Evolution in Investment Treaty Law and Arbitration*, Miles, K. and Brown, C. Cambridge: Cambridge University Press, 2011: 97 – 116. Cremades, B. «Resurgence of the Calvo Doctrine in Latin America.» *Business Law International*, 2006: 53 – 66, 57. Batens, F. «Judicial Review of International Adjudicatory Decisions: A Cross-Regime Comparison of Annulment and Appellate Mechanisms» *Journal of International Dispute Settlement,* 2016: 432 – 459.

nature, as they deal with commercial transactions between private individuals and entities regulated by trade contracts. The rights justiciable through international commercial arbitration have no public dimension. The private nature of international commercial arbitration is not diminished by the consideration that States can figure, and indeed often figures, on one of the sides of the dispute brought to arbitration.[590] States are very active actors of international trade and the necessity to insulate the claim brought by a party from the vagaries and peculiarities of domestic proceedings is all the more pressing when party to a dispute is a sovereign entity. However, when this happens, States are treated as traders that trade on the market - and dispute on the market - on the same level as any other trader.[591] In these instances, it is said, it is not the *iure imperii* manifestation of the State that comes to bear, but rather its *iure gestionis* dimension.[592] The consequences of this *de-statualisation* of the State are far reaching, and their outcome pretty much invariably coincides with the reaffirmation of the private dimension of the disputes subject to international commercial arbitration.[593]

474. By way of example, in the late '50 of the past Century a *restricted theory* of State immunity emerged, advanced by Italian[594] and Belgian Courts, according to which a sovereign entity cannot claim its sovereign status to escape being sued when it acts *iure gestionis*, namely when it enters into contracts and transactions without exercising a public function, but rather as a private trader. A State that enters into commercial transactions not determined by a sovereign purpose cannot claim to be immune before foreign courts if a dispute arises in connection with the

[590] See for instance, Hober, K. "*Even though arbitrations between States and commercial enterprises is a relatively new phenomenon in the history of international arbitration, such arbitrations have taken place for a long time"*. «Arbitration Involving States» The Leading Arbitrators' Guide to International Arbitration, Newman L. and Hill, R. Juris Publishing: 2004, 139. See also Fouchard, P. «L'Arbitrage et la Mondialisation de l'Economie», *Mélanges en l'Honneur de Geérard Farjat*, Paris, 1999 : 381-395.

[591] Mayer, P. «La Neutralization Du Pouvoir Normative De l'Etat En Matière De Contracts d'Etat» *Journal du Droit International*, 1986, 1- 12.

[592] See Seidl-Hohenveldern, I. «L'Immunité de Juridiction et d'Exécution des Etats et des Organisations Internationales*», Droit international 1*, Paris: Pedone, 1981, 159 "*Nous verrons qu'en dépit d'un certain parallélisme, les règles sur l'immunité des organisations internationales sont différentes de celles qui s'appliquent aux Etats puisque les organisations jouissent d'une immunité couvrant aussi leurs acta jure gestionis*".

[593] Heiskanen, V. «State as a Private: The Participation of States in International Commercial Arbitration» *Transnational Dispute Management*, 2010, 1 – 14.

[594] Cassese, A.« L'immunité De Juridiction Civile Des Organisations Internationales Dans La Jurisprudence Italienne», *Annuaire Français de Droit International*: 1984, 556 - 566. Treves, T. «Chronique de Jurisprudence Italienne», *Journal du Droit International*, 1983: 645 - 682.

transaction. And, albeit with certain differences, this applies both to adjudicative jurisdiction and enforcement jurisdiction.[595]

475. Strictly correlated with the private nature of international commercial arbitration is the fact that this mechanism of dispute resolution is essentially a product of the parties and the will of the parties to the dispute is a cornerstone principle of its structure, especially in contractual theories of arbitration.[596]According to these, in particular, arbitration has a contractual character and *it has its origins and depends, for its existence and continuity, on the parties' agreement*".[597] The role of the State in the arbitral process, even if it is just in terms of control or supervision of a power delegated to the arbitrators, is for the most part denied. Professors Gaillard and Savage have spoken in this regard of the *extreme autonomy* of international commercial arbitration, which is necessary in order to enable the parties to create an appropriate substantive and procedural framework within which the dispute can be addressed.[598]

476. The private nature and the privity of international commercial arbitration are also reflected in the consideration that the award rendered in the context of an international commercial arbitration in theory affects directly only the parties to the dispute and should have no other systemic effects.[599] It may be worth to notice that those who endorse the idea that a public component is lacking in international

[595] Bouchez, L. «The Nature and Scope of State Immunity from Jurisdiction and Execution», *The Netherlands Yearbook of International Law*, 1978: 3-33. Fox, H. *The Law of State Immunity.* Oxford: Oxford University Press: 2002. Lauterpacht, H. «The Problem of Jurisdictional Immunities of Foreign States» *British Yearbook of International Law:* 1951: 220 - 272; Pingel-Lenuzza, I. *Les Immunités des Etats en Droit International:* Bruylant: 1997. Sinclair, I. «Law of Sovereign Immunity—Recent Developments», *Collected courses of The Hague Academy of International Law:* 1980: 113 – 284. Trooboff, P. «Foreign State Immunity: Emerging Consensus on Principles», *Collected courses of The Hague Academy of International Law:* 1986, 235-432.

[596] Legum, B. «Investment Treaty Arbitration's Contribution to International Commercial Arbitration», *Dispute Resolution Journal*: 2005, 70 – 73, 73. Brower, C. «W(h)ither International Commercial Arbitration?», *Arbitration International*, 2008: 181-198, 190. Van Aaken, A. «International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis» *Journal of International Economic Law*: 2009, 507-538.

[597] Lew, J. et Al. *Comparative International Commercial Arbitration*. New York: Kluwer International, 2003: 77.

[598] Bernardini, P. "*Analogies and differences exist regarding the arbitration procedure, both in case arbitration is to be conducted according to the ICSID Convention, the ICSID Additional Facility Rules, or the rules of an international institution adopted mainly for commercial arbitration. Under all these systems of arbitration, the proceeding is administered in accordance with the will of the parties or, failing this, by the arbitral tribunal's determination and develops, as usual, through a written and an oral phase, with full respect at all times to the parties' equality and their right to be heard*". Bernardini, P. «International Commercial Arbitration and Investment Treaty Arbitration: Analogies and Differences in Practising Virtue» Caron, D. et Al., *Inside International Arbitration*. Oxford: Oxford University Press, 2015: 52 – 68, 55.

[599] Kremslehner, F. «Lis pendens and res judicata in International Commercial Arbitration» *Austrian Arbitration Yearbook* 2007, 127-162, 141.

commercial arbitration do not do so with a negative connotation: it is said in fact that it is a strength of international commercial arbitration that it has remained for the most part insulated from the vast array of public interests that characterize other forms of international adjudication. According to this scholarship, any attempt to revisit the *privity model*[600] systematically runs the risk of jeopardising the popularity of this mechanism of dispute resolution.

477. Against the private nature of international commercial arbitration, the ethos and culture behind international investment arbitration are oriented towards public values. In particular, in consideration of the fact that resolution of investment disputes oftentimes have an impact on the ability of States to regulate matters that traditionally are connected to the exercise of governmental powers, international investment arbitration is seen as a form of judicial review of decisions adopted by Sovereign States, including in the exercise of a public interest.[601] The position of the United States in the landmark case *Methanex v United States* exemplifies this aspect with clarity. According to the United States, the investment case before the Tribunal:

> *"was to be distinguished from a typical commercial arbitration on the basis that a State was the Respondent, the issues had to be decided in accordance with the treaty and the principles of public international law and a decision on the dispute could have a significant effect extending beyond the two Disputing Parties*[602].

478. The public nature that is said to characterise international investment arbitration would be distilled in particular from certain features that characterise this

[600] Paulsson, J. «Arbitration Without Privity» *ICSID Review*, 1995: 232-257.
[601] Batens, F. (2016) *op. cit.*; Rubins, N. «Judicial Review of Investment Arbitration Awards.» *Transnational Dispute Management*, 2005.; Ortino, F. «The Investment Treaty System as Judicial Review.» *American Review of International Arbitration*, 2014: 437 - 468. See also Maupin (2014) *op.cit*., at 370, even though speaking with regard to past cases: "*Germany is currently facing an $18.7 billion dollar claim by Swedish energy investors over the German government's decision to phase out nucle- ar power in the wake of the Fukushima nuclear accident. Australia is pre- paring to defend a multi-billion dollar claim by Philip Morris brought in response to that country's recently enacted Tobacco Plain Packaging legis- lation.6 Belgium faces a $2.3 billion dollar claim by a Chinese insurance company as a result of the government bailout and then sale of a Belgian- Dutch bank during the recent financial crisis*".
[602] Methanex Corporation v. United States of America, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" of 15 January 2001, 9.

mechanism of international dispute resolution.[603] These can in turn be mapped out as follows:

a. International investment arbitration is based on a regulatory relationship between states as governors and foreign investors as the governed.

b. International investment arbitration is not about mere contractual disputes between private parties but governmental decisions that involve the public interest,

c. The regime of international investment arbitration is a creature of public international law;

d. Investor-state arbitrators effectively engage in forms of review over public national law that resemble in form and outcome the quintessentially public constitutional or 'judicial review' undertaken by supreme courts around the world.

e. International Investment Law does not simply settle discrete commercial disputes; it generates a form of 'global governance' or, 'global administrative law' that de facto regulates states.

f. International Investment Law —despite bilateral appearances—the structure, contents, and remedies provided under international investment protection agreements are not those of tit-for-tat reciprocal deals. The regime produces multilateral effects comparable to those generated by formally multilateral regimes; it aspires to create common rights of public international law.

[603] See also Choudhury, B. «Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?» *Vanderbilt Journal of Transnational Law*: 2008, 775 - 832.

g. International Investment Law generates and relies on public case law, thereby engendering expectations for *jurisprudence constante*, unlike the private awards usually generated under commercial arbitration[604].

3.2 The Real Scope of the Private/Public Debate in International Commercial and Investment Arbitration

479. The difference between the private nature of international commercial arbitration and the public nature of international investment arbitration is conceptually clear; however, this distinction should not be exaggerated.[605] The position that is advocated in this dissertation is that, despite obvious differences between the two methods of dispute resolution, the points of commonality far outweigh the perceived differences and the above-mentioned clash of paradigms is more theoretical, than real.[606] These considerations should be read against a general decline of the viability of the private-public divide as a classification category of social phenomena, where the commistion of interests of a different nature has become more and more common.[607]

480. As regards investment arbitration and commercial arbitration, both mechanisms work as an integrated system that addresses private and public interests at once. In particular, international commercial arbitration presents certain features that bring it closer to the public model of international investment arbitration, whereas international investment arbitration, in turn, has some traits that shorten the distance to the primarily private paradigm of international commercial arbitration. In other words, contrary to what some authors state,[608] the public/private differentiation, albeit still relevant, does not correspond entirely with the differentiation between international investment arbitration and international

[604] Alvarez, J. «Is International Investment Arbitration Public?» *Journal of International Dispute Resolution*, 2016: 534 - 576.
[605] The author of this dissertation does not agree with a certain scholarship that depitcts international commercial arbitration and international investment arbitration as two conceptually different and irreconcilable models. See for example, generally Alvarez, J. (2016) *op. cit.*
[606] Roberts, A. (2013) *op. cit.*, 45.
[607] Freeman, A. and Mensch, E. «The Public-Private Distinction in American Law and Life» *Buffalo Law Review:* 1987, 237 – 255.
[608] Gal-Or, N. «Dispute Resolution in International Trade and Investment Law: Privatisation of the Public?», *Transnational Private Governance and its Limits*, Graz, J. C. and Nölke, A. London: Routledge, 2008: 209 – 221.

commercial arbitration, and this is so both at the level of general theory, and of specific legal institutions. International investment arbitration is not the sole domain of public interests; just like international commercial arbitration is not the sole domain of private ones. *This means that a structural incompatibility to cross-fertilisation between these systems, predicated on the dividing line between private and public, cannot be justified hastily, and automatically*. Such dividing line, when at all relevant, is very blurred and requires an ad hoc-analysis.[609]

3.2.1 The Closeness of the Models

481. At the level of general theory and philosophical underpinning of these mechanisms of dispute resolution, the essentially private nature of international commercial arbitration cannot escape some fundamental qualifications. An exaggeration of its private and contractual nature fails to see the way in which it has evolved over the years and does not capture the nuances of the theoretical debate that have characterised it so far.[610] The extremisation of the privity of international commercial arbitration is in fact tied to strict contractualist theorisations of the model.[611] These provide for the absolute and controlling role of the parties, without any interference of a public nature in the decision-making process.[612] Contractualist theories are however not the only available framework to explain the functioning of arbitration, and other conceptualisations exist to rationalise its foundation. According to the judicial theory of international commercial arbitration, for example, arbitration is not merely an agreement between the parties to sort out a dispute, but rather is a mechanism of dispute resolution marked by an original delegation of State function: it is the State that allows the Parties to submit their dispute to arbitration, rather than adjudication and it is the State that confers on the arbitrators the power to adjudge disputes. The parties' decision to arbitrate, therefore, must be read within an original

[609]Mansfield, M. «When "Private" Rights Meet "Public" Rights: The Problems of Labeling and Regulatory Takings», *University of Colorado Law Review*: 1994, 193 – 202.
[610] Carabiber, C. «L' Evolution de l' Arbitrage Commercial International» *Hague Academy Recueil des Cours* : 1960, 125 – 230.
[611] Byrnes, J. and Pollman, E. «Arbitration, Consent and Contractual Theory: The Implications of EEOC v. Waffle House» *Harvard Negotiation Law Review*: 2003, 289-312.
[612] Lew, J. *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*: Oceana Publications: 1978, 51-61.

delegation of powers by the sovereign, without which the arbitration agreement would have no effect.[613]

482. This of course has the consequence of qualifying significantly the notion of party autonomy, and rather highlights a public component of international commercial arbitration. The strengthened link between the State, its sovereignty, and commercial arbitration that the judicial theory postulates has a number of cascade effects, that *crack the damn of privity and autonomy*: the importance of national laws, the limits to the will of the parties as compared to the mandatory laws of the forum State that protect a public interest, the fact that the arbitrators are not merely agents of the parties, but they also serve a public function, the fact that arbitration is generally the exercise of a quasi-judicial function where respective rights have to be balanced. Also two other theories of international commercial arbitration, the hybrid theory and the autonomous theory, albeit with a lesser degree of intensity, recognise the non-exclusively private dimension of this mechanism of dispute resolution and bring it closer to a system that is not oblivious of public interests.

483. The great variability of general theories that characterise the analysis of the structural features of international commercial arbitration also occurs in investment arbitration. Here, in addition to those who postulate the strong public underpinning of this model of dispute resolution and lament the shortcomings of private adjudication of public rights,[614] there are those who adhere to a systematics of international investment arbitration that plays down significantly the role of the public dimension. According to some, for example:

> *"International investment law is of little or no public concern, as it is nothing more than an institutional support structure for the efficient settlement of private investment disputes"*[615]

[613] Klein, F. *Considérations sur l'Arbitrage en Droit International Privé* : Bâle Helbing & Lichtenhahn 1953, 181.
[614] Norris, A. and Metzidakis, K. «Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and the Cochabamba Water War» *Harvard Negotiation Law Review*: 2010, 31 – 76.
[615] Maupin, J. (2014) *op. cit.*, 371.

484. In this context, some scholars have postulated a contractual theory of investment arbitration similar to the one that emerged in international commercial arbitration, by highlighting the prominence of the will of the parties and the central role of their autonomy even in a system that regulates State's rights *vis à vis* investors.[616] According to Chios, for example,

> *"International investment law (...) appears heavily contractual. It is sourced largely in bilateral treaties concluded between pairs of countries that bear a certain resemblance to contracts. They are concluded between defined parties. They are understood to create rights and obligations for the parties alone. They may be amended or terminated according to their terms. In all of these respects, investment treaties place emphasis on the text as an expression of will."*[617]

485. Others have played the *taxonomical card* to bring investment arbitration in line, at the level of general theory, with commercial arbitration and have spoken in this regard of international investment arbitration as a *purely a subcategory of international commercial arbitration and thus infused with the values of that process.*[618] A certain ethos seems therefore to permeate quarters active in investment arbitration that this should remain a procedure in which public implications are left to the minimum and:

> *"[w]hich is characterized by (...) a discrete nature, has no systemic effect, focuses exclusively on the parties to the proceedings without affecting non-parties, is backed by confidentiality of the proceedings, and involves dispute resolvers who, rather than strictly apply the rule of law, need to hand down a decision that satisfies the parties to the proceedings and enables them to continue a business relationship".*[619]

486. This position may also be determined by the fact that many of those who operate as counsel or arbitrators come from a background of international

[616] Van Aaken, A. «International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis» *Journal of International Economic Law*: 2009, 507 – 538.
[617] Carmody, C. «Obligations versus Rights: Substantive Difference between WTO and International Investment Law» *University of Western Ontario*: 2017, 75 – 99, 86.
[618] Toope, S, J. *Mixed International Arbitration, Studies in Arbitration, Between States and Private Persons*: Grotious Publications, 1990: 389.
[619] Schill, W. «Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator.» *Leiden Journal of International Law*, 2010: 401 – 430, at 414.

commercial arbitration and hence bring into international investment arbitration a culture that is steeped in the private law discourse[620]. This of course has an impact not only on the way the arbitrator conceives international arbitration as a system, but also on the way he or she conceives certain aspects of this system, for example the role of the arbitrator in the context of the proceedings and *vis à vis* the interest of the parties.

487. Be that as it may, what has been explained above attests for a potentially much larger degree of convergence at the level of general theory between the two kinds of arbitrations, than would at first sight appear to be the case. The extremisation of the private/public tension is thus limited at the fringes of general theory. For example, the judicial theory of international commercial arbitration and the more contract-oriented theory of international investment arbitration position themselves in the middle of the spectrum of all the possible conceptualisations of arbitration, and hence share a significant amount of overlapping features. In particular, both qualify arbitration as a mechanisms based on consent, that is however not entirely detached from the State and public law categories and that addresses dispute that can also have a public dimension, through a procedurally private method of dispute resolution.

488. Even if one leaves the field of normative theories and theoretical legal analysis, to assess individual aspects of the relationship between international commercial arbitration and international investment arbitration, it appears that there are ample areas of convergence between these models.

[620] Whereas there is a general debate about the need to separate the community of international commercial arbitrators from that of international investment arbitrators, these attempts, and the related attempts to separate entirely the world of investment arbitration from commercial arbitration have so far remained at the level of speculation. The separation between epistemologic communities, as referred to earlier, is perhaps more real in a de lege ferenda perspective, than in a strictly de lege lata one, and, if there is a movement towards the valorisation of the public component of international investment arbitration, this is in progress, and far from being concluded. As Professor Paullson explains, for example: "*criticism of international tribunals on the grounds that they impede democratic policies – whether protection of the environment or the labour market – is misdirected. International Tribunals do not establish policies, they give effect to international agreements. (...) Criticism of international Tribunals on the grounds that they should operate more efficiently, transparently, coherently and fairly are entirely legitimate. But no human institutions are perfect. International arbitral tribunals have existed for many generations; complaints by those disappointed in their awards have existed for precisely as long. One must be careful to recognize criticism which is only a cover for the disinclination to obey international laws, and careful too in not rushing to implement ostensible reforms which will only have the effect of paralysing its effective application*. Paulsson, J. «What Authority do International Arbitrators have over States» Van den Berg. A. J. et Al. *New Horizons in International Commercial Arbitrations and Beyond*. New York: Kluwer Law International, 2005: 132 – 165, 163.

489. As seen previously, from the perspective of the procedure, a lot of aspects remain that bring the system of international investment arbitration in line with the private nature that defines international commercial arbitration. Arbitration proceedings are managed on the basis of rules that were created for international commercial arbitration and trade-related disputes, such as the UN Commission on International Trade Law (UNCITRAL) Arbitration Rules, the Rules of Arbitration of the International Chamber of Commerce, and the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. Even those Conventions created specifically with the purpose of managing investment disputes between a State and a private party, such as ICSID, retain the vast majority of the principles and rules that are proper to international commercial arbitration.

490. If one looks at the practice of international arbitration, this conclusion is certainly borne out. According to Llamzon, for example, when one views how investment arbitration proceedings are conducted, how evidence is admitted, how witnesses are examined, how Tribunal issue orders, terms of appointment and bifurcate proceedings, there is little doubt as to the provenance of its procedure – commercial arbitration has exerted immense influence on the conduct of investment arbitration. By way of example, the principle of party's autonomy in the choice of the law applicable to the dispute, which is a cornerstone of commercial arbitration, is a feature of international investment arbitration as well. According to Article 41(2) of the ICSID Convention, *the Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties*. And, when the Parties have chosen the law applicable to the dispute, *the arbitrators have a duty to apply such law and nothing but such law*. Also, the award rendered by an international arbitral Tribunal cannot normally be appealed and the role of domestic courts in reviewing it is very limited. Both in the case of international commercial arbitration and in the case of investment arbitration (at least investment arbitration administered under certain rules), the award rendered by the arbitral tribunal is enforceable under the New York Convention of 1958 and it consists in an award for damages.

491. Also on the substantive (as opposed as procedural) issues there is more convergence than may at first appear to be the case. One can start by looking at the nature of disputes, for example. The typical investment treaty's expropriation clause allows investors to claim damages for violations of their property and contract rights. These are traditionally private rights. On the other hand, the fair and equitable treatment clause empowers them to claim damages for violations of certain public law rights, such as the rights to procedural fairness, transparency, and non-discrimination.[621] These rights have a public dimension. On the reverse side of the argument, when a State does not act as a claimant, it may defend itself in investment claims by raising private law defences, such as contractual defences; or public law defences, as is the case with a defence of necessity. Private law, therefore, is clearly present in investment disputes, and is not always in demise as opposed to public law.

492. On the reverse, it is fictitious to hold nowadays that the disputes that international commercial arbitration addresses are entirely private in nature and that therefore a commercial arbitrator would never have to face challenges similar to those that the investment arbitrator regularly faces. And this tendency of "publicization" of international commercial arbitration disputes does not record a state of affairs that has come along by chance. Or at least, not entirely. Rather, it accounts for a desired and - to some extent - planned evolution of international commercial arbitration, spurred by two forces. First, by the growing trust in this mechanism of dispute settlement, after the initial diffidence; second, by the challenges that a rigid method of dispute resolution would face in a globalised world economy, where private and public are strictly interwoven due to the magnitude of the disputes, and where even the tenability of this distinction as a general taxonomical criterion starts to be questioned[622]. As Professor Donovan has noted:

> *"I continue to believe that if international commercial arbitration is to play the critical role in the international economy of which it is capable, arbitrators cannot shy away, and courts must be*

[621] Maupin, J. (2014) *op. cit.*
[622] Kennedy, D. «The Stages of the Decline of the Public/Private Distinction» *The University of Pennsylvania Law Review*: 1982, 1349 – 1375; Horwitz, J. M. «The History of the Public/Private Distinction», *The University of Pennsylvania Law Review*: 1982, 1423 – 1428.

prepared to refer to arbitration, both private and public law claims encompassed by a valid agreement to arbitrate"[623]

493. This is a position shared by Professor Forties, according to whom:

"International commercial arbitrators and arbitration practitioners are often called upon to deal with both public and private law issues. They are increasingly called upon to frame and resolve disputes that go beyond narrow commercial issues. This invites some reflection on the appropriate balance between the rights of private parties to a just resolution of the depute between them, and the interest of the persons or constituencies outside of the arbitral proceeding which are impacted by the public law issues bound up in the dispute"[624]

494. What does it mean in practice that international commercial arbitrators must confront themselves with commercial disputes that are increasingly characterised by a public dimension? First of all, as seen previously at the beginning of this work, that disputes with a public component are more and more often decided by arbitration. In this regard, Professor Karl Heinz Bockstiegel, noted that

"If legislators or courts feel that certain factual or legal aspects of commercial contractual relationships involve a public interest and should, therefore, not be left entirely to the disposal of private parties and their arbitration, in order to achieve the necessary influence of the State, they can (...) exclude arbitrability.[625]

495. The trend over these years has gone against the shrinking of arbitrability but rather towards it expansion. And the consequence has been that *certain factual or legal aspects of commercial contractual relationships involv[ing] a public interest* have been brought into the domain of arbitration, rather than be excluded from it.[626]

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[623] Donovan, F. «International Commercial Arbitration and Public Policy» *NYU Journal of International Law*, 1995: 654 - 657.

[624] Forties, Y. «Entre L'Arbre at l'éncore, Can International Commercial Arbitration Deliver on Environmetal Disputes?» Ndyaye, T. and Wolfrum, D. *Liber Amicorum Thomas Mensah*: Brill: 2007, 159 – 176, 167.

[625] Bockstiegel, K. H. «Public Policy and Arbitrability», Sanders, P. *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series No 3. Kluwer Law International, 1987: 177 – 181.

[626] On the reasons of the past exclusion see Bantekas, Y. «The Foundations of Arbitrability in International Commercial Arbitration» *Australian Year Book of International Law*: 2007, 193-223, at 197. Some authors suggest that the lack of arbitrability pertaining to particular types of disputes is premised on the fact that because arbitration is a private proceeding with public consequences, some states prefer to have such disputes entailing public consequences heard in

496. In addition to arbitrability, the public dimension of commercial arbitration also emerges in the magnitude of the disputes that are brought before international commercial Tribunals. Decisions rendered over controversies worth billions of dollars, involving transnational corporations and having a marked international dimension are bound to have an impact on collective interests, even if indirectly or *de facto*. The classic position that an international commercial Tribunal should only decide disputes by taking into account the interests of the parties, and the consequence of limiting the effects of the awards only between the parties, becomes therefore illusory. This should also be read against the consideration that in international investment arbitration, the need to take into account systemic interests - one of the features that would characterise this model of its public component - is not universally shared. Theories of investment arbitration more tied to a contractualist view, for instance, reject this approach. According to Reisman:

> *"While law-makers must identify and take account of the systemic implications of alternative prescriptions, international investment arbitrators are only authorized to act as law-appliers. As such, they should confine themselves to their case-specific mandate and refrain from departing from it to take account of what arbitrators may conceive to be the "systemic implications" of their decision.*[627]

497. In addition to the increase in arbitrability and the magnitude of the cases brought to international commercial arbitration, there is one element in particular that has brought a public interest dimension in international commercial arbitration, namely the participation of States or State entities to international commercial proceedings.[628] The International Chamber of Commerce has recently calculated that about 10% of all arbitration administered under their rules includes the participation of a State or a State entity and that when this is the case, a large variety of cases are involved, including both small amounts of money and larger amounts of

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the public domain. Therefore, it is argued, this task can only be achieved where cases of this type are referred to civil courts that are not subject to the privacy and confidentiality constraints of arbitration.

[627]Reisman, M. «Case Specific Mandates versus Systemic Implications: How Should Investment Tribunals Decide?: The Freshfields Arbitration Lecture», *Arbitration International*: 2013, 131-152.

[628] Feldman, M. «International Arbitration and Transparency.» *Peking University School of Transnational Law Research Paper*, 2016: 1- 23.

money.[629] In accordance with the ICC Report, claims arising out of commercial contracts constitute the largest category of cases involving States or State entities. The most frequent kinds of contracts are those relating to construction, maintenance and the operation of facilities or systems. These subject matters correspond entirely with those brought before international investment Tribunals. It is difficult therefore to agree with the consideration that these kinds of commercial arbitrations are devoid of any public component. Quite on the contrary:

> *"adverse awards would be paid from public funds, (ii) claims can include allegations of state misconduct and/or corruption, and (iii) claims can arise from a State's exercise of public power. Thus, there is a significant public interest in at least one category of international commercial arbitration cases: disputes in which a State or State entity is a disputing party".*[630]

498. Examples of public interest at stake in commercial arbitration include - among others - cases dealing with national defence issues, agriculture, a State's oil, gas and other natural resources, commercial embargoes and telecommunications.[631] And if, as seen earlier, it is sometimes said that the participation of the State to commercial arbitration occurs in its *iure gestionis* dimension and that this means that its public and sovereign component is not engaged, things are generally more nuanced than that. According to Ruscalla, for example:

> *"Even though commercial arbitrations are usually conducted between private parties, one of the disputing parties can be a State, a State entity or a State instrumentality. In fact, a State can act both in its sovereign capacity (jure imperii) under public international law and participate in international commercial arbitrations in its private capacity (jure gestionis). In the latter case, the public interest can be involved in purely commercial international arbitrations. Second, due to this presence of public interest issues, the general public could be affected by the outcome of a commercial arbitration proceeding in several ways."*[632]

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[629] Report of the ICC Commission on Arbitration and ADR Task Force on Arbitration Involving States or State Entities, Arbitration Involving States and State Entities under the ICC Rules of Arbitration, 2012, 2.
[630] Feldman, M. (2016) *op.cit*.
[631] Ruscalla, G. «Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard? » *Groningen Journal of International Law*, 2015, 1 – 26, 8.
[632] Ruscalla, G., (2015) *op.cit*., 8.

499. The public dimension that has crept into international commercial arbitration means that arbitrators are increasingly called to exercise a balancing of needs even in the commercial context in which they operate: on the one hand, having respect for the model of dispute resolution chosen by the Parties, and not exceeding its jurisdictional boundaries; on the other hand, within the jurisdictional boundaries of the model of commercial arbitration, by devising solutions that are not oblivious of the public nature dimension of certain disputes that are brought before them.[633]

500. Transparency, in this regard, is a case in point.[634] Even though significant differences remain between international commercial arbitration and international investment arbitration, a marked shift towards increased transparency has characterised both mechanisms of dispute resolution, precisely because it has been recognised that they both deal with disputes that present a certain component of public interest and a certain convergence should characterise the solutions devised by the two dispute resolution mechanisms.[635] This is not to say that transparency in international commercial arbitration is dealt in the same manner as transparency in international investment arbitration.[636] The pro-transparency movement has begun in investment law, only to be reflected at a later stage in commercial arbitration. [637]But the transparency gap has shrunk, and not increased, over the years.[638] Domestic legal orders tend to consider confidentiality of international commercial arbitration as an

[633] Tavender, P. «Considerations of Fairness in International Commercial Arbitration.» *Alternative Dispute Resolution Law Review*, 1996: 509-556, 545.

[634] Accordig to UNCITRAL, *"[T]he substantive issues to be considered in respect of the possible content of a legal standard on transparency would be as follows: publicity regarding the initiation of arbitral proceedings; documents to be published (such as pleadings, procedural orders, supporting evidence); submission by third parties ("amicus curiae") in proceedings; public hearings; publication of arbitral awards; possible exceptions to the transparency rules; and repository of published information ("registry").*" United Nations Commission on International Trade Law (UNCITRAL), REPORT: Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration, Working Group II (Arbitration and Conciliation) of the work of its fifty-third session (Vienna, 4–8 October 2010), A/CN9/712, 20 October 2010, para 31.

[635] Müller, C. «La Confidentialité en Arbitrage Commercial International: un Trompe-l'œil?», *ASA Bulletin* : 2005, 216-240.

[636] Gaillard, E. et Al (1996), *op.cit.*, 733.

[637] Comrie-Thomson, P. «A Statement of Arbitral Jurisprudence: The Case for a National Law Obligation to Publish International Commercial Arbitral Awards» *Journal of International Arbitration*, 2017: 275–301. Feliciano, F. «The Ordre Public Dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance Requirements in International Investment and Trade Arbitration» *Philadelphia Law Journal*, 2012: 10 – 24.

[638] Kluwer Arbitration Blog, Mourre, A. and Vagenheim, A, Arbitral Jurisprudence in International CommercialArbitration: The Case for a Systematic Publication of Arbitral Awards in 10 Questions, 28 May 2009, at <kluwerarbitrationblog.com/blog/2009/05/28/arbitral-jurisprudence-in-international-commercial- [Accessed on 15 July 2018]

exception, rather than a rule. For instance, the English Arbitration Act of 1996 does not address specifically the issue of confidentiality. As a consequence, even if confidentiality was considered as entrenched in arbitration law, it has now to be stipulated as an express provision in arbitral clauses, if the parties desire it in the conduct of the proceedings.[639] In France, confidentiality in international arbitration is also no longer the general rule. The New French Arbitration Law draws a distinction in this regard between domestic arbitration and international arbitration.[640] Confidentiality of arbitral proceedings is applied only to the former.[641]

501. Also, most scholars point consistently to the shortcomings of excessive confidentiality in international commercial arbitration and to the ultimate need to overcome this model.[642] The prophecy of Professor Catherine Rogers, formulated 10 years ago, is coming true that:

> *"Given the vigour of pressures for increased transparency in investment arbitration, it seems doubtful that they will stop at the blurred boundary between the two systems of investment arbitration and commercial arbitration".*[643]

502. And the movement for greater transparency in international commercial arbitration does not only regard the scenario when States or state entities are involved. Certainly, as Professor Bernardo Cremades, notes:

> *"Whilst confidentiality is the predominating characteristic in commercial arbitrations where both parties are companies, it is a different matter altogether when the State is involved. Since the State is submitted to public law and control, its arbitrations must be public".*[644]

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[639] Gerbay, R. «Confidentiality vs Transparency in International Arbitration: The English Perspective» *Transnational Dispute Management* :1 – 20, 3.
[640] French Code de Procédure Civile (Code of Civil Procedure), 2005. Gaillard, E. and de Lapasse, P, "Le Nouveau Droit Français de l'Arbitrage Interne et International", 3 Recueil Dalloz (2011) 175, 184.
[641] Article 1464(4), New French Arbitration Law.
[642] Paulsson, J. and Rawding, N. «The Trouble with Confidentiality» *ICC Bulletin*, 1994: 303 – 320. See also Delvolvé, J. L. «Vraies et Fausses Confidences, ou les Petits et les Grands Secrets de l'Arbitrage» *Revue de l'Arbitrage* : 1996 373 – 391.
[643] Rogers, C. «Transparency in International Commercial Arbitration» *Kansas Law Review*, 2006: 1301 – 1337.
[644] Cremades, B. and Cortés, R. «The Principle of Confidentiality in Arbitration: A Necessary Crisis» *Journal of Arbitration Studies*, 2013: 25 – 38.

503. However, also arbitration involving public companies, for instance, oftentimes needs to be disclosed according to the rules of the securities listing of those companies; or because if the commercial arbitral award is challenged before the courts of the forum State, the existence of the arbitration, and the content of the arbitral award, necessarily becomes public.[645]

504. Even as regards the possibility for third parties to participate to the arbitral proceedings, for example by means of submitting *amicus curiae* or otherwise intervening in the arbitral process, the situation of complete impermeability of international commercial proceedings appears to be no longer corresponding to the practice of commercial tribunals, in all instances when a considerable public interest is involved in the litigation.[646] Ultimately, as Blackbaby has noted, the presumption of confidentiality:

> *"has little basis in concrete rules and the fortress of confidentiality has often turned out to be a castle of cards even in commercial cases."*[647]

505. The shortening of the transparency gap between international commercial and international investment arbitration can also be seen from an alternative angle to the one that postulates a shift to greater transparency in both methods of dispute resolution (with which this dissertation agrees). This alternative angle requires shunning away from an overestimation of the role that transparency plays in investment arbitration, and avoiding taking positions according to which the model is characterised by unconditional and complete openness of the proceedings (*via à vis* the limits to transparency in international commercial arbitration). This is clearly not the case, and several of the institutions that administer investment arbitration proceedings, for example, still maintain a conservative approach to transparency that is certainly closer to the original confidentiality model of international commercial arbitration. Article 30 of the Rules of London Court of International Arbitration (LCIA), for example, provides

[645] Heiskanen, V. (2010) *op.cit*.
[646] Tweeddale, A. «Confidentiality in Arbitration and the Public Interest Exception.» *Arbitration International*, 2005: 59 – 69.
[647] Blackbaby, N. (2006), *op. cit*., 235.

that all awards, materials, and documents, as well as the deliberations of the arbitral tribunal are confidential. Moreover, the award is not published and hearings are held in private, unless all parties agree in writing. If the parties agree on the publication of the award, the rules require that the arbitral tribunal has to be favourable to this as well. Similar provisions are contained in the Swiss Rules of International Arbitration (Swiss Rules) that provide for privately held hearings as well as full confidentiality of awards, orders, and materials, unless the parties otherwise agree in writing. Unlike the LCIA Rules, deliberations of the arbitral tribunal are always confidential and no exception is laid down. As for the publication of the award, the procedure requires both parties to agree to it and the final decision lies with the Secretariat of the Swiss Chambers' Arbitration Institution. Either because both commercial and investment arbitration are shifting toward transparency, or because at least in certain cases the confidentiality paradigm of commercial arbitration applies to investment arbitration, the distance between these models is not one that has to be overestimated, and with it the public/private divide that is said to inform it.

506. Another example of the shortening of the public/private divide is constituted by increasingly greater predictability of international commercial decisions. Predictability of judicial decisions is traditionally required of systems that deal with public interests.[648] As such, predictability has been increasingly advocated in investment law to the point that its absence in decisions of investment tribunals has been seen as one of the elements contributing to the crisis of legitimacy of international investment arbitration.[649] The necessity to protect the public interest also by means of spelling out with clarity certain fundamental principles of investment law has been addressed by advocating the necessity of a *jurisprudence constante*[650] of investment tribunals, through a wide use of precedents and the

[648] Burke-White, W. and von Staden, A. «Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations» *Yale Journal of International Law*, 2010: 283 – 346, 299; Garvey Algero, M. «The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation» *Louisiana Law Review* 2005, 776 - 822. Guillaume, G. «The Use of Precedents by International Judges and Arbitrators» *Journal of International Dispute Settlement*: 2011, 5 – 23.
[649] Franck, S. (2005) *op. cit.*
[650] Reed, L. «The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management» *ICSID Review*, 2010: 95 – 103. Kaufmann- Kohler, G. «Arbitral Precedent: Dream, Necessity or Excuse? – The 2006 Freshfields Lecture» *Arbitration International*: 2007, 357 – 358.

principle of *stare decisis,*[651] for purposes of homogenising an otherwise fragmented system. All this in the interest of the public dimension that is engaged by the regulation of investments in the Host State.[652] In certain cases, these instances have gone so far as to advocate the creation of a supranational court of investment arbitration, made of career judges, and operating within the framework of a system with the characteristics of a permanent international tribunal.[653] Some authors, albeit admittedly arguably, have advocated the position that an award by an investment Tribunal could be annulled if the arbitrators in the case did not take into due account, or at least reviewed, precedent arbitral awards. According to Professor Commission, for example:

> *"[w]hile the possibility of annulment because the tribunal has simply relied on earlier decisions without independent decision-making is likely possible it is equally likely possible that an annulment could occur if a tribunal did not discuss prior awards. Such an agreement could be framed as an excess of powers, a serious departure from a fundamental rule of procedure, or on the basis that the award has failed to state the reasons upon which it based."*[654]

507. How does all this comport with the traditionally invoked lack of consistency of decisions in international commercial arbitration?[655] Once again, the

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[651] International Thunderbird Gaming Corporation v. United Mexican States (UNCITRAL (NAFTA) Arbitration), Separate Opinion of Thomas Wälde of 26 January 2006, para 16. It is however debated as to whether the stare decisis rule can be a viable method in international dispute resolution.

[652] Eureko B.V. v. Republic of Poland (UNCITRAL), Partial Award of 19 August 2005, at paragraph 232.; Saluka Investments BV (The Netherlands) v. Czech Republic, Partial Award of 17 March 2006, at paragraph 302; International Thunderbird Gaming Corporation v. United Mexican States (UNCITRAL (NAFTA) Arbitration, Award of 26 January 2006, 147.

[653] Van Harten, G. «The Public-Private Distinction in the International Arbitration of Individual Claims Against the State» *International & Comparative Law Quarterly:* 2007, 371 – 393.

[654] Commission, J. (2007), *op.cit*.

[655] Kaufmann-Kohler, G. (2007) *op. cit*, 362 "*I asked one of my research assistants to survey awards in order to answer these two questions. Several hundred awards later, he returned with a long, detailed memorandum that concluded that arbitrators do what they want with past cases and that there is no clear practice in this field."* Redfern, A, "International Commercial Arbitration: Winning the Battle" in Bender, M, ed, PrivateInvestors Abroad: Problems and Solutions in International Business in 1989 (The Southwestern Legal Foundation, Dallas, 1990), 11–12; Blackaby, N. et Al, *Redfern and Hunter on International Arbitration:* Oxford: Oxford University Press, 2009 at 577. A former Secretary General of the International Chamber of Commerce, Mr Stephen Bond, on commenting on the question of confidentiality in international commercial arbitration, has stated for example that: "*It became apparent to me very soon after taking up my responsibilities at the ICC that the users of international commercial arbitration, i.e. the companies, governments and individuals who are parties in such cases, place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration. When inquiring as to the features of international commercial arbitration which attracted parties to it as opposed to litigation, confidentiality of the proceedings and the fact that these proceedings and the resulting award would not enter into the public domain was almost invariably*

answer requires addressing two different angles: first, that predictability of investment arbitral decisions should be properly understood as something hortatory at best, and sometimes not even so,[656] as opposed to something that has fully occurred in practice; second, and in any event, that greater consistency is also invoked from international commercial decision-making.

508. On the first point, even in investment arbitration, consistency and predictability of decisions is not an uncontested value. Some have spoken of a cost of consistency in this field of law and have advocated that the original influence of international commercial arbitration on this aspect should be preserved.[657] The argument would appear to be that inconsistency promotes accuracy, specific determination of issues, and allows for the identification and fixing of judicial mistakes in the application of the law, when these have occurred. As a scholar explains,

> *"Inconsistency, in sum, is valuable because it keeps the investment arbitration community vigilant. It makes us question the reasons for differences between awards, and look for explanations in the reasoning in the awards and in external factors. The inquiries and debates triggered by inconsistent adjudication further contribute to the development and refinement of substantive and procedural standards".*[658]

509. On the second point, it would be wrong to exaggerate the lack of any relevance of previous arbitral decisions in international commercial arbitration, as postulated by the most extreme privity model: first, scholarship has argued that there is a need for consistency of decisions also in this field of law;[659] second, this finding has been endorsed by arbitral Tribunals. For example, in *Dow Chemicals*,

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mentioned." Expert Report of Stephen Bond Esq. in Esso/BHP v. Plowman (1995), reprinted in *Arbitration International*, para. 6 (1995)."

[656] Schultz, T. «Against Consistency in Investment Arbitration» Douglas, Z. and Pauwelyn, J. *The Foundations of International Investment Law: Bringing Theory Into Practice*. Oxford: Oxford University Press: 297 – 316.
[657] Cate, T. M. I., «The Costs of Consistency: Precedent in Investment Treaty Arbitration» *Columbia Journal of Transnational Law*: 2013, 418 - 478.
[658] Cate, T. M. I. (2013), *op.cit*.
[659] Perret, F. «Is There a Need for Consistency in International Commercial Arbitration? » Banifatemi, Y., *Precedent in International Arbitration*: 2008: 33 – 47.

an ICC Tribunal unveiled the importance of a *jurisprudence costante* also in commercial arbitration when it stated that:

> *"The decisions of these tribunals [ICC arbitral tribunals] progressively create case law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated, should respond"*[660]

510. In sum, international commercial arbitration was born as a private method of dispute resolution, with a defining role for party autonomy and a certain limit as to its usage to disputes that are characterised by an evident public component. The will of the parties is fundamental both as regards the decision to arbitrate, and as regards the modalities of conduct of the arbitral proceedings. However, overtime, a strictly contractual nature of international commercial arbitration has given way to a conceptualisation of this method of dispute resolution to which considerations of public law and collective interests are not alien. This is not only reflected in the evolution of the theory of international commercial arbitration, but also at a more practical level. Public laws, and public interest considerations, slowly, have crept into this mechanism of dispute resolution. The correct characterisation of the public/private discourse in international investment and commercial arbitration is therefore one of preponderance, rather than one of structural incompatibility of international commercial arbitration to deal with disputes that are characterised by some public interest. At most, what can be said is that:

> *"The level of public interest in arbitration proceedings is normally higher in investment arbitration than in ordinary commercial arbitration."*[661]

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[660] Dow Chemical France ia v Isover Saint Gobain, ICC Case No 4131, Interim Award of 23 September 1982, IX Yearbook of Commercial Arbitration 131, 136. See also ICC Award 6379 (1990) in (1992) XVII YB Comm. Arb. 212, referring at 214 to ICC Award 1512, though seemingly out of an abundance of caution; see also ICC Award 7047 (1994) in (1996) XXI YB Comm. Arb. 79, referring at p. 83 to the 'Carte Blanche arbitration' (unpublished ICC Award of 25 January 1988) and its subsequent confirmation in Carte Blanche (Singapore) Pte Ltd v. Carte Blanche International Ltd, 888 F.2d 260 (2d Cir. 1989).

[661] Feliciano, F. (2012) *op.cit*., 10.

511. At the same time, whereas investment arbitration has a public component, as described above, it has not lost its connection with international commercial arbitration, of which it retains several *private* features, not only in terms of procedure. Ultimately, in this blurring of private and public, the entire clash of paradigm approach should not be extremised, to the point of rendering it an automatic hindrance to cross-fertilisation between international commercial, and investment arbitration, since:

> *"The public/private [regime] problematic is really a microcosm of a fundamental problem running throughout all areas of the law. To ponder whether the international investment regime is transnational public governance regime or a private dispute settlement system is to ask the wrong question. International investment law is at once neither and both of these things. They are two sides of the same coin, and each shapes and defines the other".*[662]

3.3 Criminal Law and the Public Private/Debate in International Commercial Arbitration: When These Differences May Matter

512. The previous paragraphs have shown that using a private/public paradigm to describe the relationship between international commercial arbitration and international investment arbitration is reductive; both because the dividing line between what is public, and what is private, in not always so clear, and because elements of privity and publicity are present in both methods of dispute resolution.

513. In addition to this general consideration, there is the question of the actual scope of application of the classical paradigm, even as qualified above. In other words, even admitting that there is a residual scope of application of the traditional divide in the description of the reciprocal features of commercial and investment arbitration, the ambit of its relevance should be properly identified. There may be some issues, or areas, that still lend themselves to a description in the private/public terms; and others that may be particularly resistant to the application of this binary scheme. This differentiation applies to the question of the appearance

[662] Maupin, J. (2014) *op. cit.*, 66.

of criminal conduct during international arbitral proceedings, which is the focus of this dissertation.

514. In particular, as will be seen later on, the divide is of limited relevance for answering as to how an arbitrator should deal with the *Defence of Illegality* raised by a Host State. There are other areas of the relationship between criminal law and international arbitration, on the other hand, in which the differentiation between private and public would be more likely to have some impact. The role of the arbitrator in international commercial and international investment arbitration, respectively, would be one of this. For example, whether the function of the arbitrator is infused with a private, as opposed to a public dimension, is something that would play a role on the kind of duties and/or initiatives that an arbitrator may have, or take, respectively, to address and tackle criminal conduct that appears during an arbitration. In the pages that follow, therefore, *and for the sake of the argument presented*, it will be assumed that, contrary to what has been indicated in the previous paragraphs, the private/public scheme is a viable tool to describe the relationship between international commercial and investment arbitration and that the former is a wholly private mechanisms of dispute resolution, while the latter is close to a public model of dispute resolution.

515. The question as to what an extent the arbitrator can be described as a servant of the parties, as opposed to an adjudicator exercising a public function, is historically not new. Already in the 30' and 40' US scholarship was wondering whether the arbitrators of labour disputes are more aligned to public judges or private adjudicators. In international commercial arbitration, the answer to this question is strongly connected to the philosophical underpinning of commercial arbitration and the source of the authority of the arbitral Tribunal that one adheres to. If one adheres to a theory of international arbitration as a mere outcome of the will of the parties, then the arbitrator is a *service provider*, who is by and large only accountable to the parties who have appointed him or her, having on the other hand no responsibility *vis à vis* the State, the transnational legal system or the global community. This approach differentiates the arbitrator from the judge on a sort of speciality principles that echoes in the words of Justice White:

> *"the Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from the market place, that they are effective in their adjudicatory function.*[663]*"*

516. The preponderant public connotation of investment law would on the other hand entail a *judicialisation* of investment arbitrators. And some commentators have argued in favour of this approach. Some commentators have also noted that in consideration of the fact that arbitrators in investment cases have a role in shaping global governance and deal with cases with considerable systemic effects, they should have specific qualifications, and these:

> *"should be no less stringent than that required for adjudicators in other areas of international dispute settlement, namely a proven record of qualification in the specific subject matter of the dispute settlement mechanism and/or competence in international law more generally"*[664]

517. In a similar fashion, it has been proposed that the principle *iura novit curia* should find full application in the context of investment arbitrations: arbitrators should undertake their own independent research in the interpretation and application of international law, rather than simply be guided by the positions and the arguments of the parties, as is often the case in international commercial arbitration.

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[663] Commonwealth coating case v Continental Casualty, opinion of Justice White 393 US 145, 89 SCt 337. If one adheres to other theories of arbitration, the outcome would be different. For the purposes of this Chapter, international commercial arbitration is considered as a wholly private mechanism of dispute resolution. But, as seen, this is no longer the case. The judicial theory of arbitration, on the other hand, the arbitrator is a "quasi-judge, part of global governance". If the foundation of the arbitration is in the delegation of a State function to a private tribunal, but still a manifestation of a State's sovereignty, then the arbitrator has a different role to play and his or her debt towards the parties is lessened. The hybrid theory of international arbitration brings together, and attempts to merge, the philosophical underpinnings of both the contractualist theory and the judicial theory. With respect to the role of the arbitrator, this means that the private dimension dissolves into the public one, and the public one dissolves into the private. Because the freedom to contract out of a system of State justice is still public, then it is intrinsically public authority that an arbitrator is exercising; in this aspect, the function of the arbitrator is that of a judge . As such, he or she is not only tasked with the protection of the interest of the parties, but with larger interests. As noted by Sayed: "*The Arbitrator, the judge of international trade, is the repository of certain immannent ideals, of which he or she is the guardian. Though they are appointed pursuant to a contract, they are invested with a mission that trascedns the parties' contract, enabling them to be censors of such contracts and not servants to the parties' passions. The mission of both the Arbitrator and the State judge are complementary*". Sayed, A. *Corruption in International Trade and Commercial Arbitration,* New York: Kluwer Law International, 2004, 9.

[664] Giovannini, T. «International Arbitration and Jura Novit Curia - Towards Harmonization.» *Transnational Dispute Management*, 2013: 22 – 35.

518. How does the potentially different role of the arbitrator in international commercial arbitration, *vis à vis* international investment arbitration, determined by the private/public divide, impact on the modality in which an arbitrator may confront himself or herself with criminal law issues? One first angle is the approach that the arbitrators should take with respect to fact-finding that is related to the identification of potentially relevant criminal conduct.[665] In the context of a purely, or predominantly private method of dispute resolution, as can be the case for commercial arbitration according to the contractualist theories, the arbitrator can have a rather passive role with respect to fact finding.[666] It is often said that in international commercial arbitration, burden of persuasion and proof rests on the party making a factual allegation. In international investment arbitration, on the other hand, the public component that has been discussed earlier may require a different approach and dictate that arbitrators, who serve not only in the interest of the Parties, but of the international community at large, adopt a more pro-active approach with respect to gathering evidence on issues of criminality.[667]

519. For example, it has been argued that in cases where the arbitrators suspect the existence of corrupt practices, in light of the various international instruments that condemn corruption as a matter of *Transnational Public Policy*, they may exercise investigative powers more aligned to the inquisitorial model, than to the adversarial model that is proper to international litigation.[668]There would be a number of ways to do so. For example, Article 43 of the ICSID Convention allows the Tribunal to (a) call upon the parties to produce documents or other evidence, and (b) visit the scene connected with the dispute and conducts such inquiries there as it may deem appropriate. The question therefore becomes one of the extent to which the different role that the public component is said to have in international

[665] Wilske S. and Raible, M. «The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues?» Rogers, C. et Al The Future of Investment Arbitration. Oxford: Oxford University Press, 2009: 250 – 270, 250.
[666] Klein, E. F. *Considérations sur l'Arbitrage en Droit International Privé*. Basel: Helbing & Lichtenhahn: 1955.
[667] Van den Berg, A. J. *International Commercial Arbitration: Important Contemporary Questions*, London: Kluwer Law International: 2003, 239. Kreindler, R. H., «Public Policy and Corruption in International Arbitration: A Perspective for Russian-Related Disputes», *Arbitration,* 2006: 236 – 250, 248.
[668] Kurkela, N. S. (2008) *op.cit*, 292.

investment arbitration influences the way in which the arbitrators themselves will address issues of criminality in the context of arbitral proceedings.

520. For example, in the case of *Metaltech v Uzbekistan*, an investment Tribunal, for the first time, took it upon itself to investigate certain circumstances that emerged during the proceedings that, according to the Tribunal, might constitute evidence of the fact that the consultancies agreements into which the investor had entered with certain professionals in Uzbekistan were in fact sham contracts behind which instances of criminality hid.[669] This was done *motu propriu* without any of the parties suggesting such a investigation to the Tribunal and the Methaltech's approach ultimately signals *a shift in the willingness of ICSID tribunals to play a more active role in seeking evidence that may ultimately result in the tribunal's lack of jurisdiction over the dispute.*"[670]

521. Another question that bears on the function that is attributed to the arbitrator concerns the relationship between the confidentiality that characterises arbitral proceedings and the duty to report crimes that is required of public official in many jurisdiction: clearly, whether an arbitrator is under an obligation to report a crime is a question that may have a different answer depending on whether the arbitrator is considered the provider of a public function, or a private adjudicator.[671]

522. Assuming the private/public divide were a viable descriptive model of the relationship between international commercial and investment arbitration, another field in which the difference would be relevant would regard the possibility to resort to implied powers to address criminal matters that may appear before the arbitral Tribunal. Both in international commercial arbitration and in international investment arbitration, the extension of the powers of the arbitral Tribunal are defined by the consent of the Parties as crystallised in the agreement to arbitrate, also by reference to possible institutional rules under which the arbitration procedure will be conducted. In cases where the arbitral rules provide no indication

[669] Bonini, A. (2014) *op. cit.*
[670] Rose, C. (2014) *op.cit*., 747.
[671] See generally Lahlou, Y. et Matousekova, M. «Le rôle de l'Arbitre dans la Lutte contre la Corruption» *RDAI*, 2012: 621-648.

as to how the arbitrator should address certain procedural matters, domestic laws applicable to the arbitral proceedings will normally provide an answer. There are however circumstances in which:

> "*neither the parties' arbitration agreement [n]or the applicable curial law and rules" are able to provide a definitive answer to the lacunae in the procedure that the Tribunal will have to follow.*

523. At the international level, there is agreement among scholars that international courts and arbitral Tribunals have certain latitude to decide questions not otherwise disciplined by resorting to implied powers, or inherent powers. As the Iran – US Claim Tribunal put it in the context of a famous dictum, in international adjudication, inherent or implied powers are those powers that are not explicitly granted to the tribunal but must be seen as a necessary consequence of the parties' fundamental intent to create an institution with a judicial nature.[672] The general understanding is that implied and inherent powers of arbitral Tribunals are not unlimited: if the duties of the arbitrators is that of rendering an enforceable award and if *excess of powers* is one of the grounds on which an award may be set aside, then the exercise of inherent powers must be restrained and limited within clear boundaries.[673]

524. A typical example of when a Tribunal may be required to exercise its implied powers presents itself when the criminal behaviour of one of the Parties, or, at times, both the parties, jeopardises the integrity of the arbitral process. In *Libananco v. Turkey*, the tribunal was confronted with a specific criminally relevant question in the conduct of the Parties during the proceedings. In particular, Libananco, the claimant, alleged that the authorities of the respondent State were exercising undue forms of surveillance on counsel for the claimant and witnesses that claimants intended to call during the proceedings. Because of this, experts on behalf of the claimant refused to testify for fear of reprisal by the Turkish authorities. The Tribunal was requested to take measures to confront these allegations of

[672] Islamic Republic of Iran v. United States of America, IUSCT Cases Nos. A3, A8, A9, A14 and B61, Decision No. DEC 134-A3/A8/A9/A14/B61-FT, paragraph 59 (1 July 2011) (quoting David D. Caron, et al., The UNCITRAL Arbitration Rules – A Commentary, 915.

[673] Wachter, R. «On the Inherent Powers of Arbitral Tribunals in International Commercial Arbitration» *Austrian Yearbook on International Arbitration*: 2012: 23 – 40.

criminal conduct by the respondent State. After having satisfied itself with the existence of sufficient evidence to prove prima facie the criminal conduct complained of, the arbitrators held:

> *"Nor does the Tribunal doubt for a moment that, like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process – even if the remedies open to it are necessarily different from those that might be available to a domestic court of law in an ICSID member state. The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration [.]"*[674]

525. In the end, the Tribunal refused to use its implied powers to exclude the respondent from participating in that stage of the proceedings, since at a closer level of analysis, the question of witness intimidation was not proven beyond reasonable doubt. Instead, it ordered measures targeted at preventing concrete, future harm and warned that it could *consider other remedies available apart from the exclusion of improperly obtained evidence* if respondent wrongfully used information obtained through surveillance.

526. That implied powers are not unlimited is a proposition that remains valid both in the case of international investment arbitration and international commercial arbitration, when it comes to addressing questions of criminality that appear during the arbitral proceedings. The extension of the implied powers in the two models of dispute resolution, respectively, remains however uncertain. If one adheres to the public model of investment arbitration and to the private model of commercial arbitration, the extent of the implied powers of an arbitral Tribunal operating in the investment field should be larger than that recognised to an international commercial Tribunal. The reason behind this difference lies essentially in the theoretical foundation of the notion of implied/inherent powers and in the degree of proximity of investment arbitration and international commercial arbitration respectively, to a fully-fledged judicial function. As it has been outlined earlier, this

[674] Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8, Decision on Preliminary Issues of 23 June 2008, at 78.

is a question intimately connected to the public/private dimension of these models of dispute resolution and their roles as mechanisms based on the consent of the parties.

527. The theory of implied power is strictly correlated with the notion of judicial function.[675] In fact, it is specifically to preserve the adjudicatory powers of international courts and tribunals that the theory of inherent power was devised. The exercise of a proper judicial function is therefore the necessary prerequisite for the existence of the theory of implied powers. This theoretical underpinning of the notion of implied powers has been expressed a number of times in the jurisdiction of international courts, starting from the International Court of Justice. For instance, in her separate opinion in the case on the *Legality of the Use of Force*, judge Higgins explained that:

> *the Court's inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with the administration of justice, not every aspect of which may have been foreseen in the [constitutive instrument of the tribunal]. […] [The Court has] inherent power to protect the integrity of the judicial process.*[676]

528. Given the connection between the exercise of judicial function and the theory of the implied powers, one could argue that the nature and quality of the judicial function that a court or tribunal exercises will not be immaterial as to the scope and extent of the implied powers that can be exercised. For example, an ICSID Tribunal held in *Hrvastska Elektropriveda v Slovenia* that its ability to exercise inherent powers derived from its judicial connotation conferred to it by a body of public law.[677]

529. This begs the question as to whether a tribunal not governed by a body of public law and whose judicial function derives from and is, for the most part,

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[675] Pillet, A. *Traité Pratique de Droit International Privé*. Paris: Tenin, 1924: 537.
[676] Legality of the Use of Force (Serbia and Montenegro v Spain), Preliminary objections, Separate Opinion of Judge Higgins, ICJ Reports 2004, 1214, at 1216 – 1217.
[677] Hrvatska Elektroprivreda d.d. v. Republic of Slovenia, ICSID Case No. ARB/05/24, Decision on the participation of Counsel, at para 33: "*As a judicial formation governed by public international law, the Tribunal has an inherent power to take measures to preserve the integrity of the proceedings*".

deferential to the will of the parties, would have the same extent of inherent powers of an investment arbitral tribunal, including for purposes of addressing criminal conduct. It would not be difficult, based on more contractualist notions of international commercial arbitration, to conclude that the scope of inherent powers would in this case have to be more limited. There are circumstances in which the exercise of implied powers by international tribunals, and their different extension, becomes relevant, in the context of criminal matters in international arbitration. One of this is, for instance, the case of false testimony, that is to say, perjury, before an international tribunal, or the similar case of forged documents brought before a court.

530. In the context of international commercial arbitration, some believe that the scope of inherent powers should be extremely limited when confronting issues of criminal conduct appearing before the Tribunal. Professor Hanotaux notes for example that:

> *"faced with the issue of forged documents or other types of misdeeds, international arbitrators invariably take the wrongful or illegal conduct into consideration by awarding in favour of the other party or drawing adverse inferences.* But they often do not go beyond these measures. *It is probable that most arbitrators consider that their duty is to decide the case and that from the moment the claim of the party which is at the origin of the misdeed is dismissed, it is not appropriate or useful to blame further."*[678]

531. Others have taken a somewhat middle ground position, indicating that there are some inherent powers also in international commercial arbitration, but without elaborating exactly on their extension.[679]

532. Those who have contended that even the role of the international commercial arbitrator goes beyond what is necessary to provide the mere resolution

[678] Van Den Berg, J. (2003), *op. cit.*, 285.

[679] The limited availability of published jurisprudence from international commercial arbitrations makes it difficult to trace the degree to which inherent or implied powers have been called upon in that specific context. However, the widespread diffusion of national arbitration laws that give arbitrators substantial discretion over proceedings suggests that there exists a general recognition that arbitrators cannot carry out their mandate absent some authority to fill in gaps left unaddressed by party agreement

of a dispute between the Parties also conclude that the extent of the application of inherent powers should be greater, for the purposes of protecting certain public interests that are also present within this mechanisms of dispute resolution. According to Professor Lando, for instance:

> *"The arbitrator will have to consider not only the interests of the parties but also those of international commercial arbitration considered as an institution. Today arbitration still enjoys the prestige which has induced the liberality shown to it by most Western countries. If it becomes known that arbitration is being used as a device for evading the public policy of States which have a governmental interest in regulating certain business transactions, its reputation may suffer."*[680]

533. If, as the positions above show, the different perceptions of the role of the arbitrator and its functions bring scholars to conclude differently on the extent of inherent powers even within the same method of dispute resolution, one would have to expect that the conclusions would be all the more divergent when the role of the arbitrator in international commercial arbitration is compared to that of the arbitrator in international investment arbitration. The doubts on the existence of inherent powers in international commercial arbitration are confronted by very liberal position on their extent in international investment arbitration, where some scholars have spoken of broad inherent powers of investment arbitral tribunals and strongly advocated for their extension.[681]

534. The field of the inherent powers of arbitral Tribunals, including as regards the question of the mechanisms that would be open to arbitrators to address instances of criminality that appear during the conduct of the proceedings, would be in principle a fertile soil for the debate between the private and public models on which international commercial arbitration and international investment arbitration are based. The full judicial function attributed to international investment tribunal, that constitutes the basis for the existence of inherent powers, could easily be contrasted to the model of adjudication that lies at the foundation of international

[680] Lando, O. «Conflict-of-law Rule for Arbiters» *Festschrift für Konrad Zweigert zum* 70*:* 1980: 157-179.
[681] Paparinsky, M. «Inherent Powers of ICSID Tribunals: Broad and Rightly So» Laird, I. et Al. *Investment Treaty Arbitration and International Law*. Juris Publishing, 2012: 11 – 76.

commercial arbitration and could determine a different scope of the application of the theory of inherent powers to these mechanisms of dispute resolution.

535. However, even on such a fertile terrain for differentiation, international commercial arbitration and international investment arbitration are closer than it would appear, and the private/public debate does not determine any consequences as regards the scope of the inherent powers of an arbitral tribunal for addressing questions of criminality that appear before it. An authoritative work by the International Law Association, that has for the first time investigated formally the extent of the inherent powers in international arbitration, has concluded for example that:

> *"While there are important differences between commercial arbitration and other international fora, the differences—at least those between commercial arbitrations and investment arbitrations—by and large do not appear to be material to the present inquiry. At a basic level, all of these processes offer a consent-based form of binding dispute resolution achieved via an adjudicatory process. Whether it involves the adjudication of an investor-State dispute under a treaty and governed by international law or an international commercial dispute under a contract and governed by the law of a particular state, arbitration represents a consensual process whereby the parties' elections afford jurisdiction and define its contours."*[682]

536. In conclusion of this paragraph, it is therefore necessary to point out how the different *ethos* of international commercial arbitration and international investment arbitration and the debate on the privacy of the one model, in comparison to the publicity of the other, must not be extremised. While the debate is certainly relevant and there is no denying that structural differences exist between these two models of adjudication, they do not appear to be such as to impede to continue to use international commercial arbitration as a model to close gaps in investment arbitration, when such gaps presents themselves. Whereas there are areas in which resort to cross fertilisation from one model to the other may be more difficult, the private/public debate appears irrelevant in a number of areas.

[682] Report on Inherent and Implied Powers of Arbitral Tribunals by the Committee on International Commercial Arbitration submitted to and discussed at the 76th Conference of the International Law Association held in Washington D.C., United States of America, 7 - 12 April, 2014, at 10.

537. The *Doctrine of Separability*, that insulates the agreement to arbitrate from the illegality of the underlying transaction, appears to fall in the categories of those legal institutions that are proper of international commercial arbitration and that could be applicable to investment arbitration regardless of whether this model of adjudication tends to veer towards a mechanism of dispute resolution governed for the most part by public law and sensitive to public interests.

4. A Brief Recapitulation, and the Analysis that Follows

538. In the previous sections of this work, it has been demonstrated that the *Doctrine of Separability* is applicable to international investment arbitration due to its incorporation in certain rules that govern international investment arbitration and as a general principle of law under Article 38 of the Statute of the International Court of Justice. This Chapter has also demonstrated that there are no structural incompatibilities between international commercial arbitration and international investment arbitration that militate against the transposition of the *Doctrine of Separability* from one field, into the other. In the Chapters that follow, the modalities of this transposition will be addressed in further details.

539. In particular, first, the specific modalities of operation of the Defence *of Illegality* in investment arbitration will be addressed.

540. Second, the *Doctrine of Separability* applicable to international investment arbitration will be contrasted with the specific modalities of operation of the *Defence of Illegality*. Indeed, the *Defence of Illegality* is logically opposite, and specular, to the *Doctrine of Separability*: the former, at least in its most robust application, postulates that a Tribunal should dispose of a case at the preliminary level, for instance by declining jurisdiction, when faced by criminal misconduct on the part of the investor; the latter, on the other hand, aims at preserving the jurisdiction of the Tribunal in the event of criminal conduct. It will be demonstrated that, as a general rule, the *Doctrine of Illegality* does not have the effect of displacing the applicability of the *Doctrine of Separability* but that, on the contrary,

it is the very *Doctrine of Separability* that constitutes a limit and a constraint to the operation of the *Defence of Illegality*.

541. Lastly, from the perspective of policy considerations, the position that the *Defence of Illegality* helps contrast criminality in international investment arbitration will be addressed. Indeed, if it could be demonstrated that a robust use of the *Defence of Illegality* (again, one that mandates a Tribunal to dispose of a case at the preliminary level in the face of investor's misconduct) has the effect of advancing the fight against criminality in investments, it may be consider inappropriate to limit it through the *Doctrine of Separability*. However, this thesis will demonstrate that a robust use of the *Defence of Illegality* is not a deterrent to misconduct, but rather incentivises criminal behaviour, to the detriment of both investors and Host States.

CHAPTER 7:

THE DEFENCE OF ILLEGALITY

1. Introduction

542. As mentioned previously, the successful invocation of the *Defence of Illegality* by the respondent State can have three consequences on an investor's claim.

543. First, that if criminality on the part of the investor is proven, the Tribunal has to invariably decline its jurisdiction to hear the case. This was the position of the Arbitral Tribunal in a recent case decided in 2016, in which the arbitrators held that:

> *"Seuls les investissements légaux et réalisés dans la bonne foi sont à protéger par l'arbitrage CIRDI et que le Tribunal arbitral doit se déclarer incompétent s'il apparait que l'investissement a été fait frauduleusement ou à la suite de corruption."*[683]

544. Second, that if criminality on the part of the investor is proven, the Tribunal can still assert its jurisdiction, but the claim will be inadmissible and hence will not proceed to the merits stage of the proceedings.[684]

545. Third, that if criminality on the part of investor is proven, the matter is nevertheless addressed at the merits phase of the proceedings, in the context of the assessment of the claimant's case. Here, the Tribunal may simply find against the investor due to its criminal conduct, or may recognise certain rights to the investor, despite its misconduct, to balance them against the misconduct of the Host State, by applying a mutual standard of faults.[685] Regardless of the specific outcome that

[683] Getma International and others v. Republic of Guinea, ICSID Case No. ARB/11/29, Award of 16 August 2016, para 174.
[684] Dumberry, P. et Al. «The Doctrine of "Clean Hands" and the Inadmissibility of Claims by Investors Breaching International Human Rights Law» *Transnational Dispute Management*, 2013: 1 – 15.
[685] MTD Equity Sdn. Bhd. & MTD Chile SA v. Chile, ICSID Case No. ARB/01/7, paras 242-243.

a Tribunal will determine at the merits phase, the common aspect of this third approach to the consequences of a *Defence of Illegality* is that it does not either prevent the Tribunal from establishing its jurisdiction, nor impose a declaratory of inadmissibility of the case. In other words, the *Defence of Illegality* does not constitute under this approach a preliminary or gateway issue that bars the analysis of the case on the merits.

546. The solution that a Tribunal will reach with regard to the *Defence of Illegality*, out of the three that are theoretically possible, cannot be predicted with any degree of certainty at the present state of development of the law of illegality in investment arbitration. As Fontanelli and Tanzi note, for instance, it is not even possible to maintain with any precision which solution is normatively correct, given the great state of confusion that surrounds this evolving field of law.[686] While this state of uncertainty makes the investigation of the researcher interesting and stimulating, it also determines the usual difficulties that arise when a new, or at least not entirely developed field of law comes under the magnifying lens and becomes the subject of analytical scrutiny. This state of affairs requires defining with precision the method of investigation to be used in the conduct of the analysis. In this dissertation, the analysis of the consequences of the *Defence of Illegality* are assessed by relating them to the *routes* through which the *Defence of Illegality* can potentially enter into an investment arbitration case. Indeed, while it is true that the *Defence of Illegality* determines potentially three different consequences on an investor's case, three are also the potential inroads of the *Defence of Illegality* into an arbitral case and the modalities through which it can be invoked in practice by a Host State.

547. The first route a) is through the door of an *in accordance with Host State* law clause in a BIT. In this case, the need for the investment to comply with the laws of the Host State is an express requirement of the Treaty and the *Defence of Illegality* is connected to a specific provision in the relevant international instrument that regulates the relationship between the parties. A second road b) for

[686] Fontanelli, F. and Tanzi, A. «Jurisdiction and Admissibility in Investment Arbitration : a View from the Bridge at the Practice», *The Law and Practice of International Courts and Tribunals,* 2017: 3 – 20, 3.

the *Defence of Illegality* is constituted by the theory according to which there exists a general principle of legality of investments in international law, even in the absence of an express *in accordance with Host State law* clause. This theory is sometimes referred to as the *Legality Doctrine*. The position behind the *Legality Doctrine* is that the legality of an investment is an implied requirement in international law, and that therefore investments that are not legal, simply cannot be protected, even when no indication to this effect is present in the applicable BIT. The third road c) is constituted by the so called *Clean Hands Doctrine*, a common law theory whose status and contours in international law will be discussed further on, according to which a tribunal or court of law should not lend itself to providing redress to a claimant that has committed some wrong with regard to the claim that it intends to bring to the court or tribunal. Put it differently, only claimants that approach a judicial instance with *clean hands* would be entitled to seek redress and just satisfaction of their rights from that judicial instance. Each one of these routes are discussed below, and correlated with the possible consequences of a *Defence of Illegality*.

548. Before starting the analysis, it should be mentioned that when an *in accordance with Host State law* clause is present in a Treaty, this is normally the preferred route through which a Host State invokes the *Defence of Illegality*. The other options indicated above (*legality doctrine* and *clean hands doctrine*) are residual in nature, and used either when an express legality clause is not present in the Treaty that regulates the relationship between the State and the investor or, when such a clause is present, as an alternative and subordinate argument. For these reasons, in accordance with Host State law clauses are addressed first.

2. Investments In Accordance With the Laws of the Host State – General Considerations

549. A first way in which the *Defence of Illegality* operates is through the door of *in accordance with host State law clauses.*

550. The requirement that the investment must comply with the laws of the host State is common to a number of Bilateral Investment Treaties, and has indeed become a standard in the law of investment protection.[687] However, the forms in which the requirement presents itself vary. Quite apart from the actual wording of the clauses, which logically differ, a first distinction should be drawn between those BITs that incorporate the clause in the treaty definition of the investment, and those that address it in the section relating to the protection, promotion or admission of the investments. As an example of the first category, Article 1 of the Bilateral Investment Treaty concluded between Italy and Nigeria in 2000 reads:

> *"the term investment shall be construed to mean any kind of property invested before or after the entry into force of this Agreement by a natural or legal person of one Contracting Party in the territory of the other, in conformity with the laws and regulations of the latter".*

551. The Spain - Ecuador BIT is explanatory of the latter category. Article 2, titled *Promotion and Admission* and Article 3, titled *Protection* state that:

> *"Each Contracting Party (...) will admit investments according to its legal provisions. The present Article will also apply to investments made before its entry into force by investors of a Contracting Party in accordance with the laws of the other Contracting Party in the territory of the latter. (...) Each Contracting Party shall protect in its territory the investments made in accordance with its legislation".*

552. Both the former and the latter categories of clauses establish a link between the protection of an investment at the international level and a domestic law element.

553. The domestic legislation parameter that informs *in accordance with host State law* clauses serves the purpose of operating a selection. Theoretically speaking, such a selection can work on two different levels: a) either as setting the formal and substantial criteria of what is required of an economic transaction to be considered as an investment under the law of the Host State; in other words, that

[687] Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction of 29 April 2004.

investment made in accordance with Host State law means that it is the domestic law of the forum State that defines what constitute an investment, also for the purposes of its international protection[688] b) as a pure legality requirement, e.g. that the investment must not be illegal and in breach of the laws of the State.

554. The first characterisation of *in accordance with Host State law* clauses follows from the consideration that only certain economic transactions involving a foreign national are investments according to national laws and that, in turn, only what can be qualified as an investment under national laws enjoys the protection of the BIT. As the Tribunal in *En Cana v Ecuador* explained, property rights that constitute an investment are not created by the rules of international law encapsulated in the applicable BITs, but *for there to have been an expropriation of an investment (...) the rights affected must exist under the law which creates them".*[689] The reference, clearly, is the domestic law of the forum.

555. Deciding whether a certain economic transaction is an investment under domestic law encompasses questions such as what assets can constitute an investment according to the local regulations in force, or the modalities with which property rights can be transferred in the domestic forum. In some countries, for example, only material investments, constituted of physical assets, would be considered investments; in other countries, the domestic legislation may provide that also immaterial assets qualify as investments (for instance, rights conferred by contract, or economic rights conferred by law); in some cases, the participation of a local to the investor's enterprise is necessary in order to allow the investor to actually acquire property in the foreign State; at other times, the acquisition of property is free and does not require compliance with any additional rule. Some scholars have referred to this conceptualisation as the broader interpretation of *in accordance with Host State laws* clauses.[690] This broader interpretation, in turn, has been conjugated in different ways and the arguments that *in accordance with host State law* clauses entail a *renvoi* to domestic law in the substantial definition

[688] Betz, K. *Proving Bribery, Fraud and Money Laundering in International Arbitration: On Applicable Criminal Law and Evidence*. Cambridge, Cambridge University Press: 2017, 17.
[689] EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, UNCITRAL, Award of 3 February 2006, para 184.
[690] Miles, C. (2012), *op.cit*., 349.

of what is an investment have developed across a wide spectrum of nuanced arguments.

556. By way of example only, in *Saipem v Bangladesh*, the respondent State withdrew its original position that the words *in conformity with the laws and regulations* impose the application of national law in the definition of the investment; however, it still held that national law should be used as a reference in *construing* and *interpreting* the notion of investment under the treaty.[691] In particular, that the choice of the word *property*, rather than the word *asset* in the Italy – Bangladesh BIT definition of investment was operated because the notion of property (as opposed to that of asset) carries a specific characterisation under Bangladeshi law, to which an arbitral Tribunal could not have been oblivious.[692]

557. According to some scholarship, this interpretation of *in accordance with Host State law* clauses is in line with the adoption by public international law of the private international law principle of the *lex situs*, for the purposes of adjudicating the responsibility of States when they interfere with the proprietary interests of foreign nationals.[693] According to this scholarship, BITs create an additional layer of protection to investments made in a foreign country, but BITs are not per se sufficient to transfer property rights that are at the basis of the investment, nor to regulate their validity. The transfer of the property rights that constitute an investment is a matter reserved, as said, for the *lex situs*.

558. According to the second interpretation, an *in accordance with Host State law clause* operates as a proper parameter of legality of the investment, in consideration of the fact that some economic transactions, despite being investments from the economic perspective and also according to the domestic legislation definition of what constitutes an investment, can be illegal because they violate the laws and regulations of the host State. In a situation like this, the

[691]Reply of Bangladesh, pp. 13-14, para 3.8, quoted in Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction of 21 March 2007, para 81.
[692]Reply of Bangladesh, pp. 14, para 3.9 quoted in *The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction of 21 March 2007, para 82.
[693] Douglas, Z. (2014) *op.cit*.,174. Staker, C. «Public International Law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations.» *British Yearbook of International Law*, 1978: 163-169.

outcome of the illegality could be that the economic transaction, despite being an investment from the economic perspective, and despite complying with the requirements set by domestic law in order for a transaction to be an investment, yet is not an investment for the purposes of the BIT. The idea behind this position is that only legal investments are investments, and transactions that would be investments from the economic perspective would not be considered as such for the purposes of a BIT when they are affected by some form of illegality (and, all the more so, criminality).

559. For instance, the setting up of a company in a foreign country is an investment from the economic perspective, and also from the perspective of the laws and regulations of virtually all domestic jurisdictions. If the concession to set up the company, however, is obtained through bribery or fraud, then the incorporation of the company would no longer be qualified as an investment for the purposes of the Treaty. Scholars have at time defined this interpretation as a narrower interpretation of *in accordance with Host State law clauses.*[694]

560. The position of the Arbitral Tribunal in *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, is one of the many exemplifications of this approach, and perhaps one of those expressed with the most clarity:

> *"[I]t is clear that States may specifically and expressly condition access of investors to a chosen dispute settlement mechanism, or to the availability of substantive protection. One such common condition is an express requirement that the investment comply with the internal legislation of the host State. This condition will typically appear in the BIT where this is the instrument that contains the State's consent to ICSID arbitration".*[695]

561. Both under the narrow and the broad interpretation, in accordance with Host State law clauses are part of an exercise of jurisdictional inquiry to assess whether a Tribunal has, or has to decline, jurisdiction to hear a case. The scope of the jurisdictional inquiry, however, varies. In the case of the narrow interpretation,

[694] Miles, C. (2014) *op.cit.*
[695] Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award of 18 June 2010, para 125.

the analysis concerns the general legality of the investment; in the case of the broader interpretation, on the other hands, it does not concern the question of the possible misconduct of the investor in general terms, but only the violation of those norms that determine the modalities of the acquisition of property rights under Host State law, which is the necessary condition for the existence of the investment. If these laws have been violated, and property rights not legally transferred, the Tribunal would have to pronounce itself without jurisdiction for lack of an investment in the territory of the Host State.

562. In principle, the broad and the narrow interpretations could co-exist and logically complement with one another: in order to grant a certain economic transaction protection under a BIT, it must first be established that it qualifies as an investment according to the domestic legislation and that, for example, property rights have been effectively transferred between a buyer and a seller; after this, and if the answer is in the affirmative, that this transaction is also legal from the perspective of the laws of the Host State, and that it does not breach them, for example because the authorization to transfer the property rights in question has been procured through corruption or some other kind of misconduct.[696]

563. Even though a double interpretative layer of the kind specified above is attractive, it has never been considered by a Tribunal and scholars also are of the opinion that the two possible interpretations of an in accordance with Host State law clause are to be treated as alternative. In this sense, also claimants and respondents in arbitral proceedings tend to portray the two possible meanings of the reference to domestic law in mutually exclusive terms: Host States are generally more prone to considering it as a legality parameter, and on this they base the *Defence of Illegality*; investors, on the other hand, have traditionally maintained that the domestic law connection is not a yardstick against which to

[696]A connection between the two interpretation can operate on multiple levels. For instance, in Inceysa v El Salvador, the Respondent State, in identifying the correct intepretation of a legality clause, explained: "if a State has the power under a treaty not to "admit" investments that are in violation of its laws, surely the intent and implication is that such non-admitted investments would not qualify for protection under that treaty. That a particular investment may have been initially "admitted" as a result solely of the investor's fraud on the State -- without fraud, the investment never would have been admitted -- should not entitle that investment to protection under the treaty once the fraud has been exposed". InceysaVallisoletana, S.L. v. Republic of El Sal., ICSID Case No. ARB/03/26, Award of 2 August 2006, para 181

measure the legality of a transaction in general, but only a criteria to decide what transactions are investments under domestic law.[697]

564. Against this background, two questions are especially important with regard to *in accordance with Host State law* clauses: a) first, the very question of the presence (or else) of an *in accordance with Host State law* clause in a Treaty, and the consequences that this presence determines, if compared to situations where no such clause appears in the relevant international instrument applicable to the relationship between the investor and the Host State; b) second, the identification of the correct interpretation of an *in accordance with Host State law clause*s, or at least the definition of the modalities for the identification of the correct interpretation in each case.

565. The first question is important because, according to some scholars, the presence of an *in accordance with Host State law clause* in a Treaty would always and invariably determine a certain consequence in the event that the investment were found to be illegal: that the Tribunal should decline its jurisdiction over the case. On the other hand, where such clause is not present, according to the same scholars, the question of the investor's illegality becomes automatically one of admissibility, rather than of jurisdiction.[698] Dr Cameron Miles, for example, distils two basic rules in the model he developed on how to address criminality in investment arbitration, that are as follows:

> *Rule 2.1: if the relevant IIA contains an express legality requirement, the corruption will undermine the jurisdiction of the tribunal.*
>
> *Rule 2.2: where there is no express legality requirement in the IIA, the corruption will only affect the admissibility of the claim*[699].

566. Models that rely on automatisms such as the one proposed by Miles are not entirely convincing. It is in fact debatable, as we shall see, that it is appropriate that the finding of lack of jurisdiction, on the one case, or the inadmissibility of the

[697] Grubenmann, B. *Der Begriff der Investition in Schiedsgerichtsverfahren in der ICSID -Schiedsgerichtsbarkeit*, Helbing Lichtenhahn: 2010. Betz, K. (2017) *op.cit.*, 17.
[698] Moloo, R. (2010) *op. cit*.
[699] Miles, C. (2012), *op. cit*., 151.

claim, on the other, should be determined automatically only on the basis of the presence, or absence, of a clause like an *in accordance with Host State law clause*. As mentioned, these clauses are today standard and somewhat stylistic, so that reading too much into their presence or absence risks being too superficial an approach. As Professor Cremades noted, commenting on this specific aspect,

> *"The foreign investor that commits a crime should go to jail or suffer the other penalties prescribed by law. However, it is equally mistaken to adopt an interpretation of a standard phrase in investment instruments in a manner capable of leaving an investor without a remedy, and a Host State secure and immune in a gross violation of a Bilateral Investment Treaty*."[700]

567. On the second question, it is clear that the finding of the correct interpretation of *in accordance with Host State law clauses* becomes crucial, because a lot turns on them: ultimately, whether an investor will be able to find redress from an arbitral Tribunal in a case tainted by its misconduct depends on the interpretation given to *in accordance with Host State law* clauses, when they are present in a BIT.

568. Some scholars have no doubts that an *in accordance with Host State law clause* ought to always be considered as a legality requirement, and that the narrow interpretation is the only possible interpretation. Under this premise, the conclusion that an illegal investment would not be an investment, and hence the Tribunal would be deprived of its jurisdiction *ratione materiae*, follows logically.

569. Arbitral Tribunals can in fact only exercise their jurisdiction with regard to what qualifies as an *investment* under the applicable BIT and any other relevant rule of international law. This is so because the system of international investment arbitration has been set up specifically to protect investments, as opposed to all other kinds of economic transactions, which are protected through other mechanisms (for instance, domestic court jurisdiction, or international commercial arbitration). The jurisdiction of tribunals constituted under institutional

[700] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Dissenting Opinon of Professor Bernardo Cremades of 16 August 2007, para 39.

rules, such as those of the ICSID Convention, reflects this requirement expressly. According to Article 25(1) of the ICSID Convention, for instance:

> *"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. (...)"*

570. In *Fraport*, the Arbitral Tribunal explained with much lucidity this mechanism, as follows.

> *"With respect to a bilateral investment treaty that defines "investment", it is possible that an economic transaction that might qualify factually and financially as an investment (i.e. be comprised of capital imported by a foreign entity into the economy of another state which is party to a BIT), falls, nonetheless, outside the jurisdiction of the tribunal established under the pertinent BIT, because legally it is not an "investment" within the meaning of the BIT".*[701]

571. Whereas one can certainly agree that if a transaction does not qualify as an investment the Tribunal would not have jurisdiction to entertain claims related to it, the finding that a transaction does not constitute an investment should be one that is reached with great care and after appropriate analysis. The narrow interpretation of in accordance with Host State law clauses should not be lightly presumed.

572. Anticipating the conclusions of the analysis that follows, the thesis advocated here is that it is inappropriate to decide the actual meaning of *in accordance with Host State law clauses* in general terms, and out of context. A *one fits all* interpretation of the clause that suits every case is methodologically unsound. On the other hand, as with any other provisions of an international Treaty, also in accordance with Host State law clauses have to be interpreted with respect to each individual case, and according to the principles of the Vienna Convention

[701] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award of 16 August 2007, para 306.

on the Law of Treaties. An ad hoc assessment is therefore necessary to establish when an *in accordance with Host State law* clause only refers to the definition of what constitutes an investment under domestic law, and when, on the contrary, it operates as a legality requirement.

2.1 In Accordance With Host State Law" Clauses as Legality Requirements

573. According to the narrow interpretation, an *in accordance with Host State law clause* is a legality requirement that links the legal definition of what constitutes an investment with its respect of all domestic laws and legislation and that operates as a filter, *ratione materiae*, with respect to the kind of economic transactions that ought to be granted protection under a BIT, including as regards the system of dispute resolution.[702] In essence, according to this interpretation, the fact that a certain economic asset, a transaction, or a transfer of property rights should be acquired in accordance with the laws of the Host State is another requirement of what defines an investment in international law. Put it in other words, an economic transaction that violates the laws of the Host State is not an investment.

574. The narrow interpretation of in accordance with Host State law clauses moves from the consideration that normally BITs are not self-contained systems for purposes of defining what sort of economic transactions constitute an investment, and the definition of the relevant qualifying criteria must be complemented either from domestic legislation, or from international law and international arbitral practice.[703] Because of this, even when an express legality requirement does not exist in a BIT, that links the definition of an investment with its legality, criminality can have an impact on the question as to whether a

[702] Obersteiner, T. «In Accordance with Domestic Law" Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors» *Journal of International Arbitration*, 2014: 265 – 288.
[703] Also the ICSID Convention does not contain a definition of what consitutes an investment for the purposes of the Convention.

transaction is an investment for the purposes of its protection. An example will clarify this statement.

575. The most famous test developed in international law to decide when an economic transaction constitutes an investment is the *Salini test*. The test sets out four qualifying criteria of an investment. In particular, the transaction 1) must be a contribution of money or assets 2) must have a certain duration 3) must entail an element of risk and 4) must make a contribution to the economic development of the Host State.[704] This test has at times been criticised, either with a view to shrinking its scope or to enlarging it,[705] but the fact remains that the Salini test is ordinarily applied in investment law.

576. The Salini test was also used in the *Abaclat v Argentina* case. In that case, an Arbitral Tribunal constituted under the auspices of ICSID had to decide whether bonds bought by foreign investors in Argentina and issued by Argentinian banks constituted a foreign investment for the purposes of its protection under international law. The majority of the Tribunal gave a positive answer to the question, but one member, Professor George Abi-Saab, produced a strong dissenting opinion, based on the notion that an investment should be deemed to contribute to the development of the Host State. Among the examples quoted by the Professor in which an economic transaction would not contribute to the development of the Host State featured the case of illegal investments, for example investments procured through bribery. In the words of George Abi Saab:

> *"Not all funds made available to governments are necessarily used as investments in projects or activities contributing to the expansion of the productive capacities of the country. Such funds can be used to finance wars, even wars of aggression, or*

[704]Salini Construttori S.p.A. and Italstrade S.p.A. v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, para 52.

[705] Burger, L. «The Trouble with Salini (Criticism of and Alternatives to the Famous Test)» *ASA Bulletin*, 2013: 521-536. The contribution to the development of the Host State as a criterion to identify an investment under ICSID has been contested for example in other cases, such as in Phoenix Action, Ltd v Czech Republic. There, the Tribunal rejected the Salini test by holding that "*a contribution of an international investment to the development of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes "development"*. Phoenix Action Ltd. v. Czech Republic, Decision on Jurisdiction of 15 April 2009 (ICSID Case No. ARB/06/5) para. 85. See also Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, Decision on Jurisdiction of 27 September 2012 (ICSID Case No. ARB/06/2) para. 222.

oppressive measures against restive populations, or even be diverted through corruption to private ends"[706]

577. According to the reasoning of Professor Abi Saab, instances of corruption that affect the economic transaction would have the effect of removing that specific economic transaction from the realm of those protected under international law as investments; the consequence would be that the Tribunal would not be able to establish its jurisdiction on the claimant's claim, because the non-existence of a protected economic transaction (an investment) would have effects on the jurisdiction of the arbitral tribunal *ratione materiae*. In the reasoning of George Abi-Saab, though, illegality disqualifies a transaction from the realms of those protected under a treaty in an indirect manner: if a transaction, in order to be qualified as investment, must contribute to the development of the Host State, and an illegal transaction does not contribute to the development of the Host State, then an illegal transaction cannot be considered an investment because the consequence of the illegality is that the transaction fails to meet one of the requirements of the Salini test: contribution to Host State development.

578. The relationship between an *in accordance with host State law* clause and illegality of the investment would have to be read in the same context of Professor Abi Saab's reasoning. The notable difference is that whereas Abi Saab's reasoning is indirect, in the sense explained above, *in accordance with Host State law clauses* link expressly the legality of a transaction with its qualification as investment. In this case, considerations of criminality would not have to be considered thorough the logic that, for example, a corrupt transaction does not help the development of a State, and hence fails the *Salini test*; but on the consideration that illegal transactions violate an express requirement of what constitutes an investment under the applicable treaty: its legality.

579. The narrow interpretation of *in accordance with Host State law*, as explained above, is prevalent. So that, according to most scholars and tribunals,

[706] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic), Dissenting opinion of Professor George Abi Saab of 28 October 2011, para 111.

when these clauses are present in a BIT and when investor's illegality is established, the Arbitral Tribunal should simply decline its jurisdiction.

580. In the case *Inceysa v El Salvador*, for example, the claimant brought a claim against El Salvador lamenting breach of contract and expropriation with respect to a contract awarded to the claimant by the Republic of El Salvador. Amongst the defences that it raised, the Respondent argued that the transaction in question was not one of those that deserved protection under the BIT, in consideration of the fact that it was not made in compliance with the laws and regulations of the Host State.[707] In particular, El Salvador explained that Inceysa had secured its investment through fraud, having submitted false financial statements, having misrepresented the experience of Inceysa's sole administrator, having misrepresented Inceysa's experience in the field of vehicle inspections and its relationship with its supposed strategic partner and having submitted forged documents to support the existence of multi-million dollar contracts concluded by Inceysa in the Philippines and in Panama.

581. The Tribunal addressed Article III of the Spain – El Salvador BIT, regulating the relationship between the investor and the Host State, according to which: e*ach Contracting Party shall protect in its territory the investments made, in accordance with its legislation*. It interpreted this provision in accordance with the *Travaux Preparatoire* of the BIT. The *Travaux* of the BIT provided as follows:

> *"We consider that the reference to the requirement that Investments must be made according to the internal legislation of each of the Contracting Parties is more closely related to the process of admission of the Investment. Hence, Article II, titled "Promotion and Admission," has a section expressly indicating*

[707] Objections to Jurisdiction by El Salvador, *"[...] the Investment Treaty by its terms and intent extends protection only to investments made in El Salvador in accordance with its laws. EI Salvador never consented to treaty protection of investments, such as those based on contracts to provide services for the State, that were procured by fraud, forgery and corruption" Also, further down in El Salvador's objections to jurisdiction: "Inceysa's fraud is relevant at this stage of the proceedings, because EI Salvador never consented to ICSID jurisdiction for claims about investments procured by fraud, forgery, and corruption. If the Tribunal finds, as a matter of fact, that Inceysa indeed committed fraud, Inceysa's investment in EI Salvador would fall outside the scope of EI Salvador's consent to ICSID jurisdiction, and this case should end.*" Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award of 2 August 2006, para 141.

that each Contracting Party will admit Investments according to its legal provisions".[708]

582. The text of the BIT and the Travaux led the Tribunal to conclude that:

"The will of the parties to the [El Salvador-Spain] BIT was to exclude from the scope of application and protection of the Agreement disputes originating from investments which were not made in accordance with the laws of the host State."[709]

583. And that, therefore, the Tribunal did not have jurisdiction to entertain the claim brought by Inceysa.[710]

584. It will be remembered that in a similar fashion to Inceysa, in *Fraport AG Frankfurt Airport Services v Republic of the Philippines*, an arbitral Tribunal declined jurisdiction *ratione materiae* over the claim brought by the German investor, due to the criminal conduct in which it had engaged at the stage of securing the investment in the Republic of the Philippines. In this case, the Tribunal had to interpret the scope of Article 1 of the Germany – Philippines BIT, according to which:

"The term "investment" shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State".

585. In *Fraport*, the Tribunal found that through false representation and secret shareholders agreements, the investor had eluded[711] the provisions of Commonwealth Act No. 108, entitled *An Act to Punish Acts of Evasion of the Laws on the Nationalization of Certain Rights, Franchises or Privileges*, commonly known as the Anti-Dummy Law. The Anti-Dummy Law, by reference to the provisions of the Pilipino Constitution, that imposed quotas of participation of Pilipino nationals into certain types of investments made by foreigners in the

[708] Inceysa Vallisoletana, S.L. v. Republic of El Sal., ICSID Case No. ARB/03/26, Award of 2 August 2006, para 195.
[709] Inceysa Vallisoletana, S.L. v. Republic of El Sal., ICSID Case No. ARB/03/26, Award of 2 August 2006, para 195
[710] Inceysa Vallisoletana, S.L. v. Republic of El Sal., ICSID Case No. ARB/03/26, Award of 2 August 2006, para 335.
[711] The investor, Fraport, concluded that the only plausible way for its equity investment to prove profitable was to arrange secretly for management and control of the project in a way which the investor knew were not in accordance with the law of the Philippines. Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award of 16 August 2007, paragraph 189.

territory of the Philippines, imposed criminal sanctions in the case of the violation of those dispositions, specifically providing that any individual violating the relevant rules:

> *"shall be punished by imprisonment for not less than five nor more than fifteen years and by a fine of not less than the value of the right, franchise or privilege enjoyed or acquired".*[712]

586. In light of this, the Tribunal finally concluded that:

> *"Fraport knowingly and intentionally circumvented the Anti Dummy Law by means of secret shareholder agreements. As a consequence, it cannot claim to have made an investment "in accordance with law". Nor can it claim that high officials of the Respondent subsequently waived the legal requirements and validated Freeport's investment, for the Respondent's officials could not have known of the violation. Because there is no "investment in accordance with law", the Tribunal lacks jurisdiction ratione materiae".*[713]

587. More recently, the tribunal in *Alasdair Ross Anderson et al. v Republic of Costa Rica* rejected the claimants' claims on the basis that the investment in question did not comport with the local laws. In this case, 137 Canadian nationals brought claims against Costa Rica for alleged violations of the Canada-Costa Rica BIT relating to their investment. The applicable BIT between Canada and Costa Rica defined "investment" as:

> "*any kind of asset owned or controlled either directly, or indirectly through an enterprise or natural person of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws*"[714]

[712]Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award of 16 August 2007, para 166.
[713]Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award of 16 August 2007, para 191.
[714] Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award of 19 May 2010, para 46.

588. The Tribunal found that the investor had breached the Organic Law of the Central Bank of Costa Rica by engaging in financial intermediation without authorization. As such, the Tribunal concluded that because:

> "*the transaction by which the Claimants obtained ownership of their assets ... did not comply with the requirements of the [law;] ... the Claimants did not own their investment in accordance with the laws of Costa Rica, and (...) [T]he tribunal is without jurisdiction to hear and decide the Claimants claims*.[715]

589. What can be distilled from these cases is that, in all circumstances when a BIT contains an *in accordance with Host State law clause* and the investor commits a criminal act at the stage of securing the investment, Tribunals tend to automatically decline to exercise their jurisdiction over the claim, for lack of jurisdiction *ratione materiae*.

590. Before moving on to discussing the alternative interpretation of in accordance with Host State law clauses, it must be recalled what has already been discussed in the introduction to this dissertation dedicated to the research question, namely that the jurisdictional outcome of investor's illegality in the face of an in accordance with Host State law clause only concerns, in the interpretation of Tribunals, investments *made*, as opposed to investments *performed*, against the law of the Host State. When the investment is made legally, but performed illegally, Tribunals have treated illegality not as a preliminary matter, but rather as one reserved for the merits stage of the proceedings. This distinction derives from a very textual interpretation of the way in which most *in accordance with Host State law clauses* are formulated. In *Quiborax v Boliva*, for example, the Tribunal interpreted Article II of the Chile – Bolivia BIT of 1994. The Article reads, in Spanish, as follows: *[e]l término "inversión" se refiere a toda clase de bienes o derechos relacionados con una inversión siempre que ésta* se haya efectuado de conformidad con las leyes y reglamentos de la Parte Contratante en cuyo territorio se realizó la inversión".

[715] Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award of 19 May 2010, para 59.

591. The Tribunal attributed great weight to the actual formulation of the provision and ruled that since the alleged illegality committed by the investor concerned the post-establishment phase of the investment, the investor's conduct did not have an impact on the jurisdiction of the Tribunal, having the investment been *made* legally. The Tribunal explained that:

> *"under this BIT, the temporal scope of the legality requirement is limited to the establishment of the investment; it does not extend to the subsequent performance. Indeed, the Treaty refers to the legality requirement in the past tense by using the words investments "made" in accordance with the laws and regulations of the host State and, in Spanish, "haya efectuado"* (…) [A]ny *such breach would lie outside the temporal scope of the legality requirement, as it would have been committed after the investment was established.*[716]

592. Similarly, in *Saba Fawkes v Turkey*, the Tribunal was called upon to interpret Article 2(2) of the Netherlands – Turkey BIT, and confirmed the interpretation whereby only illegality committed at the genetic phase of the investment affects the Tribunal's ability to establish its jurisdiction over a case brought by a claimant. According to the Tribunal,

> *"As to the nature of the rules contemplated in Article 2(2) of the Netherlands-Turkey BIT, it is the Tribunal's view that the legality requirement contained therein concerns the question of the compliance with the host State's domestic laws governing the admission of investments in the host State. This is made clear by the plain language of the BIT, which applies to "investments (…) established in accordance with the laws and regulations (…)"*[717]

593. In *Hamester v Ghana*, the Tribunal was even more explicit in tracing the distinction and explained that:

> *"The Tribunal considers that a distinction has to be drawn between (1) legality as at the initiation of the investment ("made") and (2) legality during the performance of the investment. Article 10 legislates for the scope of application of the BIT, but conditions*

[716] Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction of 27 September 2012, para 66.
[717] Saba Fawkes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award of 14 July 2010, para 199.

this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal's jurisdiction. Legality in the subsequent life or performance of the investment is not addressed in Article 10. It follows that this does not bear upon the scope of application of the BIT (and hence this Tribunal's jurisdiction) – albeit that it may well be relevant in the context of the substantive merits of a claim brought under the BIT. Thus, on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the investor's conduct during the life of the investment is a merits issue".[718]

594. Lastly, in *Fraport v Philippines* the position was that:

"The language of both Articles 1 and 2 of the BIT emphasizes the initiation of the investment. Moreover the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction."[719]

595. It is debatable whether such different consequences as a declaratory of lack of jurisdiction in the case of *illegally made* investments, or rather the sanction of illegality at the merits stage in the case of *illegally performed* investments, should depend on a merely textual interpretation of *in accordance with Host State law clauses*. As some scholar has noted, *"[t]he temporal dividing line between the issues of jurisdiction and the merits (...) leads to artificial results [...] has no sound basis in principle*".[720]

596. This is especially the case when the illegality does not occur at a clearly identifiable time. For example, if the investor agrees to pay a bribe to a State official in order to secure an investment, but in practice the payment happens after the investment has been made, and also covers services rendered by the corrupt

[718] Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award of 18 June 2010, para. 127.
[719] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award of 16 August 2017, para 345.
[720] Douglas, Z. (2014), *op.cit.*,185.

State official to operate the investment, can the illegality be said to be related to the genetic moment of the business operation, or to its performance?

597. Also, what would happen if the illegality committed at the genetic phase of the investment was minor, and a more substantive illegality were committed during the execution of the business operation? Would it be *fair* to sanction the minor genetic illegality with a declaratory of lack of jurisdiction, which would not be applied for the much graver illegality in the execution of the investment?

598. The question of *fairness*, in the context of treaty interpretation, would have to be properly framed as one of compatibility of such an approach with the object and purpose of a Treaty. Indeed, according to Article 31 of the Vienna Convention on the Law of Treaties, "*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*". The ordinary meaning of a term is not the only interpretative canon, but rather has to be combined with the object and purpose of the Treaty. And, arguments based on the scope and purpose of a Treaty are ordinarily resorted to by arbitral Tribunals when discussing investor's illegality.

599. In *Saba Fawkes v Turkey*, the Tribunal used the object and purpose of the Treaty argument to limit the relevance of the laws whose violation would determine a declaratory of lack of jurisdiction only to the laws strictly related to the regulation of the investment. It held that "*it would run counter to the object and purpose of investment protection treaties to deny substantive protection to those investments that would violate domestic laws that are unrelated to the very nature of investment regulation*"[721] since the object and purpose of domestic treaties *is to protect and foster foreign investments*. The same object and purpose of a Treaty could be invoked to argue that there should be no difference as to the outcomes between illegality in the *making*, and illegality in the *performing*, and that the less

[721] Saba Fawkes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award of 14 July 2010, para 119.

serious treatment of illegality in the performance of the investment should be extended to illegality in the making of the investment.

600. The object and purpose of the Treaty would give legitimacy to the unification of the treatment of illegality in the *making* and in the *performing* also from another angle. If the object and purpose of a Treaty is only to protect legal investments, then it would be contrary to this object and purpose to claim that investments that are in any event affected by illegality, either at the genetic phase or at the execution phase, should be subject to a different sanctioning of the misconduct. This argument was well articulated by the Respondent in the case *Teinver v Argentina*, even if in that case Argentina was trying to extend the jurisdictional approach also to illegality in the performance investment. Argentina argued that:

> *"[it] does not believe that the jurisdictional issue solely concerns whether the investments were made in accordance with Argentine law; this interpretation leads to results contrary to the object and purpose of the Treaty. If the investment's inception was the only relevant criterion at the jurisdictional stage, this would lead to an absurd situation in which transactions that were made legally, but were followed by "an everlasting series of illegal acts" following their creation, nonetheless still benefit from the Treaty's protections".*[722]

601. Even if the Tribunal ultimately refused to unify the treatment of the two forms of illegality, it did so only on the basis of a *stare decisis* approach that limited itself to the taking into account of the findings of other Tribunals. It did not engage at all Respondent's argument whereby treating illegality in the making and illegality in the performing in a different manner runs counter the object and purpose of a Treaty. It is to be hoped that other Tribunals will fix this shortcoming.

2.2 The Alternative Interpretation of "In Accordance With Host State Law" Clauses

[722] Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1, Decision on Jurisdiction of 21 December 2012, para 295.

602. The Vienna Convention on the Law of Treaties, indicated just above, is also relevant when it comes to assessing possible alternative interpretations of *in accordance with Host State law clauses*. The origin of the interpretation of *in accordance with Host State law clauses* as legality clauses derives from the decision of the Tribunal in the case of *Salini v Morocco*, that has been mentioned earlier with regard to the Salini test. In that case, the Tribunal had to interpret a provision contained in the Italy – Morocco BIT, regarding the definition of the term investment. The relevant provision, Article 2, read as follows:

> *"[T]he term 'investment' designates all categories of assets invested, after the coming into force of the present agreement, by a natural or legal person, including the Government of a Contracting Party, on the territory of the other Contracting Party, in accordance with the laws and regulations of the aforementioned party".*

603. In a dictum, the Tribunal held that the phrase *in accordance with the laws and regulations* was a legality clause, which would exclude from protection investments not made in accordance with the legislative provisions of Morocco. According to the Tribunal, in particular:

> *"[The underlined clause] refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investment that should not be protected, particularly because they would be illegal".*[723]

604. Referring to this dictum by the Salini Tribunal, and using it as a precedent, a number of international arbitral Tribunals have interpreted *in accordance with Host State law* clauses as legality clauses.[724] The relevant case law has been identified in the previous pages.

605. There appears to be at least two shortcomings however with the Tribunal's reasoning in Salini, both at the systemic and at the specific level. From the latter angle, it is doubtful that the Salini interpretation is an accurate reading of

[723] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, Decision on Jurisdiction of 31 July 2001, para 46.
[724] Lorz R. A., et Al. «Investment in Accordance with the Law – Specifically Corruption.» In *International Investment Law*, Bungenberg M. et Al (ed). Vienna: Hart Nomos: 577 – 589.

the *in accordance with Host State law* clause contained in the Italy - Morocco BIT. The Italy-Morocco BIT does not make any reference to the word *illegality* nor any reference to the conduct of the prospective investor in the Host State.[725] This is something that would have been necessary, from the perspective of textual interpretation, to attribute to the clause the meaning given to it by the Tribunal in Salini. It is all the more striking that the Salini Tribunal did not venture at all in the hermeneutical exercise of discovering the actual meaning of the clause, but rather concluded, tautologically and in a *dictum*, that the clause was a legality clause.

606. From the systemic perspective, the fact that the Salini interpretation, which as seen is debatable even in the context of the Salini case, has assumed the value of precedent, is a fact that deserves criticism. It is at least doubtful, if not entirely erroneous, that a method of interpretation based merely on the rule of precedent and *stare decisis* should be acceptable in international law and international investment law.[726] This is so for a number of reasons.

607. BITs are fully-fledged international treaties and therefore the question of interpretation of provisions contained in a BIT is a pure matter of treaty interpretation. As such, it is governed by the rules of the Vienna Convention on the Law of treaties. These are mandatory rules of interpretation and it is not disputed that Article 31-33 of the Convention, that crystallise them, constitute part of customary international law. In the opinion of the International Court of Justice, the principles of interpretation that:

> "*are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, [..] may in many respects be considered as a codification of existing customary international law on the point".*[727]

[725] Douglas, Z. (2014) *op.cit.,* 172.
[726] Resort to precedent has become quite common in arbitral practice, but, as it is indicated below, this does not appear a methodologically sound approach in international investment law, especially when the rule on precedent becomes the main interpretative approach followed by an arbitral Tribunal. On the increased used of precedent in international investment arbitration see in particular: Commission, J. «Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence», *Journal of International Arbitration*, 2007: 129 – 158.
[727] Judgment of November 12, 1991, ICJ Reports 53 (1991), at 70.

608. The customary law nature of the Vienna Rules on interpretation also reverberates onto the construing of jurisdictional clauses in investment Treaties, and somehow disqualifies the entire debate about the narrow, as opposed to the broad, interpretation of in accordance with Host State law clauses. As the Tribunal in Mondev noted:

> *"In the Tribunal's view, there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31-33 of the Vienna Convention on the Law of Treaties, which for this purpose can be taken to reflect the position under customary international law."*[728]

609. The Vienna Convention on the Laws of Treaty, and its mandatory nature, is however often disregarded by international investment Tribunals. The late Professor Thomas Walde, in one of his last scholarly articles, complained that:

> *"[t]ribunals often do not practice what they preach; reference to the Vienna Rules is now mandatory, but such reference does not mean the Rules are taken and applied seriously" and "it is difficult to find a tribunal which formally and properly applied the Vienna Rules step by step."*[729]

610. When the disregard for the Vienna Rules affects the interpretation of clauses that are outcome-determinative of decisions denying or conferring jurisdiction to a Tribunal, the consequences are particularly serious. In the context of the ICSID Convention, for example, it would be possible that a decision that asserts or denies the jurisdiction of a Tribunal over a dispute based on a

[728] Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002, para. 43.

[729] Walde, T. Interpreting Investment Treaties: Experiences and Examples *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, New York: Oxford University Press, 2009: 724 – 781, 730. Similarly see also Michael Reisman and Mahnoush Arsanjani according to whom "*provisions [of the Vienna Convention] have become something of a clause de style in international judgments and arbitral awards: whether routinely and briefly referred to or solemnly reproduced verbatim, they are not always systematically applied"* Reisman, M. «Interpreting Treaties for the Benefit of Third Parties: The "Salvors Doctrine" and the Use of Legislative History in Investment Treaties*.» American Journal of International Law,* 2010: 597 – 604.

misapplication of the general rule of treaty interpretation is subject to annulment for manifest excess of power of the Tribunal.[730]

611. It is therefore inappropriate from the methodological perspective that a number of Tribunals rely on precedents and disregard the principles of the Vienna Convention to interpret the meaning of in accordance with Host State law clauses.[731] This is not a problem only related to in accordance with Host State law clauses, but is symptomatic of a trend that permeates the investment law discourse in more general terms. Let us take the example of the definition of the expression *fair and equitable treatment*, that is a cornerstone of investment protection law and that Tribunal are so often called upon to interpret. In *Spyridon Roussalis v. Romania*[732], in order to give substance to the definition of *FET* under the Greece-Romania BIT, the Arbitral Tribunal expressly declared that it would look at the decisions of Tribunals that were confronted with a similar task, specifically *Rumeli v. Kazakhstan*, *Parkerings v. Lithuania*, *Azinian v. Mexico*, *Tecmed v.*, and *Saluka v. Czech Republic*. These Tribunals however, while doing an attentive job of specifying the notion of the FET standard, did so in the context of specific BITs - those applicable to the cases brought before them. Can it be assumed that the meaning of FET under the Norway-Lithuania BIT (the one relevant in *Parkerings v Lithuania*), for example, is exactly the same as the one under the Greece-Romania BIT, applicable to the *Spyridon Roussalis v. Romania?* In general, can it be said that there is only one definition of FET, as there would be just one meaning of *in accordance with Host State law clause*, that is independent of the specific treaty instrument in which the norms to interpret are incorporated?

612. Yes and no. The words are the same. They have the same ordinary meaning, in accordance with Article 31 of the Vienna Convention. *But they appear in each treaty with distinct contexts, objects, purposes, texts, preambles, annexes,*

[730] Roberto Castro de Figuereido, Interpreting Investment Treaties, 2014, available at http://kluwerarbitrationblog.com/2014/10/21/interpreting-investment-treaties/
[731] Weeramantry, R. J. *Treaty Interpretation in Investment Arbitration*. Oxford: Oxford University Press, 2012, 14.
[732] Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award of 7 December 2011, paras 313 ff.

related agreements, subsequent agreements, related instruments, and preparatory work".[733]

613. The adherence of a number of international Tribunals to the Salini dictum regarding the meaning of *in accordance with Host State law*, only, or primarily, on the basis of a rule of precedent, does not therefore appear to be the correct way of proceeding. Not only have treaties to be interpreted autonomously,[734] on the basis of the Vienna Rules; it is also that the rule of precedent is not a general principle of interpretation under public international law. According to the famous statement by Lord Denning, indeed, *international law knows no rule of stare decisis*.[735] At best, precedents can play an auxiliary and indirect role in the definition of the meaning of a certain rule of law, and certainly they are not binding.[736] This is a position that several Tribunals have correctly shared, also in the field of international investment arbitration. In the case *LETCO*, for example, an arbitral Tribunal held that it was *not bound by the precedents established by other ICSID Tribunals* and that it was only *instructive to consider their interpretations.*[737] Perhaps even more precisely, the Arbitral Tribunal in *Enron v Argentina* agreed:

> *"with the view expressed by the Argentine Republic in the hearing on jurisdiction held in respect of this dispute, to the effect that the decisions of ICSID tribunals are not binding precedents and that every case must be examined in the light of its own circumstances.*[738]

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[733] Born, G. Should Investment Treaties Have Their Own Rules of Interpretation? http://kluwerarbitrationblog.com/2015/02/03/should-investment-treaties-have-their-own-rules-of-interpretation. See also on this question, Dumberry, P. «The Meaning of the Fair and Equitable Treatment Standard under NAFTA Article 1105 in Light of the General Rules of Treaty Interpretation» *International Arbitration Law Review*, 2013: 121- 134.

[734] Weeramantry, R. J. (2012) *op cit*., 154-167.

[735] Trendex Corp. v. Central Bank of Nigeria, [1977] 2 W.L.R. 356, 365.

[736] Guillaime, G. «The Use of Precedent by International Judges and Arbitrators.» *Journal of International Dispute Settlement* 2011 5-23. Jennings, R. et Watts, A. *Oppenheim's International Law*. Oxford: Oxford University Press, 2008. See also Cheng, T. «Precedent and Control in Investment Treaty Arbitration» *Fordham International Law Journal*, 2007: 1014 - 1041. Kauffman-Kohler, G. «Arbitral Precedent: Dream, Necessity or Excuse?—Freshfields Arbitration Lecture 2006.» *Arbitration International*, 2007: 357 – 380.

[737] Liberian Eastern Timber Corporation v. Republic of Liberia, ICSID Case No. ARB/83/2, Award of 31 March 1986, ICSID Reports 346, 352.

[738] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic), Decision on Jurisdiction of 2 August 2004, para 35.

614. According to Professor Bernardo Cremades, also:

> *"The meaning [of a BIT provision] must be determined in light of the terms, context, object and purpose of each bilateral investment treaty. The integrity of this interpretative process must not be compromised by the pronouncements of other arbitral tribunals in their interpretation of different treaties in wholly unrelated factual and legal contexts. Other awards or decisions are no more than illustrative of the implications of a standard form of treaty wording."*[739]

615. When the focus is shifted to the specific question of the consequences of the illegality in the presence of an *in accordance with Host State law* clause, it is somehow reassuring that at least some Tribunals have been very punctual in not relying to automatic definitions, but rather have resorted to attentive interpretations in the context of the Treaty, as mandated by the Vienna Rules. The Tribunal in *Metaltech v Uzbekistan*, for instance, seems to espouse this idea by admonishing that:

> *"In the Tribunal's view, the Contracting Parties to an investment treaty may limit the protections of the treaty to investments made in accordance with the laws and regulations of the host State. Depending on the wording of the investment treaty, this limitation may be a bar to jurisdiction, i.e. to the procedural protections under the BIT, or a Defence on the merits, i.e. to the application of the substantive treaty guarantees".*[740]

2.3 A Practical Example of Alternative Interpretation, in Accordance With the Vienna Rules

616. What does it mean, in practical terms, that *in accordance with Host State law* clauses should be interpreted, in each case, on the basis of the Vienna Convention Rules? Article 31 of the Vienna Convention identifies the criteria that

[739] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Dissenting Opinon of Professor Bernardo Cremades of 16 August 2007, para 9.
[740] Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award of 4 October 2013, para 127.

are to be resorted to when interpreting a provision in a Treaty governed by public international law. Under Article 31 of the Vienna Convention a Treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose.[741] The Germany – Philippines BIT, discussed in the case Fraport, mentioned above, provides an example for an alternative interpretation of the *in accordance with Host State law* clause, that appears to be more in line with the principles of judicial interpretation required by the Vienna Convention. Indeed, as will be seen, if the principles of Treaty interpretation are properly applied to the Germany - Philippines BIT, the expression *in accordance with Host State law* only defines the kind of assets that can constitute an investment under the laws of the Host State, as opposed to expressing a legality requirement of the investment.

617. As it will be remembered from the preceding pages, Article 1(1) of the BIT between Germany and the Philippines provides that the term investment shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State.[742] According to the interpretative process mandated by the Vienna Convention, it is first necessary to identify the scope and object of the Treaty, and its context. As regards the scope and object of the Germany – Philippines BIT, this can be derived from its title, as well as from the preambular section of the Treaty itself, according to which the Treaty pursues the scope of promotion and reciprocal protection of investments between Germany and the Philippines.

618. As regards the context of the Treaty, as further specified by the second comma of Article 31 of the Vienna Convention, this is constituted by the preamble,

[741] Article 31, General rule of interpretation 1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context:(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;(c) any relevant rules of international law applicable in the relations between the parties. A special meaning shall be given to a term if it is established that the parties so intended.»*

[742] Article 1(1) Germany – Philippines.

the other provisions of the Treaty, the annexes to the Treaty, as well as any other Treaty that may have been entered in between the Parties after the Treaty that has to be interpret. Certain other provisions of the Germany-Philippines BIT, in particular, contain rules regarding the modalities of acceptance of investments under the Treaty and, as such, they provide the necessary background interpretation to make sense of the *in accordance with Host State law* provision. In this regard, Article 2 of the BIT, titled *Promotion and Protection* of the investment, provides, at paragraph 1, that:

> *"Each Contracting State shall promote as far as possible investments in its territory by investors of the other Contracting State and admit such investments in accordance with its Constitution, laws and regulations as referred to in Article 1 paragraph. Such investments shall be accorded fair and equitable treatment".*

619. As regards the Annexes to the Treaty, that also provide context for the hermeneutical exercise mandated by the Vienna Convention, it is possible to recall Article 2 of the Annex, according to which:

> "*[A]s provided for in the Constitution of the Republic of the Philippines, foreign investors are not allowed to own land in the territory of the Republic of the Philippines. However, investors are allowed to own up to 40% of the equity of a company which can then acquire ownership of land.*"

620. Lastly, according to Article 5 of the Annex to the Treaty,

> "*With respect to the Republic of the Philippines it is understood that duly registered investments are assets of any kind as defined in Article 1, admitted in accordance with Article 2(1) and reported to competent governmental agencies at the time the investment was made. It is further understood, that the transfer guarantee is not limited to the capital values of the investments that have been duly registered.*"

621. Now, if one looks at the limitations imposed by the BIT on investments, it appears that the main point of reference here is the Constitution of the Philippines, and the limitation that it provides regarding the ownership of property

by foreign investors. The limitation concerns the kind of property (assets) and the modalities in which these kinds of properties may be owned (with a limitation on the percentage of shares that a foreigner may have in a Pilipino asset). Imagining that a provision of the Anti-Dummy law of the Republic of the Philippines were breached by the investor, would this be enough to deny that the investor holds *assets* that are admitted in accordance with this provision? It appears that the answer should be in the negative. To put it in the words of Professor Cremades, in his dissenting opinion in the Fraport case:

> *"The fact that the Claimant's asset may have engaged in illegal conduct in the Philippines (allegedly, a breach of the Anti-Dummy Law) does not change the fact that its shareholdings are an asset accepted in accordance with Philippine law (...). [I]n my opinion, it is an artificial, decontextualised interpretation of Article 1(1) of the BIT that excludes the jurisdiction of this Arbitral Tribunal for an alleged breach of the Philippine Anti-Dummy Law, and an interpretation that does violence to the object and purpose of promoting and protecting investment in the Philippines".*[743]

622. In light of the above, treating the *in accordance with Host State law provision* of the Philippines-Germany BIT as a legality requirement, under the narrow interpretation of this clause, may be seen as a result that is inconsistent with the need to value the context of the Treaty, and its scope and purposes, in the context of its interpretation. It may be seen as a result that is ultimately at odds with the rules of interpretation of the Vienna Convention. In a similar fashion, in *Saba Fawkes v Turkey*, the Arbitral Tribunal was requested to interpret a clause of the Netherlands-Turkey Treaty that provided as follows:

> *"[T]he present Agreement shall apply to investments owned or controlled by investors of one Contracting Party in the territory of the other Contracting Party which are established in accordance with the laws and regulations in force in the latter Contracting Party's territory at the time the investment was made."*[744]

[743] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Dissenting Opinon of Professor Bernardo Cremades of 16 August 2007, para 13.
[744] Article 2(2) of the Netherlands-Turkey BIT.

623. In this case, the Tribunal was more respectful of the modalities of treaty interpretation imposed by the Vienna Convention. The Tribunal did not jump to the automatic conclusion that, since it was dealing with an *in accordance with Host State law* clause, it should decline jurisdiction if faced with criminal or illegal conduct by the investor. On the contrary, the Tribunal noted that the sort of illegality complained of by the Respondent in this case had to do generally with the discipline of the telecommunication sector, as well as with general principles of Turkish competition law. The Tribunal, by referring to the language of Article 31 of the Vienna Convention, proceeded to make the following considerations:

> *"[The clause] contained [in the treaty] concerns the question of the compliance with the host States domestic laws governing the admission of investments in the host State. This is made clear by the plain language of the BIT, which applies to "investments (...) established in accordance with the laws and regulation (...). The Tribunal also considers that it would run counter to the object and purpose of investment protection treaties to deny substantive protection to those investments that would violate domestic laws that are unrelated to the very nature of investment regulation."*[745]

624. In this case, the Tribunal declined its jurisdiction over the investor's claim. However, it did not do so because it had found, as the Respondent had argued, that laws in the sector of telecommunication had been violated, or general competition laws. In other words, the Tribunal did not deny jurisdiction because the investment was generally illegal. On the other hand, it declined jurisdiction because it found that a specific law *governing the admission of investments in the host State* had not been respected*;* a law, in other words, concerning the definition of investment under the rules of the domestic forum. The Tribunal asked itself *'whether any property and rights [..] were actually transferred to the Claimant' as a result of that transaction.* It carried out its analysis on the basis of domestic law. It concluded that the Claimant *had not acquired legal title to the shares because these were not acquired in a manner cognizable under the law of the host State, with the consequence that the definition of what constituted an investment under domestic law was not met, and the Tribunal therefore lacked jurisdiction ratione*

[745] Saba Fawkes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award of 14 July 2010, para 119.

materiae.[746] In an important *obiter dictum*, the Tribunal held that an investment might be *legal* or *illegal*, *it nonetheless remains an investment*.

625. On an approach that is consistent with the Vienna Rules on interpretation, there will be certain cases when the *in accordance with Host State law* clause is a legality clause; and others, in which it is not. Precisely because an *ad-hoc* interpretation of in accordance with domestic law clauses is necessary, it would also be wrong to automatically conclude that an *in accordance with Host State law* clause can never be a legality clause regarding the general compliance of the investment with the laws of the Host State. For opposite reasons to the Salini *dictum*, that generalised the legality nature of *in accordance with Host State law* clauses, it is difficult to agree, therefore, with the decision of the Arbitral Tribunal in *Vladimir Berschader and Moïse Berschander v. The Russian Federation*. This Tribunal, without engaging in any exercise of interpretation of the provisions contained in the Belgium – Russian Federation BIT, and rather apodictically, concluded that:

> *"The Respondent has further contended that the investments relied upon by the Claimants were illegal and, as a result, do not satisfy the requirements of compliance with the laws of the Russian Federation contained in Article 1.2 of the Treaty. The Tribunal is of the view that the lawfulness of the investments relied upon by the Claimants is a not an issue affecting the jurisdiction of the Tribunal, but rather a substantive issue pertaining to the merits of the case. It would, therefore, be inappropriate for the Tribunal to consider this issue at this stage in the proceedings".*[747]

3. The Legality Doctrine – The Legality Requirement Implied in the System of Investment Protection

626. The previous paragraphs have discussed the *Defence of Illegality* in one of its clearest manifestations, namely through the operation of an express *in accordance with Host State law* clause. The analysis above has shown that there

[746] Saba Fawkes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award of 14 July 2010, para 147.
[747] Vladimir Berschader and Moïse Berschander v. The Russian Federation, SCC Case No. 080/2004, Award of 21 April 2006, para.111.

should be no automatism in concluding that these provisions are legality clauses; rather, that the matter turns out to be one of interpretation, to be determined on an *ad-hoc* basis in light of the principles set forth by the Vienna Convention on the Law of Treaties.

627. An *in accordance with Host State law clause* is however not always present in BITs. Some Treaties, especially the old ones, do not expressly require the investment to conform with the laws of the Host State. In cases like these, the *Defence of Illegality* against illegal investments could not operate through a direct textual connection with the BIT. However, another route of operativity appears to be possible: some Tribunals have in fact taken the position that a general legality requirement of investments is implicit in all BITs, and in the system of investment protection at large.[748] This approach is sometimes referred to as the *Legality Doctrine*, and the expression is adopted in this thesis.[749]

628. A first authoritative affirmation of the *Legality Doctrine* in investment law can be found in the decision of the arbitral Tribunal in the case *Phoenix v Czech Republic*. In that case, even though a specific *in accordance with Host State law* clause existed in the BIT, the Tribunal commented more generally that:

> *"It is the view of the Tribunal that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT."*[750]

629. The Phoenix Tribunal, in conceptualising the implied legality requirement, had in turn referred to a decision rendered by an arbitral Tribunal in the case of *Plama v Bulgaria*. In that case, the claim was based on the Energy Charter Treaty, that does not contain a specific legality requirement. The Tribunal held that:

[748] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Decision of 15 April 2009, para 101. See also Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar, Asean I.D. Case No. ARB/01/1, Award of 31 March 2003, 42 ILM 540 (2003), para 58; Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction of 6 July 2007, para 185.
[749] Betz, K. (2017) *op cit*., 296.
[750] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Decision of 15 April 2009, para 101.

> *"Unlike a number of Bilateral Investment Treaties, the ETC [Energy Charter Treaty] does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law (...) The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law".*[751]

630. Other Tribunals have gone beyond reading the implied legality requirement in the *specifically applicable* BIT or Treaty, and have theorised that it is the entire system of investment law, as such, that only protects legal investments.[752] The Tribunal in *Saur v Argentina*, for example, held that:

> *"[the tribunal] is aware that the finality of the investment arbitration system is to protect only lawful and bona fide investments. Whether or not the BIT between France and Argentina mentions the requirement that the investor act in conformity with domestic legislation does not constitute a relevant factor. The condition of not committing a serious violation of the legal order is a tacit condition, inherent to any BIT as, in any event, it is incomprehensible that a State offer the benefit of protection through arbitration if the investor, in order to obtain such protection, has acted contrary to the law."*[753]

631. The affirmation of an implied legality clause in BITs - and in general in the system of investment protection - would be the consequence of an interpretation of Treaties in accordance with the principles of the Vienna Convention. For example, in the case of *Hulley v Russia*, the claimant argued that an implicit legality requirement is built in the Energy Charter Treaty due to its necessary interpretation in light of Article 31 of the Vienna Convention, that

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[751] Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24 (Energy Charter Treaty), Award of 27 August 2008, paras 138-139. See also Railroad Development v Guatemala, Second Objection to Jurisdiciton, 18 May 2010, para 140.

[752] Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award of 18 June 2010, paras 123-124. See also SAUR International SA v. Republic of Argentina, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, para 306. "*Le Tribunal coïncide avec la Demanderesse en ce que l'APRI France-Argentine n'exige pas expressis verbis qu'un investissement, pour mériter une protection, ait été réalisé conformément à la législation du pays d'accueil. L'art. 2 de l'APRI, qui définit le cadre de protection, s'exprime dans les termes suivants :« Chacune des Parties contractantes admet et encourage, dans le cadre de sa législation et des dispositions du présent Accord, les investissements effectués par les investisseurs de l'autre Partie sur son territoire et dans sa zone maritime* ".

[753] SAUR International SA v. Republic of Argentina, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, para 308.

provides that a Treaty must be interpreted *in good faith according to its object and purpose*. The argument continued that the *object and purpose* of the Energy Charter Treaty – just like the object and purpose of any BIT - would not include the promotion and protection of illegal investments.[754]

632. It is difficult not to agree with this statement in general terms, and hence exclude in principle from the protection of BITs investments that are illegal, or even criminal. However, the scenarios that in practice present themselves are much more complex than may at first appear, and the rule whereby illegal investments are not protected is too generic, and too vague, to provide a solution for all the relevant cases.

633. For example, what does it mean at the practical level that an investment is not protected under a BIT? Also, the deprivation of the protection operates in the same manner regardless of the nature of the illegality, or is it somehow gravity-dependent? Lastly, is the limitation of protection to legal investment only an absolute value, or does it have to be balanced against other values and goals that the system of investment law pursues?

634. On the first question, it is necessary to note immediately that denying protection to an illegal investment under the *Legality Doctrine* is not an objective that *can only be achieved through a declaratory of denial of jurisdiction*. The scenario that presents itself under the *Legality Doctrine* is in fact different from the case of an *in accordance with Host State law clause* that operates as a legality clause: in such a situation, an investment that is illegal would not qualify as an investment, and the Tribunal would be *obliged* to decline jurisdiction *ratione materiae*. Similarly, the *Clean Hands Doctrine*, which is another route through which the *Defence of Illegality* operates, connects directly the illegality of an investment with a declaratory of lack of jurisdiction by a Tribunal. This is because, as mentioned, one of the rationales of the *Clean Hands Doctrine* is to preserve court's integrity from the exploitation of those who seek redress, despite having

[754] Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 226, Final Award of 18 July 2014, para 1314. See also Lim, K (2016), *op.cit*., 606.

committed some wrong; and *the only way* for a court to preserve its integrity when faced with illegal conduct is to decline jurisdiction and not entertain the case at all.

635. This jurisdictional exitus, however, is not mandatory under the *Legality Doctrine*. Rather, it is only optional. In other words, denying the protection of the system of BITs to illegal investments does not mean that the Tribunal *must do so by unavoidably declining its jurisdiction, but rather that it can also do so by denying it jurisdiction*. The position of the Tribunal in the case of *Yukos v Russia* is significant in this regard. In that case, the Tribunal agreed that there exists a general legality rule which is implicit in the system of investment protection. But also, it argued that:

> *"[…] the Tribunal does not need to decide here whether the legality requirement it reads into the ECT operates as a bar to jurisdiction or, (…) to deprive claimants of the substantive protections of the ECT.*[755]

636. By adopting this position the Tribunal acknowledged that under the *Legality Doctrine,* more than one response is possible to address an illegal investment; one, is to decline jurisdiction. But another alternative is available: that the claimant is prevented from having access to the *substantive protection* of the Treaty.

637. In effect, if one looks at the relevant case law in the field, it appears that in all circumstances in which the *Legality Doctrine* has been invoked so far, *Tribunals have been reluctant to decline jurisdiction.* In Plama, for example, the clearest affirmation of the *Legality Doctrine* so far, the Tribunal treated the question of the legality of the investment as a matter impinging on the access to the substantive protection of the Treaty, rather than on the jurisdiction of the Tribunal. It held that:

> *"[T]he ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule o f law. The Arbitral*

[755] Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 226, Final Award of 18 July 2014, para 1353.

Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law."[756]

638. Since the solution of declining jurisdiction is not common under the *Legality Doctrine*, but, as we shall see in the model developed further on in this dissertation, it is a solution to be reserved for the most serious cases of illegality, the fate of an illegal investment under the *Legality Doctrine* has become, primarily, one of either admissibility of the claim, or of its merits.

639. The pages the follow provide an answer to the other two questions anticipated above: does the deprivation of the protection operates in the same manner regardless of the nature of the illegality, or should this be somehow gravity-dependant? Also, is the limitation of protection only to legal investment an absolute value, or does it have to be balanced against other values and goals that the system of investment law pursues?

3.1. The Legality Doctrine – Admissibility or Merits?

640. The first question, in consideration of the fact that the *Legality Doctrine* has so far been addressed primarily from the admissibility/merits dialogy, translates in the following practical terms: is a claim concerning an illegal investment inadmissible, or should the lack of protection happen at the merits stage of the proceedings? And, strictly related: what are the parameters to consider to answer this question?

641. A close analysis of the scholarship reveals that the various positions can be reduced two basic models, which revolve around the notion of *Transnational Public Policy*.

a) According to the first position, in the absence of an *in accordance with Host State law* clause that operates as a legality clause, the Tribunal

[756] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award of 27 August 2008, para 139.

should declare the inadmissibility of an illegal claim *regardless of the gravity of the illegal conduct that is put in place by the investor*; [757]

b) According to the second position, in the absence of an *in accordance with Host State law* clause that operates as a legality clause, the Tribunal should declare the inadmissibility of the claim *only in the event of the most serious conduct by the investor, specifically, in the event that the investor engages in conduct that is contrary to Transnational Public Policy*.

642. Some scholars ground the first position on the reasoning of the arbitral Tribunal in the *Plama Case*. In that case, as seen, the Tribunal had to confront itself with issues of alleged fraud by the investor. Fraud, as such, while constituting a form of illegality and a crime, does not amount to an instance of violation of Transnational Public Policy, or, at least, not one on which there is general consensus. The Tribunal in Plama refused to recognize that the investor enjoyed the standard protection of the Energy Charter Treaty on the plain fact that the investment was contrary to law, and therefore illegal.[758]

643. The second approach postulates that an arbitral Tribunal should declare the inadmissibility of the claim only in circumstances in which the crime committed is of such gravity as to offend *Transnational Public Policy*, while the other, less serious breaches could be assessed at the merits. According to some scholarship, there would be good reasons why conduct that offends *Transnational Public Policy* should not be addressed at the merits stage of the proceedings, but constitute a barrier to the merits: *an arbitral Tribunal should not lend the arbitral proceedings to any kind of enforcement or recognition of rights that have been acquired in a manner that is repugnant to the international community*.[759]

644. However, also the idea that a breach of public policy is a bar to the admissibility of a claim must be taken with some caution. Given the serious

[757] Miles, C. (2012) *op.cit*., 357.
[758] Miles, C. (2012) *op.cit*., 357.
[759] Douglas, Z. (2014) *op.cit*., 170.

consequences of the finding that an investor has breached *Transnational Public Policy* would have on its claim, some authors recommend that the notion of *Transnational Public Policy* for the purposes of a *Defence of Illegality* should be very precisely and strictly curtailed to those conducts that are really abhorrent to the international community. Or, put it in other words, that only the most serious breaches of *Transnational Public Policy* should be sanctioned with inadmissibility.

645. This is a problem that is strictly connected to the third question indicated in the previous pages: is the limitation of protection only to legal investment an absolute value, or does it have to be balanced to other values and goals that the system of investment law pursues? The discussion of these issues is reserved for Chapter 8 (particularly section 3) of this thesis, where a model is proposed that contrast the values behind the *Defence of Illegality* with the values promoted by another fundamental principle of international arbitration: *the Doctrine of Separability*.

646. For the purposes of the present discussion, it is sufficient to explain that the authorities relied upon by those who argue that *any instance* of investor illegality under the *Legality Doctrine* necessarily renders the claim inadmissible are not always so clear and that there are several doubts that inadmissibility should be the default answer in the face of an illegal investment.

647. According to Miles, for instance, the Tribunal in *Plama v Bulgaria* certainly dismissed the claim at the admissibility level.

648. However, if one looks at the texts of the decision, this conclusion appears farfetched. The Tribunal in Plama limited itself to saying that *[the] assertions by the Respondent are serious charges which the Tribunal [will] examine on the merits*.[760] In this regard, Professor Newcombe therefore also notes that *Plama may also be read that the substantive protections of the ECT are applicable only if the investment is legal, which is a question of the merits of the*

[760] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award of 27 August 2008, para 97.

claim".[761] Also, that Tribunal *seems* to have dismissed the case on grounds of inadmissibility.

649. And indeed, even Miles has to admit that "*regrettably, the tribunal failed to state explicitly that the claimant's case was inadmissible; it merely stated that the protections of the ECT could not be granted to the relevant investment*". [762] In an area of law still in development, where theoretical conceptualisations are still difficult to find, and Tribunals make statements on the basis of a tentative language, dubitative language is also necessary from scholars. There is therefore some difficulty in considering Plama as the ultimate evidence that any instance of illegality under a *Legality Doctrine* mandates a declaration of inadmissibility.

650. On the contrary, it appears that arbitral practice presents cases where the implied legality requirement of investments meant that the question of the conduct of the investor resulted in an investigation at the *merit phase* of the proceedings. In the case of *Veteram Petroleum Limited v Cyrpus*, for example, the arbitral Tribunal confirmed the existence of an implied legality clause in the text of the Energy Charter Treaty. After denying that the Tribunal had to decline jurisdiction due to the alleged misconduct by the investor, it held:

> *"The Tribunal is well aware of Respondent's argument that Claimant in this arbitration has "unclean hands" and that Claimant's corporate personality should be disregarded because it is an instrumentality of a "criminal enterprise." […] Specifically, the Tribunal then decided to defer consideration of Respondent's arguments concerning the "unclean hands" of Claimant or Claimant being an instrumentality of a "criminal enterprise" to any merits phase of this arbitration. Accordingly, by finding, as it does, that Claimant qualifies as an Investor owning or controlling an Investment for the purposes of Articles 1(7) and (6) of the ECT, the Tribunal does not dispose of the issues argued by Respondent concerning the "unclean hands" of Claimant and Claimant being an instrumentality of a "criminal*

[761] Newcombe, A. (2011) *op.cit*., 297.
[762] Miles, C. (2012), *op.cit.*, 358.

enterprise," which it will address during any merits phase of this arbitration."[763]

651. This position was adopted by the Arbitral Tribunal also by the Arbitral Tribunal in *Hulley and Yukos Universal v Russia.*[764]

652. In conclusion to this section, it is possible to summarise the analysis as follows.

653. Under the *Legality Doctrine*, an implied legality requirement is built into the system of investment law, according to which only legal investments are protected. In the absence of an express legality clause in the treaty, which would mandate a declaratory of lack of jurisdiction in the case of an illegal investment, the prevalent position is that an illegal investment will not enjoy the protection of the Treaty and of international law. This, in turn, can mean two things: a) either that the claim connected to the illegal investment is declared inadmissible; b) or that the denial of treaty protection of the illegal investment occurs at the merits phase.

654. According to a part of the scholarship, the declaration of inadmissibility should follow automatically from any kind of violation committed by the investor; according to another, this should be a sanction reserved only for serious breaches, essentially those that consist in conduct in violation of *Transnational Public Policy*. The notion of *Transnational Public Policy*, in turn, and the kinds of violations that could prevent the Tribunal for entertaining a claim in the merits are debated, and the debate needs to be carried out in the light of other principles of law that govern international arbitration, such as the *Doctrine of Separability*. This means that *Transnational Public Policy* must be interpreted narrowly in the context of a *Defence of Illegality*; or, which is similar, that only the most serious breaches of *Transnational Public Policy* should determine the most serious effects of the *Defence of Illegality vis à vis* the investor's claim.

[763] Veteran Petroleum Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 228, Final Award of 18 July 2014.
[764] Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 226, Final Award of 18 July 2014, para 436.

655. This discussion is reserved for Chapter 8, Section 3 of the dissertation.

4. The "Clean Hands" Doctrine – General Remarks and its Difference from the Legality Doctrine

656. Another way by which the *Defence of Illegality* may operate is through the door of the so-called *Clean Hands Doctrine*.

657. The *Clean Hands Doctrine* is a theory that developed functionally in the context of common law, but with a Roman law matrix, encapsulated in the maxim *ex turpi causa non oritur actio*.[765] A court described the underpinning of the *Clean Hands Doctrine* as follows:

> *"(...) public policy requires that the Courts will not lend their aid to a man who founds his action upon an immoral or illegal act".*[766]

658. In essence, the doctrine requires that a Court should deny putting the machinery of justice at the service of a claimant who has engaged in illegal or morally reprehensible conduct. The impact of the *Clean Hands Doctrine* is on the jurisdiction of a court or tribunal. Its effect is to deny the claimant the *right of entry* into the judicial proceedings. In other words, a Tribunal should deny a claimant *locus standi* if it turns to the Tribunal to seek protection against any breach of its rights, when that claimant has been involved in illegal conduct that is connected to the right they seek to protect.

659. In the words of Sir Gerald Fitzmaurice:

[765] Kreindler, R. «Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine.» Hober, K. et Al, *Between East and West: Essays in Honour of Ulf Franke.* New York: Juris Publishing, 2010: 309 – 327, 317.
[766] Standard Chartered Bank v Pakistan National Shipping Corporation and others (No 2), 2000, Lloyd's Reports, 218.

> *"He who comes to equity for relief must come with clean hands". Thus a State which is guilty of illegal conduct may be deprived of the necessary locus standi in judicio for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it"*[767]

660. In this sense, the *Clean Hands Doctrine* is a form of judicial abstention. Lord Sumption in *Les Laboratoires Servier v Apotex*, explained:

> *"But in general, although described as a defence, [the doctrine of illegality is] is in reality a rule of judicial abstention. (...). The ex turpi causa principle precludes the judge from performing his ordinary adjudicative function in a case where that would lend the authority of the state to the enforcement of an illegal transaction or to the determination of the legal consequences of an illegal act.*[768]*"*

661. An example will clarify this mechanism. Claimant A has helped Defendant B steal a vehicle. During an escape from the police, due to the reckless conduct of B, A is injured in a traffic accident and seeks compensation from B. The *Clean Hands Doctrine* would prevent A from seeking damages from B - as would ordinarily be the case - because B, having participated with A to the theft of the car, would not be approaching the Court with *clean hands*. Similarly, Claimant A, an employee, brings suit against Defendant B, alleging of having been unjustly fired. Defendant B counters claimant's A allegations by arguing that A has accepted to be paid for his services with modalities not allowed by the law (e.g. *cash in hand*).[769] Again, A would be prevented to turning to a court to seek the enforcement of its rights, as would otherwise be the case if it had conducted itself in a non-illegal manner.

662. In the context of investment law, the *Clean Hands Doctrine* would operate without the need of an express *in accordance with Host State law* clause.[770] This is a feature that the *Clean Hands Doctrine* has in common with the *Legality*

[767] Fitzmaurice, G. «The General Principles of International Law considered from the Standpoint of the Rule of Law» 92 *Recueil des Cours*, 1957-II: 1 -227,119.
[768] United Kingdom Supreme Court, Les Laboratoires Servier & Anor v Apotex Inc & Ors (Rev 1), 2014, para 23.
[769] Court of Appeal of England, Hall v Woolston Hall Leisure [2001] 1 WLR 225.
[770] See generally Lamm, C. B. (2014) *op.cit*, 328.

Doctrine that has been discussed previously. However, differently from the situation in which Tribunals read an *implied in accordance with Host State law* clause in the applicable treaty or in the system of investment arbitration at large, the operativity of the *Clean Hands Doctrine* would rest on its being positively applied under the guise of a general principle of law, according to which judicial redress can only be sought by those who have not committed any illegality with respect to the investment for which they seek protection. In other words, jurisdiction would be declined on the basis of the operation of a doctrine that would be considered as mandatory under international law, regardless of whether it is embodied in an express or implied clause that requires the investment to comply with the laws of the Host State. As it is apparent, the viability of the *Clean Hands Doctrine* depends on its status in international law, and on whether it can be considered a general principle of law under Article 38 of the Statute of the International Court of Justice. This is a matter that is discussed later on in this Chapter.

663. For the purposes of the present section, it is necessary to distinguish further the *Legality Doctrine* and the *Clean Hands Doctrine*, given the diffuse and regrettable trend of confusing these two concepts. Even if the two doctrines have significant traits in common, they are not one and the same. The *Legality Doctrine* postulates that the system of investment protection is ontologically aimed at protecting *only* those investments that are legal; and that, for this purpose, subordinating the protection of an investment to its legality does not require a specific provision to this effect in the text of BITs; the *Clean Hands Doctrine*, while similar to the *Legality Doctrine*, rests on different, and more complex, policy underpinnings. As indicated below, the main one of these is that that a claimant cannot benefit from their own wrongdoing, and that the system of court justice should never be put at the service of people who have committed some wrong connected to the situation with respect to which they seek a judicial form of redress or a court remedy.

664. It is not unlikely that the *blame* for the terminological confusion between the *Clean Hands Doctrine* and the *Legality Doctrine* has to be placed on

Tribunal in the *Plama v Bulgaria* case, whose decision has been quoted in the previous pages as indicative of the emergence of the *Legality Doctrine*. In that context, in attempting to read an implied legality requirement in the ECT, and in the system of investment protection in general, the Tribunal resorted to language that would have been more appropriate in the context of the *Doctrine of Clean Hands*. In particular, the Tribunal held that:

> *"Claimant, in the present case, is requesting the Tribunal to grant its investment in Bulgaria the protections provided by the ECT. However, the Tribunal has decided that the investment was obtained by deceitful conduct that is in violation of Bulgarian law. The Tribunal is of the view that granting the ECT's protections to Claimant's investment would be contrary to the principle nemo auditur propriam turpitudinem allegans invoked above.*[771]

665. As indicated earlier, the maxim *nemo auditur propriam turpitudinem allegans* is the principle at the basis of the *Doctrine of Clean Hands*, as opposed as the *Legality Doctrine*. The terminological confusion, however, should not be used as an excuse to blur notions that are distinct based on their rationale and modalities of operation.

666. Ultimately, the difference also in practice between the two doctrines is well exemplified by the final decision rendered by an international arbitral Tribunal in the case of *Yukos v the Russian Federation*. The Tribunal was first asked to decide whether an implied legality requirement could be read into the Energy Charter Treaty, to deny protection to an investment made contrary to law. The Tribunal answered this question in the negative. Subsequently, it turned its attention to the distinct possibility that the *Clean Hands Doctrine* could operate to the same effect. As the Tribunal explained:

> *"Since the Tribunal will not read into the ECT any legality requirement with respect to the conduct of the investment, it must consider Respondent's more general proposition that a claimant who comes before an international tribunal with "unclean hands"*

[771] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jusridiction of 8 February 2005, para 130, para 146.

is barred from claiming on the basis of a "general principle of law."[772]

4.1 The Policy Underpinnings of the Clean Hands Doctrine

667. After having clarified its notion and the way in which it is distinct from related doctrines, the first issue to address with regard to the *Clean Hands Doctrine* concerns its philosophical underpinning, from a teleological perspective: what are the goals that the *Clean Hands Doctrine* intends to advance? What are the values that it seeks to promote? The idea that a wrongdoer should not benefit from its own wrong permeates the discourse in legal systems in more general terms, and it transcends the limits of the application of the *Clean Hands Doctrine*. Let us take the case of criminal law: the principle whereby a criminal cannot benefit from the proceeds of their crime is well established and is at the basis of normative provisions that provide for the need to seize the economic value or other utility that derive from a criminal activity.[773]

668. Even if the *Clean Hands Doctrine*'s ambit of operation is not limited to the *Defence of Illegality*, identifying policy goals and its general underpinning is particularly important in the context of the *Defence of Illegality*. This is so because denying a claimant *tout court* the right to approach a tribunal to seek redress is a rather exceptional solution. Normally, even claims that are tainted by some sort of illegality do not prevent the wrongdoer from having its case *at least* heard. In dealing with, or in responding to wrongdoing, the law mostly imposes liability (such as in torts), obligations (such as in contract law), or punishment (such as in criminal law).[774] It is therefore necessary to assess whether the objectives that the *Clean Hands Doctrine* pursues are such as to justify a departure from the standard treatment of claimant's illegality.

[772] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Award of 18 July 2014, para 1358.
[773] See for example, in general terms, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism of the Council of Europe; Also, Article 240 of the Italian Criminal Code.
[774] Herstein, O. J (2011) *op.cit*.

669. As mentioned previously, according to the majority of tribunals and scholars, the *Doctrine of Clean Hands* is primarily aimed at preserving the integrity of a court and of the judicial process. Case law from common law countries, where the *Doctrine of Clean Hands* has developed, provides guidance in this regard. According to the US Court of Appeal, for instance:

> *"The equitable doctrine of unclean hands is designed to 'prevent the court from assisting in fraud or other inequitable conduct' (...) it protects the integrity of the court and the judicial process by denying relief to those persons' whose very presence before a court is the result of some fraud or iniquity."*[775]

670. This idea is strictly correlated with the necessity to guarantee public confidence in the system of the administration of justice, which could be undermined if rights tainted by illegality could nevertheless be enforced through the assistance of courts.[776]

671. Another - often recalled - policy rationale that lies at the heart of the *Clean Hands Doctrine* is that preventing the claim brought by a wrongdoer from being heard may further the purpose of the rule which the claimant has infringed. In the domestic context, one could take the case of the laws that in certain jurisdictions prohibit lawyers from entering into contingency fees arrangements with their clients. If a lawyer does indeed enter into such an agreement with his or her client, and then the client refuses to pay the lawyer's fees, disallowing the claim of the lawyer would have the purpose of enhancing the prescriptive power of the rule that prohibits contingency fees. In *Awwad v Geraghty*, the English Court of Appeal was faced with one such contingency arrangement between a solicitor and her client. The Court held:

> *"What public policy seeks to prevent is a solicitor continuing to act for a client under a conditional normal fee arrangement. This is what [the claimant] did. That is what she wishes to be paid for. Public policy decrees that she should not be paid."*[777]

[775] Mona v. Mona Elec.Group, Inc., 176 Md. App. 672, 714 (Md. Ct. Spec.App. 2007)
[776] Birkett v Acorn Business Machines Ltd, Court of Appeal - Civil Division, July 16, 1999, [1999] EWCA Civ 1866
[777] Awwad v Geraghty, [2001] QB 570, 596.

672. Another typical rationale of the doctrine is constituted by the idea that it furthers consistency within a certain legal system. This is well expressed by a judgement of the Supreme Court of Canada. One of the Judges, referring specifically to the case of tort law, explained:

> *"I conclude that there is a need in the law of tort for a principle which permits judges to deny recovery to a plaintiff on the ground that to do so would undermine the integrity of the justice system. The power is a limited one. Its use is justified where allowing the plaintiff's claim would introduce inconsistency into the fabric of the law, either by permitting the plaintiff to profit from an illegal or wrongful act, or to evade a penalty prescribed by criminal law."*[778]

673. Another goal behind the *Clean Hands Doctrine* is deterrence. As will be seen later on, this, together with the need to preserve the Tribunal's integrity, is the main reason for which the doctrine is invoked in investment law. The idea is that if a claimant who commits a wrongdoing is prevented from enforcing the rights that would otherwise be recognised to them, there is a disincentive to committing wrongdoings. In *Taylor v Bhail*, for example, a builder had inflated an estimate of his works for his customers. This was so as to enable them to fraud an insurance company, by claiming sums in excess of those actually due. At some point, the builder had sought damages against his customers with respect to certain conduct committed by them that had been detrimental to the builder. In consideration of the criminal and fraudulent conduct of the builder, the Court held:

> *"It is time that a clear message was sent to the commercial community. Let it be clearly understood if a builder or a garage or other supplier agrees to provide a false estimate for work in order to enable its customer to obtain payment from his insurer to which he is not entitled, then it will be unable to recover payment from its customer."*[779]

674. The last objective that the *Clean Hands Doctrine* pursues is to punish wrongdoers, or, to use criminal law jargon, retribution. However, this position is shared by a minority of the scholarship. Punishment and retribution continue to

[778] [1993] 2 SCR 159, 179.
[779] Taylor v Bhail [1996] CLC 377, 383-384.

remain predominantly the domain of criminal law, and, while it is not difficult to imagine a mechanism rooted in civil law that prevents a wrongdoer from benefitting from the proceeds of crime, it is more difficult to imagine such a civil law mechanism to pursue retribution.[780]

675. It is apparent that there is significant overlap among the various policy rationales that have been discussed above. This is not surprising, if one considers that the contours of each policy rationale are unclear and, in any event, they are not mutually exclusive. On the contrary, for the most part they merge in defining the purpose of the *Clean Hands Doctrine*. There may be cases in which a rationale prevails over another, due to the specificities of the circumstances, or even cases when a policy rationale is not at all applicable.

676. The policy rationales of the doctrine that have been discussed here from the perspective of domestic law can be transposed into the domain of international investment arbitration. As will be shown later on, those international Tribunals that have upheld the *Doctrine of Clean Hands* have often argued in the same terms as domestic courts.

677. With all these premises in mind, a note of caution is now needed. The fact that the policy rationales that the doctrine pursues are commendable and they deserve praise, does not necessarily mean that they are actually achieved by the doctrine, or that the doctrine is the best way to attain them. This is true both at the level of domestic law, and at the level of international law. An example will clarify this statement.

678. As discussed, one of the purposes of the *Doctrine of Clean Hands* is to further the norms that the claimant has violated, by dismissing the claim already at the level of jurisdiction. The aim is the protection of the integrity of the law. This argument applies, *a fortiori*, in all cases when the provision that is breached is assisted by a criminal sanction. However, there may be cases when preventing a court from establishing its jurisdiction over a claim affected by illegality has the

[780] Weinrib, E. J. *The Idea of Private Law*, Oxford: Oxford University Press, 169.

opposite effect from enhancing respect for the violated provision. There may be cases in which the *Clean Hands Doctrine* undermines the integrity of the law, rather than protecting it.

679. A case decided by the European Court of Justice, *Courage Ltd v Crehan,*[781] provides an exemplification of this possible scenario. In *Courage Ltd v Crehan*, the tenant of a pub let by a brewery under terms which included a beer tie agreement sought damages that resulted precisely from being a party to the beer tie. The tenant argued that the beer tie was contrary to article 81 (previously article 85) of the EC Treaty, therefore unenforceable, and that he was entitled to compensation for losses that he had suffered as a result of being party to the agreement. The brewery defended itself in the claim by invoking the *Clean Hands Doctrine*. In particular, it held that the claimant had a part in the beer tie agreement, and was therefore approaching the Court with unclean hands. It proceeded to request that the claim for damages brought by the tenant should be dismissed at the jurisdictional level. However, the European Court explained that in a case like the one before it, the promotion of the principle of competition, namely the aim that Article 81 seeks to achieve, would have required the Court to establish its jurisdiction, rather than decline it. According to the Court:

> *"The existence of such a right [to claim damages for loss caused to him by a contract liable to restrict competition] strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community".*[782]

680. There are also other cases in which one can doubt that, in general terms, a zero-tolerance approach towards illegality as the one that is advocated under the *Clean Hands Doctrine* really serves the purpose of protecting the integrity of the legal system and furthering legal norms.

[781] Courage Ltd v Crehan and Inntrepreneur Pub Company v Crehan [2001] C-453/ 99.
[782] Courage Ltd v Crehan and Inntrepreneur Pub Company v Crehan [2001] C-453/ 99, para 27.

681. For example, there are cases in which the legal system whose norms govern the question of the enforceability of a certain transaction that is tainted by illegality is distinct from the legal system whose norms declare the transaction illegal. In these cases, establishing jurisdiction for purposes of enforcement of the transaction does not have an impact on the integrity of the legal system that governs it. One scholar notes that:

> "*This scenario is not uncommon in cases involving transnational activity, where the governing law of the contract might be different from the local law that makes it illegal for a particular contract to be performed".*[783]

682. Another reason why the *Doctrine Of Clean Hands* may not always be able to live up to its goals can be understood by drawing a parallel with international trade law and the question of the enforceability of an illegal contract. As noted by Davis:

> *"[T]here is a distinction between holding that a contract is legally enforceable and holding that there is a legal duty to perform it. A tribunal which holds that a contract to grant an illegally awarded concession is enforceable but also says that the only available remedy is damages and not specific performance arguably manifests due respect for the law that would render performance illegal. For both these reasons the zero-tolerance approach should not be viewed as a necessary corollary of the need to maintain the integrity of the legal system".*[784]

683. In circumstances in which the *Doctrine of Clean Hands* is not always the best way to achieve the objectives that it seeks to attain, it is all the more doubtful that the trade off with the deprivation of a claimant's right to access legal remedies is a fair one. The purpose of this dissertation is not to discuss the *Doctrine of Clean Hands* from the perspective of general theory of law. However, in consideration of the fact that this thesis also discusses policy questions, it seems appropriate that evaluations of this nature are at least hinted at. Especially when one considers that, as is better seen below, the employment of a robust *Defence of Illegality* with effects on the jurisdiction of a Tribunal (including by recourse to the

[783] Davis, K. E. (2009) *op. cit*., 38.
[784] Davis, K. E. (2009) *op cit*., 38.

Clean Hands Doctrine) is seen by some authors as a way to fight illegality effectively in investment law. As it has been seen here with regard to the *Clean Hands Doctrine*, and as will be seen in Chapter 10 in more general terms with regard to the *Defence of Illegality* in international investment arbitration, a declaratory of lack of jurisdiction does not actually always help to pursue this aim.

4.2 The Clean Hands Doctrine in a Comparative Light: The Experience of a Few Countries

684. As mentioned earlier, the *Clean Hands Doctrine* originated in the context of common law systems, and, more precisely, within equity, where it was shaped by the case law of courts and tribunals. The cases referred to above have shown some examples drawn from the practice of the English Legal system.[785] Even though in England the *Clean Hands Doctrine* has been applied rather mechanistically in practice, this approach is not immune from criticism. Oftentimes, a more balanced approach has been invoked, and it has been suggested that the set of values that the *Clean Hands Doctrine* pursues must be assessed against other sets of values that would recommend exercising the judicial function, rather than abstaining from it. As Lord Toulson, of the English Supreme Court, explained:

> *"So how is the court to determine the matter if not by some mechanistic process? In answer to that question, 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"*[786]

[785] The doctrine of illegality under English law remains one of the most complex fields, and the distillation of general principles is particularly difficult to achieve. A sentence has become famous in this regard, according to which: "*As any hapless law student attempting to grapple with the concept of illegality knows, it is almost impossible to ascertain or articulate principled rules from the authorities relating to the recovery of money or other assets paid or transferred under illegal contracts*". Patel v Mirza [2014] EWCA Civ 1047; [2015] 2 WLR 405, per Gloster LJ at [47].
[786] Hounga v Allen [2008] 1 WLR 2889, 101.

685. In the United States, the *Doctrine of Clean Hands* is also well known as a principle, and it applies in theory to remedies both in equity and in law. For example, the Supreme Court of California, in a recent case of 2015, stated that:

> *["A] plaintiff [must] act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim".*[787]

686. Also in the US, the *Clean Hands Doctrine* has an eminently jurisdictional dimension, and is able to operate as a barrier between the claimant and the machinery of justice. As Pomeroy explains

> *"When a party, who as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience with his prior conduct, then the doors of the court will be shut against him in limine, the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy".*[788]

687. As is the case for the UK experience, however, also in the US the law in this field is unclear and affected by several complexities. The question of how far a defendant to a civil action may plead that the plaintiff's illegal conduct, in the transaction out of which the cause of action arises, affords him a good defence, has long perplexed courts in the United States of America. Instances in which a court effectively denies access to its service to a plaintiff who has committed some wrongdoing do not appear to be particularly common. This situation must be read in connection with the fact that also the substantive question as to whether a contract that involves some illegality is enforceable under US law is complex and nuanced. As a general principle, the Restatement 2 on contracts explains that a promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its

[787] Kendall-Jackson Winery, Ltd., 76 Cal.App.4th, 978.
[788] Pomeroy, N. *A Treatise on Equity Jurisprudence*, San Francisco: Bancroft-Whitney and Lawyers Cooperative 1941, 397.

enforcement is clearly outweighed in the circumstances by a public policy against the enforcement in such terms.[789]

688. Normally, considering whether the illegality committed by the claimant follows into one of the two exceptions to enforcement indicated above requires courts to engage in a careful balancing of the interests at issue so that, all in all, the margins of operations of the *Clean Hands Doctrine* are residual. And, in any event, even when the doctrine is applied, there are a variety of mechanisms to mitigate, and at times disapply, the *Clean Hands Doctrine*. For example if it can be proven that one of the parties was excusably ignorant of the law prohibition that was violated, and the other was not, then the excusably ignorant party may claim damages. As an alternative, the court would be in a position to enforce the rest of the agreement in favour of a party who did not engage in serious misconduct, as long as the unenforceable part is not an essential element.[790]

689. In civil law systems, the *Clean Hands Doctrine* - intended as a strict jurisdictional doctrine that prevents a court from entertaining a claim affected by the claimant's wrongdoing - does not exist. This is the case both with respect to contract law, and with regard to tort law. The absence of a *Clean Hands Doctrine* does not mean that in civil law systems a wrongdoer is allowed to benefit from their own wrong. However, the consequences of the illegality are not applied in a formalistic manner that has direct effects on the jurisdiction of a Tribunal.

690. As regards contract law, this is confirmed by the case *Courage Ltd v Crehan*, mentioned earlier. The European Court of Justice recognized that something similar to the *ex turpi causa principle* exists in EU law, and is common to the jurisdictions of the majority of Member States. The Court, speaking with regard to competition law, but making more general considerations, explained in particular that:

> *"Community law does not preclude national law from denying a party who is found to bear significant responsibility for the*

[789] Restatement 2 on Contracts, at 178(1).
[790] Restatement 2 on Contracts at 178(3).

> *distortion of competition the right to obtain damages from the other contracting party. Under a principle which is recognized in most of the legal systems of the member states and which the court has applied in the past ... a litigant should not profit from his own unlawful conduct, where this is proven".*[791]

691. At the moment of applying this principle, which in its formulation by the Court may sound reminiscent of the actual *Clean Hands Doctrine*, however, the Court endorsed the conclusion of the Advocate General. The position of the Advocate General was somehow aligned to the one supported in this dissertation: that instances of illegality cannot result in an automatic denial of jurisdiction, but rather that they require a court to entertain a claim on the merits, and make the relevant decisions at that stage. In particular, the Advocate General had argued that it was not at all clear that being a party to an illegal agreement *amounts automatically in all circumstances to a wrong*. He went on to note that the *Clean Hands Doctrine* was *too formalistic and [did] not take account of the particular facts of the individual cases*. It failed to distinguish between parties who were genuinely responsible for the wrongdoing and parties who were *too small to resist the economic pressure* imposed by more powerful undertakings.

692. The Court agreed with this assessment. It explained that in each individual case, the context and the circumstances have to be taken into account to decide what the outcome of illegal conduct should be. In other words, it decided that each case has to be assessed on its merits. The Law Commission of England and Wales, who commented the decision in the context of a report about the *Defence Of Illegality* in common law systems, described the approach of the Court in the Courage case as follows:

> *"The European Court of Justice was clearly unhappy with the idea that national courts may deprive citizens of their rights under European Union law through the application of formalistic tests that bear little relationship to considerations of fairness or public policy."*[792]

[791] Courage Ltd v Crehan and Inntrepreneur Pub Company v Crehan [2001] C-453/ 99, para 31.
[792] Law Commission of England and Wales, The Illegality Defence: A Consultative Report, 2009, para 3.85.

693. Similarly, in *South American Silver v Bolivia*, and international investment case, Bolivia tried to argue that the *Doctrine of Clean Hands* is a general principle of law under Article 38 of the Statute of the ICJ. It did so, among other things, *by quoting a decision* of the French Court of Cassation in which the court explained that a victim can only obtain compensation for the loss of its remuneration if the latter is lawful.[793] Once again, this affirmation does not correspond to the *Clean Hands Doctrine* as a theory of judicial abstention, that operates at the level of a court's jurisdiction; the jurisdiction of the court was never in discussion due to the illegality of the claimant's conduct. On the other hands, the question was one of compensation, namely a matter reserved for an assessment at the merits stage.

694. Shifting the assessment from contract law to tort law leads pretty much to the same conclusion. In his book on the *Common European Law of Torts*, Professor von Bar explains that the *Clean Hands Doctrine* in the sense in which it is adopted under English law has been applied only exceptionally. This has occurred primarily when other defences, such as those based on standard of mutual culpability and a balanced assessment of the Parties' conduct, were for some reason not available, or were otherwise misinterpreted by the courts.

695. For instance, in a decision rendered by the Supreme Court of Austria, a passenger who had been in a car accident was denied the right to approach the court to claim damages because he knew that the person driving the car did not possess a driving license. However, this case is exceptional, and it could probably have been dealt with under a standard of mutual fault, whereby the right of compensation is not denied *tout court*, but rather is reduced due to the contribution, either in active or omissive terms, of the victim to the damages suffered.

696. In general, under tort law, there is no general rule whereby approaching a court with unclean hands deprives the claimant of a right to seek redress. For example, the French Court of Cassation in a case decided in 1993, *Groupe Drouot*

[793] South American Silver v Bolivia, UNCITRAL, PCA Case No. 2013-15 Rejoinder by Bolivia of 21 March 2015, para 305, note 503, quoting the French Court of Cassation, 2nd Civil Chamber, Ruling of 4 February 2010. 09.11-464.

v Rumeau, clarified that the only instances in which something similar to the *Clean Hands Doctrine* could be applied is when the award of damages would result in itself in a grossly immoral or illicit outcome.[794] A threshold that is exceptionally difficult to meet.

4.3 The Status of the Clean Hands Doctrine in International Law

697. As mentioned previously, the mechanism through which the *Clean Hands Doctrine* would work in international law is different from the one at the basis of *in accordance with Host State law* clauses and the *Legality Doctrine*. The *Clean Hands Doctrine* would operate as a general principle of law under Article 38 of the Statute of the International Court of Justice. A principle that rests on the idea that a court faced with instances of illegality committed by a claimant is required by international law to decline its jurisdiction to entertain the case.

698. As a general principle of law, the *Clean Hands Doctrine* would be applicable especially to procedural questions. Indeed, there is consensus that general principles are especially useful to provide guidance in the field of international procedural law, including as regards the procedure before investment tribunals. For example, the report prepared by the Study Group on the Use of Domestic Principles in the Development of International Law at the 2016 Johannesburg Conference states that: *one area where reliance on general principles may be particularly fruitful is international procedural law.*[795]

699. If the mechanism behind the operation of the *Clean Hands Defence* is clear and uncontested, the premise of the doctrine is less so. In particular, the status of the doctrine as a general and binding principle of international law is still the subject of considerable debate. The pages that follow give account of this debate, and draw conclusions on the existence of the *Doctrine of Clean Hands* in international law as a general principle under Article 38 of the Statute of the ICJ.

[794] French Supreme Court, 17 November 1993. Groupe Drouot v Rumeau.
[795] Study Group on the Use of Domestic Principles in the Development of International Law at the 2016 Johannesburg Conference, 19.

700. In investigating this question, this section proceeds as follows: a) first, it recalls cases and opinions in which international adjudicators and scholars have postulated the existence of a *Doctrine of Clean Hands*; b) second, it explains why it is not possible to agree that the *Doctrine of Clean Hands* exists as either a general principle of law, or an otherwise binding rule of international law; c) third, it assesses how, even if the *Doctrine of Clean Hands* were to be recognised in terms of principle in international law, it has never been applied consistently.

701. The idea that a *Doctrine of Clean Hands* may exist in international law has made a first appearance in the context of the debate on of equity. The argument goes that since equitable principles are an integral part of international law, so too the *Doctrine of Clean Hands*, being a principle of equity, is part of it.[796]

702. And indeed, scholars who have worked on the distillation of general principles of public international law subscribe to the idea that the recognition of equity in international law has paved the way to the recognition of the *Doctrine of Clean Hands*. According to Hersch Lauterpacht, for instance*, the principle ex injuria jus non oritur is one of the fundamental maxims of equity. An illegality cannot, as a rule, become a source of legal right to the wrongdoer*.[797]

703. From the perspective of case law, two decisions in particular are worth mentioning that may constitute an *in nuce* recognition of the *Doctrine of Clean Hands* in modern international law, and highlight its origin in equity. The first was rendered in the case concerning the diversion of water from the River Meuse,[798] decided by the Permanent Court of Arbitration; the second one is constituted by the Dissenting Opinion of Judge Schwebel in the case of Military and Paramilitary Activities of the United States in Nicaragua.

[796] Salmon, J. «Des 'Mains Propres' Comme Condition de Recevabilité des Réclamations Internationales.» *Annuaire Français de Droit International*, 1964 : 225 – 266. Zoller, E. *La Bonne Foi en Droit International Public*. Paris: Pedone, 1977: 298.
[797] Lauterpacht, H. *Recognition in International Law* . Cambridge: Cambridge University Press, 1947, 420,421.
[798] Case Concerning the Diversion of Water from the River Meuse (Netherlands v. Belgium), Judgment of 28 June 1937, PCIJ Series A/B, No. 70.

704. In the *Case Concerning the Diversion of Water from the River Meuse*, the Permanent Court of Arbitration had to interpret a Treaty between Belgium and the Netherlands dating back to 1863, concerning the regime of the diversion of a river. Belgium, in its capacity of respondent, raised a *Defence of Illegality* based on clean hands. In particular, it claimed that that since the Netherlands had completed certain works contrary to the terms of the Treaty that regulated the relationship between the Parties with regard to the River Meuse, the Netherlands was barred from invoking the Treaty to seek the enforcement of certain rights against Belgium. The Court analysed the wrongful conduct that Belgium imputed to the Netherlands, and held that:

> *"[I]n these circumstances, the Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past.*[799]

705. The Dutch Judge concurred with the decision of the Court, but appended a separate opinion to the judgment, clarifying that:

> *"[h]e who seeks equity must do equity"* and that *"a court of equity refuses relief to a plaintiff whose conduct in regard to the subject matter of the litigation has been improper."* He also explained that *" (...) in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.*[800]

706. In the declaration of the Dutch judge the link between equity and the *Doctrine of Clean Hands* discussed earlier emerged with particular clarity.

707. In the case of *Nicaragua v United States*, Nicaragua approached the International Court of Justice to denounce the alleged violation of its sovereignty by the United States. This had occurred according to Nicaragua in an indirect manner, through the support that the United States were lending to certain military

[799] Case Concerning the Diversion of Water from the River Meuse, Judgment of 28 June 1937, PCIJ Series A/B, No. 70. at 25.
[800] Case Concerning the Diversion of Water from the River Meuse, Judgment of 28 June 1937, PCIJ Series A/B, No. 70 at 77.

and paramilitary activities by rebels operating in Nicaragua's territory. While the Court found against the United States, the US judge rendered a powerful dissenting opinion based, among other arguments, on the *Doctrine of Clean Hands*. Judge Schwebel opined that the case brought by Nicaragua should not have been entertained at all by the Court, since Nicaragua had approached the Court with unclean hands. In particular, the judge held that the US intervened in Nicaragua in response of an illegal attack that Nicaragua had perpetrated in turn against El Salvador. In the words of Judge Schwebel:

> *"Nicaragua has not come to the Court with clean hands. On the contrary, as the aggressor, indirectly responsible—but ultimately responsible—for large number of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua had sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail".*[801]

708. Despite strong assertions such as those just mentioned, the International Court of Justice never confirmed the existence of the *Doctrine of Clean Hands* as a general principle of law. This is not surprising. As it was also explained in the part of this dissertation concerning the *Doctrine of Separability*, the investigation as to whether a principle of law can be considered as a general principle for purposes of international law must be carried out in the light, and in the context, of Article 38 of the Statute of the International Court of Justice. In listing the sources of public international law, this provision mentions the *general principles of international law recognised by civilised nations*.[802] General principles of law have been used in a number of cases by international courts and Tribunals as a source of norms.[803]

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[801] Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). 1984 ICJ Reports 169, 392.

[802] Article 38(1) Statute of the International Court of Justice.

[803] Pau, G. «I Principi dell'Ordinamento Interno degli Stati Civili nella Teoria delle Fonti del Diritto Internazionale» *Comunicazioni e Studi*, 1954, 99 – 178. Verdross, A. «Les Principes Généraux du Droit dans la Jurisprudence Internationale.» *R.C.A.D.I*, 1935. 195- 221. In case law see, for example, the ICJ, which resorted to this category in the case of Case concerning the Temple of Preah Vihear, when it held that *"it is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error"; Similarly,*

When can it be said that a principle of law has been raised to the level of a general principle?

709. The process of identification of general principles is intrinsically difficult. Difficulties are at times such that a scholar like Kelsen was doubtful as to *whether such principles common to the legal order of the civilized nations exist at all*.[804] For example, according to some scholarship, the fact that a principle is common to a number of domestic jurisdictions, or even the majority of jurisdictions, does not necessarily render the principle a *general principle* for the purposes of Article 38(1). This is due to the *difference in structure between the international society and municipal societies* that *may make it inappropriate to transpose to international relations a principle that is part of municipal law*.[805] In other cases, the difficulty has derived from the circumstance that principles applied domestically are only vague and are of little use, should one intend to apply what is common to a large number of legal systems.[806]

710. The greatest challenge to the identification and application of general principles of law, however, remains the divergent solutions that are used in domestic jurisdictions to tackle similar legal problems. As Judge Giorgio Gaja has explained,

> "*The great variety of approaches that are taken on specific legal issues by municipal laws*" (…) *often makes it difficult to ascertain whether a general principle exists*.[807]

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the Permanent Court of International Arbitration has turned to a general principle of law when it held that It is (...) a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him". Case concerning the Temple of Preah Vihear : (Cambodia v. Thailand) merits : Judgement of 15 June 1962, 76.

[804] Kelsen, H. *Principles of International Law*, New York, Holt Rinehart and Winston: 1967, 39.

[805] Gaja, G. «General Principles of Law.» *Max Planck Encyclopedya of Public International Law*, 2013, 13.

[806] Gaja, G. (2013) *op.cit*.

[807] Gaja, G. (2013) *op.cit* .Amogst the ICJ cases that concluded in the sense of the absence of a general principle of law, see for example South West Africa Cases [Ethiopia v South Africa; Liberia v South Africa] [Second Phase] para. 88; Or, also, Application for Review of Judgment No 158 of the United Nations Administrative Tribunal [Advisory Opinion] para. 36.

711. As seen in the context of the discussion on the *Doctrine of Separability*, a certain consistency is required across nations and legal systems in order for it to be possible to establish the existence of a general principle. The arbitral Tribunal in the Yukos case explained that *general principles of law require a certain level of recognition and consensus*[808]. While it may be discussed what level of generality is required, it appears that a principle that is only applicable in a few jurisdictions, or even only in a certain system of law, does not reach the threshold of *recognition and consensus*.

712. This is the case with respect to the *Doctrine of Clean Hands*. The brief comparative review of domestic solutions that has been outline above shows that the doctrine is, at best, only present in certain common law systems, in particular, the United Kingdom and the United States. Even here, however, the limits and the real scope of application of the doctrine are unclear, but, as seen, it is certain that the application of the rule *is not unconditional or uncontested*. The Law Commission of England and Wales has spoken of the *Doctrine of Clean Hands* as of a *complex body of case law with technical distinctions that are difficult.*[809]

713. The doubts that surround the application of the *Doctrine of Clean Hands* in common law make it unfit to be raised to the standard of general principle according to Article 38 of the Statute of the International Court of Justice. At the same time, even if it could be proven that the *Doctrine of Clean Hands* constitutes an uncontroversial principle in common law systems, it would be difficult to imagine that a doctrine that is unknown to civil law jurisdictions could attain the level of generality that is required under Article 38 of the Statute of the International Court of Justice.

714. This position was perhaps prevalent in the past. For example, in the context of the preparatory works for the Statute of the International Court of Justice, the UK delegate aired his view that *all the principles of common law are*

[808] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Award of 18 July 2014, para 1359.
[809] Law Commission of England and Wales, The Illegality Defence: A Consultative Report, 2009, para 3.55.

applicable to international affairs. They are in fact part of international law.[810] If one looks at the modern practice of international courts and tribunals, however, general status is hardly attained if a principle does not appear in both common law and civil law. According to the Study Group on the use of domestic law principles in the development of international law, for example, *on important issues, the court or tribunal* will *undertake an empirical study and provide evidence of this study in the reasons for its decision. For these studies, the court and tribunals tended to refer to the same common and civil law systems*.[811] The same applies with respect to investment Tribunals. In a recent case between Argentina and the Company Total, the Arbitral Tribunal had to assess whether the principle of protection of expectations is a general principle of international law. It used as terms of reference for the comparative analysis that it carried out common law and civil law systems and ultimately held that: *[w]hile the scope and legal basis of the principle varies, it has been recognized lately both in civil law and common law jurisdictions within well defined limits.*[812]

715. Ultimately, the International Tribunal in the case of *Yukos v The Russian Federation* had to assess the question of the existence of a *Doctrine of Clean Hands* as a general principle of international law. In particular, after establishing that an implied legality requirement could not be read into the Energy Charter Treaty, the Tribunal turned its attention to determining whether the *Doctrine of Clean Hands* could be applied as a general principle of law instead. It held:

> *"The Tribunal must consider Respondent's more general proposition that a claimant who comes before an international tribunal with "unclean hands" is barred from claiming on the basis of a "general principle of law." The Tribunal is not persuaded that there exists a "general principle of law recognized by civilized nations" within the meaning of Article 38(1)(c) of the ICJ Statute that would bar an investor from making a claim before*

[810] PCIJ/Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, meeting of 16 June – 24 July 1920), The Hague: Van Langehuysen Fréres, 1920, 316.
[811] Study Group on the Use of Domestic Law Principles in the Development of International law, 2016, at 42. See also Von Mangoldt, H. (1980) *op.cit.,* 554; Banakas, E. «The Use of Comparative Law in Public International Law: Problems of Method» *Revue Hellénique de Droit International*, 1982: 121 – 134.
[812] Total S.A. v Argentina, ICSID Case No. ARB/04/01, Decision on Liability of 27 December 2010, paras. 128 and 129.

> *an arbitral tribunal under an investment treaty because it has so-called "unclean hands." General principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an "unclean hands" principle in international law."*[813]

716. The conclusion by the Yukos Tribunal appears correct, and is endorsed in this dissertation.

717. Even if, *ex hypothesis*, it were possible to conclude that the *Clean Hands Doctrine* is a principle of international law in abstract terms, a look at the practice of courts and tribunals would demonstrate that the occasions in which it was actually applied in concrete terms are virtually non-existent. This consideration is important because another instance in which a certain principle of law can become binding in international law - in addition to being a general principle of law developed in domestic jurisdictions - is through the consistent application by an international court or tribunal. In a scenario like this, an analysis based on the application of the principle in the various domestic jurisdictions would not be necessary. The *Doctrine of Clean Hands* would exist as an autonomous customary rule of international law, applied by international tribunals due to its *opinio iuris sive necessitatis.*

718. Also this alternative approach to the *Doctrine of Clean Hands*, however, does not allow to conclude in the sense of its existence as a binding rule of international law. According to Professor Crawford:

> *"The so-called 'clean hands' Doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied".*[814]

[813] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Award of 18 July 2014, para 1358. According to others, clean hands doctrine can indeed be recognised as a general priciple of international law, as per the definition of Article 38 of the Statute of the International Court of Justice. See for instance Dumberry, P. (2013) *op. cit*.

[814] Crawford, J. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries.* Cambridge, Cambridge University Press, 2002, at 162. "*The so-called 'clean hands' Doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied*". Rousseau, C. *Droit International Public. Tome V. Les Rapports Conflictuels*. Paris: Sirey, 1983, 170.

719. This position is based on the consideration that the doctrine has never been applied concretely to the consequences that it would entail, namely preventing a Court from establishing its jurisdiction over a case.[815] In most of the cases before the Court, the ICJ simply disposed of the case without having to resort to the *Doctrine of Clean Hands*.

720. Arbitral Tribunals seem to adhere to this finding and most recently, an UNCLOS Annex VII Arbitral Tribunal held in the *Guyana v Suriname arbitration* that:

> *"No generally accepted definition of the clean hands doctrine has been elaborated in international law. Indeed, the Commentaries of 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".*[816]

721. The rarity of the application of the *Doctrine of Clean Hands* does not authorise the interpreter to raise it to the level of customary law rule, and indeed is at odds with the basic requirement for establishing the existence of a customary rule in international law: *the opinio iuris sive necessitatis*.

722. All in all, it seems that the *Doctrine of Clean Hands* shares the bleak fate of other alleged principles of international law: enounced, advocated, invoked, but hardly ever applied. International law is not novel to the situation in which principles are enunciated in abstract terms, while their concrete scope of application remains virtually non-existent. For example, it is generally recognised that time bar and extinctive prescription are general principles of international law,

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[815] Blondel, A. «Les Principes Généraux du Droit Devant la C.P.J.I. et la C.I.J.» *Mélanges Guggenheim*, 1968: 201-236. See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, p. 136; Case Concerning the Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment of 6 Nov. 2003, I.C.J. Reports 2003, p. 161; Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, Dissenting Opinion of Judge van den Wyngaert, ICJ Reports 2002, p. 137 ("The Congo did not come to the Court with clean hands").

[816] Guyana v Suriname, Award of the Tribunal of 17 September 2017, para 418.

that should be applied by international Tribunals. As early as 1925, for instance, the *Institut the Droit International*, stated that:

> *"Des considérations pratiques d'ordre, de stabilité et de paix, depuis longtemps retenue par la jurisprudence arbitrale, doivent faire ranger la prescription libératoire des obligations entre États parmi les principes généraux de droit reconnues par les nations civilisées dont les tribunaux internationaux sont appelés à faire application."*[817]

723. However, defences based on the prescription of a claim in international law are almost always destined to fail. Indeed, cases in which a Tribunal found that a claim was extinct due to the passage of time are rather exceptional, and for the most part refer to instances of gross negligence in pursuing a claim by the claimant. In consideration of the fact that no statute exists that indicates the exact amount of time in which a claim could be extinct as a matter of international law, Tribunals have at times waited more than 100 years to satisfy themselves that the claim was no longer actionable.[818] In cases like this, one has to wonder if the enunciation of the principle of extinctive prescription in international law is nothing more than paying lip tribute to the notion.

724. However, even if one wanted to follow the minority doctrine and agree that a principle of *Doctrine of Clean Hands* exists in international law and is applied by courts and tribunals, its actual application would have to be curtailed properly. The dissenting opinions in the International Court of Justice and Permanent Court of International Justice indicated above show that the judges made the application of the doctrine implicitly subject to three conditions:[819] a) that the breach complained of must concern a continuing violation, b) that the remedy sought must be *protection against continuance of that violation in the future*, rather

[817] Annuaire de l'Institut de Droit International, 1925, p. 558.
[818] Hober, K. *Extinctive Prescription and Applicable Law in Interstate Arbitration*. Uppsala: Coronet Books Inc., 2011: 253-254
[819] Guyana v Suriname, Award of the Tribunal of 17 September 2017, paragraphs 420-421.

than damages for past violations and c) that there must be a relation of reciprocity between the obligations considered.[820]

725. This is a very infrequent scenario in international investment arbitration, in particular as regards points a) and b) indicated above. Indeed, if it is instance of criminality that occur at the making of the investment that come to bear for the purposes of assessing a Tribunal's jurisdiction over a claim, it is also true that by the time the case is brought before an international Tribunal, the initial illegality in the making of the investment is over; similarly resort to international arbitration does not seek protection against continuance of a violation in the future, but normally damages for past events. On this basis, for instance, the Tribunal in the case *Niko Resources v Bangladesh Petroleum Exploration & Production Company Limited* denied that the *Doctrine of Clean Hands* would have the effect of depriving the Tribunal of its jurisdiction, even after recognising that the Claimant had engaged in corruption for the purposes of securing the investment.[821]

4.4 Attempts at Reviving the Clean Hands Doctrine in International Law

726. The analysis carried out in the previous paragraphs shows that the *Doctrine of Clean Hands* does not exist in international law, as either a general principle, or a customary rule. Therefore, arbitral Tribunals do not have a normative basis to apply it to deny their jurisdiction over a case that concerns an investment tainted by criminality. While this outcome has been sanctioned in two recent cases as *Yukos v Russia* and *Niko resources v Bangladesh*, it has not been welcomed by all commentators, in particular by the scholarship that had considered previous decisions by arbitral Tribunals as evidence of the existence of the *Doctrine of Clean Hands* in international law.

[820] Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case No. ARB/10/18, Award on Jurisdiction of 19 August 2013, para 130.
[821] Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case No. ARB/10/18, Award on Jurisdiction of 19 August 2013, para 420.

727. This scholarship has tried to salvage the operation of the doctrine even in the face of its non-recognition by arbitral Tribunals, primarily by equating the *Doctrine of Clean Hands* to the *Legality Doctrine*, that has been discussed in previous parts of this dissertation. According to Llamzon, for example *perhaps the assimilation of the legality and clean hands doctrines is inevitable, as both are in many ways responses to the problem of claimant wrongdoing. Both reinforce the idea that arbitral protection can only be given to the good investor*.[822] The reasoning behind this position is that the expression *Doctrine of Clean Hands* is only a *nombre de guerre* for the doctrine according to which a general principle of legality of investments exists in international law (the *Legality Doctrine*) and that therefore the *Doctrine of Clean Hands* is well and alive, but it operates under another guise, an another name.

728. Another author has similarly attempted to equate the *Doctrine of Clean Hands* to an implicit legality requirement in the system of investment arbitration, albeit in less definitive terms. According to Dumberry, for example *the inadmissibility of a claim based on the ground that an investor has failed to respect the implicit legality requirement is indeed an expression of the clean hands doctrine*.[823] Others have invoked the reasoning of the Tribunal in Yukos – which denied the existence of the *Doctrine of Clean Hands* – to demonstrate that the *Doctrine of Clean Hands* and the *Legality Doctrine* are the same. In Yukos, the Tribunal asked: *can a clean hands principle or legality requirement be read into the ECT?*. According to Bjorklund and Vanhonnaeker *the terms used by the Tribunal suggest that it considered the clean hands doctrine and the legality requirement as synonymous.*[824]

729. For the reasons discussed in Section 4 of this Chapter, however, the equation of the *Doctrine of Clean Hands* with the *Legality Doctrine*, must be rejected.

[822] Llamzon, A. (2015) *op.cit.,* 42.
[823] Dumberry, P. «State of Confusion» *The Journal of World Investment and Trade*, 2017: 229 – 259, 236.
[824] Bjorklund, A. et Al. «The Clean Hands Doctrine Revisited» *Diritto Internazionale e Diritti Umani,* 2015: 365 – 386, 367. Dumberry, P. (2017), *op. cit*., 239.

730. A most recent attempt to revive the *Doctrine of Clean Hands,* in addition to the attempts from scholarship, can be seen in the reasoning of the Arbitral Tribunal which was called to decide a dispute between Indonesia and a Saudi investor.[825]In this case, the Tribunal found the claim to be inadmissible due to the operation of the *Doctrine of Clean Hands*, but the case cannot be invoked to prove the existence of the principle as a matter of international law.

731. The dispute addressed by the Tribunal arose with respect to the bailout of Bank Century, a bank indirectly owned by a Saudi Arabian national. In November 2008, the central bank of the Republic of Indonesia (Bank Indonesia) provided Bank Century with a short-term loan and placed it under *special surveillance*. Shortly after this bailout, Bank Indonesia filed a complaint with the national police regarding alleged banking irregularities by the investor, and, in December 2008, a warrant was issued for his arrest. Following the issuance of the arrest warrant, a third party hired by the investor was made to understand by Indonesian officials that the case could be settled with the payment of certain *fees*, including US $1 million of *networking fees*. After the Indonesian press reported allegations that bailout funds had been used to fund the 2009 presidential election campaign, Indonesia's Corruption Eradication Commission and the Attorney General's Office began further criminal investigations of Bank Century. After a trial in absentia, the investor was convicted by the Central Jakarta District Court of theft, corruption and money laundering, and his assets in Indonesia were confiscated.

732. In August 2011, the investor commenced arbitration proceedings under the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (OIC Agreement) and UNCLTRAL. In June 2012, the Tribunal rejected the Respondent's preliminary objections to jurisdiction and admissibility, finding that Article 17 of the OIC Agreement provides for investor–State arbitration and that Indonesia had consented to arbitration. In its Final Award, the Tribunal addressed the further

[825] Newcombe, A. and Marcoux, J. M. «Hesham Talaat M. Al-Warraq v Republic of Indonesia: Imposing International Obligations on Foreign Investors.» *ICSID Review*, 2015: 525-532.

jurisdictional issue of whether the Claimant was an investor under the OIC Agreement and found in the affirmative. The Tribunal then turned to whether Indonesia's treatment of Bank Century during its bailout, and surveillance of the Claimant during his criminal investigation and prosecution, were consistent with Indonesia's obligations regarding expropriation, fair and equitable treatment as well as protection and security of the investment under the OIC Agreement. It found that a breach of fair and equitable standard of treatment had occurred, due to Indonesia's failure to comply with the most basic elements of justice when conducting a criminal proceeding against the investor."[826]

733. Despite finding a breach of fair and equitable treatment, the Tribunal determined that, as a result of the investor's wrongdoing, he was *prevented from pursuing his claim for fair and equitable treatment* and, further, that the *Doctrine of Clean Hands* precluded the awarding of damages. The Tribunal referred to a series of illegal and fraudulent activities relating to the operations of Bank Century, in which the Claimant had participated between 2004 and 2008. The Tribunal also highlighted the Claimant's failure to undertake his duties as vice president of the Board of Commissions of Century Bank, as required by Indonesian Company Law. The Tribunal concluded that, having breached local laws and put the public interest at risk, the Claimant *has deprived himself of the protection afforded by the OIC Agreement*, and declared the investor's claim inadmissible.[827]

734. Some scholars have tried to use the decision of the Tribunal in the present case as evidence of the fact that, after closing the door to a defence based on the principle of clean hands in Yukos, Tribunals have changed their mind again and that they now envisage a role for the principle in disqualifying the investor from the protection of a BIT on the basis of its criminal conduct.[828] However, the decision of the Tribunal in the present case should not be overrated for purposes of establishing the existence of the *Doctrine of Clean Hands* as a general rule of international law. As noted by Newcombe, for example:

[826] Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, Final Award of 14 December 2004.
[827] Newcombe, A. (2015) *op.cit*., 525
[828] Dumberry, P. (2017) *op. cit*., 239.

> *"The contribution of the Final Award in Al-Warraq v Indonesia with respect to the controversy surrounding this doctrine must be put into its context. Rather than seeking to establish the existence of this doctrine as a stand-alone principle in international law, the Tribunal could anchor its analysis in the presence of Article 9 of the OIC Agreement.*[829]

735. And indeed, two points in particular need to be made with respect to this case: first, that the Tribunal was assessing a case where misconduct by the investor did not occur at the time of the making of the investment, but rather at the different time of the performing of the investment. And, in fact, the Tribunal did not consider the *Doctrine of Clean Hands* as a potential ground to decline its jurisdiction to hear the case (as it would normally be under the *Doctrine of Clean Hands* that, as seen, is a principle of judicial abstention), but it assessed it at the admissibility stage of the proceedings.

736. Secondly, but perhaps most importantly, the Tribunal did not attempt to derive any notion of clean hands from general international law, but rather found a textual link in the Treaty through which the *Doctrine of Clean Hands* could have made its entry among the legal principles governing the case. Indeed, Article 9 of the OIC Agreement specifies that *every investor is to follow the laws of the Host State and is to refrain from acts that are prejudicial to the public interests, such as acts against public order or morals*.[830] This language is similar to that of the standard *in accordance with Host State law clauses* that have been discussed earlier. Therefore, not only has the Tribunal not derived the principle of clean hands from general international law, but it is likely that the Tribunal's very reliance on the expression *clean hands* is misplaced in the present case. The case could easily have been addressed from the angle of an expressed legality clause in the Treaty.

[829] Newcombe, A. (2015) *op.cit*., 525.
[830] Article 9 OIC Agreement.

CHAPTER 8:

A PROPOSED MODEL TO ADDRESS ILLEGALITY IN INVESTMENT ARBITRATION – THE APPLICATION OF THE DOCTRINE OF SEPARABILITY TO THE DEFENCE OF ILLEGALITY

1. Introduction

737. This Chapter proposes an analytical framework to address investor's illegality that builds on the considerations made in the course of this dissertation. Developing a principled model in this area of law is particularly important. This is so in consideration of the fact that Tribunals have oftentimes been criticised for following tentative approaches in deciding questions of criminality in international investment arbitration – something that goes against the need for consistency and predictability that is central for the legitimacy and credibility of international dispute resolution. Indeed, as explained by Professor Reinisch, *predictability and coherence lead to confidence in the system and enhance its perception of being legitimate and just.*[831]

738. Due to the exigency of consistency and predictability, attempts to systematise the approaches to criminality in international investment arbitration are not entirely new, and certain models have been proposed over the last years.[832] These have been discussed in the previous pages, and will be again addressed in this Chapter of the dissertation when relevant for the discussion. The pages that follow indicate the features of the model that is proposed in this dissertation, and explain how it distances itself from the models proposed thus far. Before this,

[831] Reinisch, A. The Role of Precedent in ICSID Arbitration, 2005, at 1, available at the website: https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Publikationen/role_precedents_icsid_arbitrationaayb_2008.pdf

[832] Abdel Raouf, M. «How Should International Arbitrators Tackle Corruption Issues?», *ICSID Review*, 2009: 116-136; Cremades, B. «Investment Protection and Compliance with Local Legislation» *ICSID Review*, 2009:557-564; Menaker, A. J. «The Determinative Impact of Fraud and Corruption on Investment Arbitrations» *ICSID Review*, 2010: 67-75; Llamzon, A. *Corruption in International Investment Arbitration*, The Hague, Oxford University Press, 2014: 238-281 and p. 493-513; Llamzon, A «The State of the "Unclean Hands" Doctrine in International Investment Law: Yukos as both Omega and Alpha» *ICSID Review*: 2015, 1-15.

however, a brief recapitulation of the traditional approaches to investor's illegality is proposed, and their shortcomings identified.

739. The previous pages have discussed the increasingly common *Defence of Illegality* as raised by Host States in the context of investment proceedings and the various solutions that are open to an arbitral Tribunal confronted with investor's criminality. In particular, three possible articulations of the *Defence of Illegality* have been presented.

740. One is the reliance on an *in accordance with Host State law* clause in the text of the BIT. It has been explained, however, that *in accordance with Host State law* clauses should not always and necessarily be considered as concerning the legality of the investment, but may also operate as clauses that identify the kind of economic assets that can constitute a transaction according to the *lex situs*. It has also been argued that the actual determination of the meaning of *in accordance with Host State law* clauses depends on an exercise of interpretation of the BIT, in line with the criteria of the Vienna Convention on the Laws of Treaty.

741. The other route through which the *Defence of Illegality* can be invoked is by way of reading an implied legality requirement into investment treaties, even when they do not present an express *in accordance with Host State law* clause. It has been shown that, normally, a finding of criminality in the context of a BIT or other treaty that does not contain a legality clause has the consequence of depriving the investment of the protection that international law may otherwise afford to it. This is achieved either by an interpretation of the system of investment protection as only aiming at promoting and safeguarding investments that are legal; or, in a somewhat similar manner, by resorting to the notion of *Transnational Public Policy* that would prevent the protection of an investment made contrary to principles endorsed by the international community. As it has been explained in the pages that precede, however, denying the substantive protection of a treaty to an investment that is tainted by criminality does not necessarily require dismissing the investor's claim at the preliminary level. On the contrary, the same result may be achieved by addressing the criminal conduct of the investor at the merits phase of the proceedings.

742. The last route through which the *Defence of Illegality* may operate is constituted by the *Clean Hands Doctrine*. Previous parts of this dissertation have shown in what ways the *Clean Hands Doctrine* diverges from the *Legality Doctrine* in international law. It has also been shown that it is not possible to conclude in the sense of the existence of either a general principle of law under Article 38(1) of the Statute of the International Court of Justice - or a customary law rule - that mandate that a Tribunal should decline jurisdiction when faced with instances of criminality. The status of the *Clean Hands Doctrine* is at best, uncertain.

743. The model developed here is made of two pillars, one based on law, and the other based on policy. The policy pillar is addressed in Chapter 10. The legal pillar on which the model rests is addressed here, and is constituted by the *Doctrine of Separability*. While the general contours of the *Doctrine of Separability* have been addressed above, in the pages that follow it will be shown how the *Doctrine of Separability* constitutes in practice a limit to the scope of the three routes through which the *Defence of Illegality* normally operates: a) in *accordance with Host State law* clause, b) *Legality Doctrine* and c) *Clean Hands Doctrine*. Since the *Doctrine of Separability* operates to counter and to limit the *Defence of Illegality*, the outcome of the model presented here is that the most drastic consequences of the *Defence of Illegality*, e.g. the dismissal of a claim at the preliminary level due to its illegality, is limited to exceptional circumstances, while, in accordance with the *Doctrine of Separability*, criminal conduct by the investor should normally be addressed at the merits stage of the proceedings.

2. Separability and in *Accordance with Host State Law* Clauses

744. As discussed previously, in *accordance with Host State law* clauses have to be interpreted on an *ad-hoc* basis to determine whether they operate as legality clauses, or whether they are clauses that only regulate with a *renvoi* to domestic law what kind of assets can constitute an investment protected under a BIT. This solution distances itself from the position that *according to Host State law* clauses are always and invariably clauses that operate a *renvoi* to domestic law

as regards the definition of what constitutes an investment.[833] It also distances itself from models that consider *in accordance with Host State law* clauses as legality clauses, without exception.[834]

745. How does the *Doctrine of Separability* operate in this scenario, and to what effects? This model proposes that the *Doctrine of Separability* constitutes a hermeneutical tool to be used in the context of the exercise of interpretation of *in accordance with Host State law* clauses, that points towards the direction that *in accordance with Host State law* clauses are not ordinarily legality clauses. In particular, that, unless it emerges clearly otherwise from the principles of interpretation of the Vienna Convention on the Laws of Treaties, and other generally admitted principles of interpretation in international law – the *Doctrine of Separability* should orient arbitrators in the sense that *in accordance with Host State law* clauses define what constitutes an investment under the domestic laws of the Host State, as opposed to being legality clauses. This outcome is based on the consideration that the *Doctrine of Separability*, as a general principle of law, also plays a hermeneutical role in interpreting legal provisions of Treaties, including those other provisions of law that may displace its applicability, such as a *Defence of Illegality* that postulates a jurisdictional outcome to investor's illegality. [835]

746. Separability, in fact, being a general principle of law, operates under a double hat: one the one hand, as a direct source of norms (as indicated in Section 3 of Chapter 4); on the other hand, as a hermeneutical tool. As noted by Fauchauld:

> "*general principles of law may be used as interpretive arguments in relation to treaty provisions. Moreover, ICSID tribunals may*

[833] Douglas Z. (2014) *op.cit*.
[834] De Alba, M. (2016), *op.cit.*
[835] Mc Lachlan, C. «Investment Treaties and General International Law.» *International and Comparative Law Quarterly*, 2008: 361 - 401 at 380: *Reference to general principles of national law in the investment context may indeed be required to supply interstitial rules which are not referred to in, or required by, the treaty, but which may be regarded by a tribunal as essential for the proper operation of the investment treaty system as a whole. An example of this would be the consideration of the general principles of res judicata and lis pendens, where the parallel claims meet the conditions for the application of the doctrines. But the reference to general principles of law in the investment context more commonly serves a rather different function, namely to inform the content of an existing, but open-textured treaty norm.*

apply customary international law and general principles of law directly as independent sources of law."[836]

747. In a similar manner, Professor Bin Cheng identifies three functions of general principles of law, two of which are relevant for the purposes of the development of the model in this thesis: a) they constitute the source of various rules of law, which are merely expression of these principles; b) *they form the guiding principles of the juridical order according to which the interpretation and application of the rules of law are oriented.*[837]

748. The double function of general principles of law, and the suggested manner of their operation in the present model, is empowered by their special importance in investment arbitration, even more than in general international law. In international investment arbitration between States and foreign nationals, in particular, *general principles play a prominent role.*[838] And, as noted by one scholar,

"[W]hile general principles of law are a source of law that plays a marginal role in most areas of public international law, however, such principles could be expected to play a significant role in international investment law. One reason is that there is a close substantive relationship between public international law, private international law, and domestic law in relation to international investments. Moreover, ICSID tribunals often have competence to make decisions in accordance with international law, domestic law, and contractual obligations simultaneously"[839]

749. There is evidence of this in international arbitration practice. For example, in *Lanco v Argentina*, the arbitral Tribunal had to interpret the notion of *nationality*, which was not defined by the applicable BIT. In deciding which one, out of the various possible interpretations authorised under the Vienna Convention was the correct one, the Tribunal turned to a general principle of law and

[836] Fauchald, O. K. «The Legal Reasoning of ICSID Tribunals: an Empirical Analysis» *European Journal of International Law*, 2008: 301 – 364, 312.
[837] Cheng, B. *General Principles of Law as Applied by International Courts and Tribunals*: Cambirdge, Cambridge. University Press: 1953, at 390. See also Draetta, U. (2012) *op.cit*.,185 Dimolitsa A. (1988) *op.cit*., 223.
[838] Schreuer, C. *ICSID Convention, A Commentary*. Oxford: Oxford University Press, 2001, at 614.
[839] Fauchald O. K. (2008), *op.cit*., 312; See also Gazzini, T. «General Principles of Law in the Field of Foreign Investment.» *The Journal of World Investment & Trade*, 2011: 103 – 119.

recognised that *States use as criteria [to establish nationality] the principal place of business or where the company is established.*[840]

750. How does the proposed model operate in practice, with regard to in *accordance with Host State law* clauses?

751. First, it would be necessary to decide whether the institutional rules applicable to the investment proceedings in question provide for separability, as is for instance the case of UNCITRAL Rules; if they do, separability will apply under this rubric, as seen in other sections of this thesis.

752. In the absence of a specific rule on separability, which is for instance the case with respect to ICSID Rules, separability will apply as a general principle of law, and hence as a source of law, according to Article 38(1) of the Statute of the International Court of Justice. Again, reference is made to Section 3 of Chapter 4, that illuminates this mechanism.

753. When it operates as a principle incorporated into institutional rules, or as a general principle of law, separability operates as *lex generalis,*[841] and could be displaced only by a *lex specialis*, according to the hierarchy of sources of international law indicated in Article 38(1) of the Statute of the ICJ, and confirmed by the case law of the International Court of Justice.[842] In order for the *lex generalis* of separability not to operate, it would be necessary for another provision (the *lex specialis*) to apply, that expressly excludes the application of separability. This *other provision* could be constituted, for the purposes of the present discussion, by an *in accordance with Host State law* clause that requires the Tribunal to decline its jurisdiction in the event of criminality affecting the investment.

[840] Lanco International Inc. v. The Argentine Republic, ICSID Case No. ARB/97/6, Decision on Juridiction of 8 December 1998, para 46.
[841] Gazzini, T. (2011) *op.cit*, at 109.
[842] Right of Passage over Indian Territory, Portugal v India, Merits, Judgment, [1960] ICJ Rep 6, ICGJ 174, Decision on the Merits of 12 April 1960.

754. However, to decide whether the *in accordance with Host State law* clause is actually a legality clause, that mandates this effect, is, as seen, an exercise of interpretation. Put it in other words, whether the *in accordance with Host State law* clause is actually meant to determine the disapplication of the *Doctrine of Separability* in the case of an illegal investment, and whether it is *lex specialis* that derogates the *lex generalis,* is a matter do be determined at the level of Treaty interpretation. The hermeneutical exercise must determine to what an extent, and with respect to which circumstances, an *in accordance with Host State law* clause constitutes a limitation to the consent of submitting to the jurisdiction of an arbitral Tribunal a dispute in which the relevant investment is affected by investor's misconduct.

755. At this stage, the principles of the Vienna Convention come into play, as explained in Sections 2.2 and 2.3 of Chapter 7. If it can be established according to the Vienna criteria of interpretation that the *in accordance with Host State law* clause is a legality clause, then it will operate as *lex specialis* and displace the *lex generalis* of separability.

756. At this hermeneutical phase governed by the principles of the Vienna Convention, the *Doctrine of Separability* as a general principle becomes relevant again, not as a source of norms, but as a hermeneutical tool, and can illuminate the real meaning of an *in accordance with Host State law* clause.

757. Against this scenario, and the *lex generalis/lex specialis* dialogy indicated above, a State that wanted to rely on the text of a BIT to exclude the protection of illegal investments already at the level of jurisdiction, may have an interest in modifying the sometimes cryptic formulation of *in accordance with Host State law* clauses. *In accordance with Host State law* clauses, when they are meant to operate as barriers to the jurisdiction of a Tribunal, could state in clear terms that their purpose is that of disapplying the *Doctrine of Separability* and of operating like *lex specialis*. In cases like these, even a textual interpretation of the relevant BIT would reveal their nature. In line with this approach, Yackee, for instance, notes that:

> *"States interested in securing their right to a corruption Defence of reasonably certain content would do well to consider adapting the texts of their investment treaties rather than to continue to rely on the vagaries of international public policy or cryptic "in accordance" provisions.*[843]

758. He therefore proposes a model clause that could replace the generic and at times difficult to interpret *in accordance with Host State law* clause along the following lines:

> a) *In order to enjoy the protections granted by this treaty, an otherwise covered investment must be made and operated in accord with the international principle of good faith, without fraud or deceit, and in accord with the material laws and regulations of the State party in whose territory the investment is made. In addition, any investment procured or operated, in whole or in part, through the corruption of public officials shall not be covered by the provisions of this treaty.*
>
> b) *Any question of whether an investment is precluded under this Article from enjoying the protections of this treaty shall be treated as a preliminary issue; where a tribunal finds that an investment is not entitled to enjoy the protections of this treaty under this Article, the tribunal shall decline jurisdiction over the merits of the dispute. Where a tribunal has so declined jurisdiction, the investor shall be precluded from raising substantially similar claims before any other international tribunal.*[844]

759. A clause like the one proposed above simplifies the role of the interpreter. As every clause of a Treaty, it still has to be interpreted according to the principles of the Vienna Convention on the Law of Treaties, but the meaning of the provision emerges clearly at the textual level. In particular, with respect to the consequences that criminal conduct by the investor may have on the power of the arbitral Tribunal to adjudicate a dispute, the clause covers any potential issue that may arise before the arbitrators. Let us take the case of an investment made in a Host State, in which the consent of the State to the investment has been affected by fraud, because the investor has deliberately provided false information on the nature of its business. An arbitral Tribunal, that has to interpret the clause indicated

[843] Yackee, J. (2011) *op.cit.*, 723.
[844] Yackee, J. (2011) *op.cit.*, 724.

above, would first of all find that the substantive protection of the Treaty, according to paragraph a), would not cover an investment secured by fraud. From the perspective of whether the Tribunal should decline its jurisdiction to hear a case regarding an investment made with fraud, paragraph b) of the clause provides that: *where a tribunal finds that an investment is not entitled to enjoy the protections of this treaty under this Article, the tribunal shall decline jurisdiction over the merits of the dispute.*

760. The clause clearly operates as *lex specialis*, *vis à vis* the *lex generalis* of separability. Therefore, in accordance with the will of the parties as memorialised in the clause, the Tribunal would have to decline jurisdiction in the kind of scenario depicted above.

761. The formulation of the clause indicated above also takes into account the artificial nature of the difference between the consequences of illegality at the time of the making, and of illegality at the time of the performance of the investment which is used under the traditional approach, and that has been discussed - and criticized - at Section 2.1 of Chapter 7. Indeed, the text "*in order to enjoy the protections granted by this treaty, an otherwise covered investment must be made and operated in accord with the (...) material laws and regulations of the State"* equates the consequences of the investor's illegality irrespective of the stage of the investment at which it occurs, and identifies those consequences with a declaratory of lack of jurisdiction of the Tribunal with the clear and unequivocal language of "*where a tribunal finds that an investment is not entitled to enjoy the protections of this treaty under this Article, the tribunal shall decline jurisdiction over the merits of the dispute."*

3. Separability And the Implied Legality Requirement in Investment Law, in the Light of *Transnational Public Policy*

762. An implied legality requirement that permeates the system of investment protection is used to substantiate a *Defence of Illegality* in two cases: either when there is no express *in accordance with Host State law* clause in the

BIT; or, when such a clause is present, but does not operate as a legality requirement.

763. How does the *Doctrine of Separability* operate with regard to a *Defence of Illegality* that is based on the *Legality Doctrine*?

764. In line with what has been discussed in Section 3 of Chapter 7, the answer that this model proposes is not univocal; rather, it requires a first fundamental distinction based on whether the conduct put in place by the investor breaches or not *Transnational Public Policy*. In particular the distinction is between criminal conduct that amounts to a violation of the laws of the Host State that does not constitute a breach of *Transnational Public Policy*, or by fraud, on the one hand; and by violations of the laws of the Host State that do constitute a violation of *Transnational Public Policy*, or corruption, on the other hand. As usual, first it will be necessary to assess if the *Doctrine of Separability* applies by way of its incorporation into the specific arbitral rules used in the proceedings. If it does not, as is the case in ICSID arbitration, it will still apply as a general principle of law. And, in its guise of general principle of law, it is in the pages that follow contrasted with the *Legality Doctrine*.

3.1 Corruption and Violations of Host State Laws that entail a violation of *Transnational Public Policy*

765. For argumentative reasons, the case of corruption and of violations of the laws of the Host State that do constitute a violation of *Transnational Public Policy* is addressed first. The paragraphs that follow relate to the case of corruption.

766. The application of the *Doctrine of Separability* to the case of corruption under the *Legality Doctrine* requires an analysis that is essentially based on the reciprocal balancing and interplay between *Transnational Public Policy*, on the one hand, and general principles of law, on the other. The critical question is as follows: can the violation of a norm of *Transnational Public Policy*, such as the

prohibition against bribery, determine the disapplication of the general principle of law into which has crystallised the *Doctrine of Separability*? Can *Transnational Public Policy* prevent a Tribunal from becoming cognizant of the merits of a case when corruption taints an investment? Or, to put it in a slightly different way: to what extent are the ideas at the basis of the *Doctrine of Separability* able to resist the repugnance that corruption creates?[845]

767. As usual, the answers to this question need to be investigated both from the perspective of jurisdiction, admissibility and merits. A number of potential solutions are possible:

a) that the prohibition of corruption under *Transnational Public Policy* trumps the *Doctrine of Separability* and require that the Tribunal declare itself without jurisdiction;

b) that the prohibition of corruption under *Transnational Public Policy* trumps the *Doctrine of Separability*, but renders the claims inadmissible (as opposed to depriving the Tribunal of its jurisdiction);

c) third, that the prohibition of corruption under *Transnational Public Policy* does not trump the *Doctrine of Separability*, so that an arbitral Tribunal may nevertheless become cognizant of the case brought before it in the merits.

768. To the first alternative, it is possible to answer with some ease: under the *Legality Doctrine*, corruption is not a matter ordinarily able to impinge on a Tribunal's jurisdiction. And indeed, the only cases in which arbitral Tribunals or respondents have argued that corruption was as a bar to jurisdiction are either based on BITs whose text presented an express *in accordance with Host State law* clause; or in the context of the *Clean Hands Doctrine* as a general principle of international law. When allegations of corruption are raised in the context of a *Legality Doctrine*, the question is ordinarily whether corruption can bar the claim

[845] Sayed, A. (2014) *op.cit*., 407.

at the level of admissibility, or rather allows the claim to survive till the merits stage. Scholars have also been reflecting primarily around this possibility. For instance, Dr Cameron Miles articulates three general rules to deal with bribery in investment arbitration, based on a review of scholarship and case law. These are as follows:

a) as a presumption of public international law, an allegation of investor corruption by the Host State affects the *admissibility* of the claim and not the jurisdiction of the tribunal;

b) if the relevant investment treaty contains an express legality requirement, the corruption will undermine the *jurisdiction* of the Tribunal;

c) where there is no express legality requirement in the investment treaty, the corruption will only affect the *admissibility* of the claim[846].

769. The three options indicated at paragraph 703, therefore, can be reduced to two: does the *Doctrine of Separability* allow a Tribunal to entertain a claim in the merits even when the respondent State alleges bribery on the part of the investor? Or is the Tribunal mandated to declare the claim inadmissible due to the contrariety of bribery to *Transnational Public Policy*? Some scholars, including those who have taken a restrictive approach to the use of the *Defence of Illegality* in investment law, consider that bribery is actually the only crime that would effectively prevent a Tribunal from becoming cognizant of the merits of a claim brought by an investor. This position is based on the following reasoning:

> *"The concept of international public policy vests a tribunal with a particular responsibility to condemn any violation regardless of the law applicable to the particular issues in dispute and regardless of whether it is specifically raised by one of the parties. That condemnation must entail that a party that has engaged in a violation of international public policy is not assisted in any way by the arbitral process in the vindication of any rights that are asserted by that party under any law."*[847]

[846] Miles, C. (2012) *op.cit*., 351.
[847] Douglas, Z. (2014) *op.cit*., 180.

770. As it is apparent, this reasoning is reminiscent of that used to justify the *Clean Hands Doctrine* as a bar to the jurisdiction of a court or tribunal: when a claimant engages in corruption, Tribunals should fail to entertain their claims, because the machinery of justice cannot be put at the service of those who committed such serious abuses; the argument is in other words similar to that of Judge Lagergren in the famous award that was discussed at the beginning of this dissertation. The difference is that it is not used to ground a decision to decline jurisdiction; but rather a decision of inadmissibility of the claim.

771. This approach, albeit being the one that Tribunals have applied with the greater degree of consistency, is not satisfactory at the level of policy; for the reasons that will be discussed in further parts of this thesis, any solution that allows the corrupt Host State to walk away scot-free, either at the level of jurisdiction or at the level of admissibility, is not ideal from the policy perspective of the fight against corruption; also, it is debatable that declaring the inadmissibility of a claim tainted with corruption is a legally sound solution from the perspective of *lex lata*, when the public policy against corruption is balanced with the general status of the *Doctrine of Separability* in international law.

772. Recent judicial developments seem to confirm this view, even if, admittedly, this field of law is still very much in evolution. In particular, as will be seen below, it seems that when a conflict arises between a general notion such as the *Doctrine of Separability* and *Transnational Public Policy*, *this conflict should not always and automatically be decided to favour Transnational Public Policy over separability*. Rather, there seems to be margins for more nuanced solutions. As noted by Uluc, two approaches seem possible:

> *"A zero tolerance policy asserting that it is undisputable that engagement in any type of corruption is a clear violation of public policy and is sufficient to impeach the doctrine of separability;*
>
> *In contrast to the zero tolerance policy, the second train of thought asserts that not every violation of public policy should be capable of upsetting the doctrine of separability. For this second*

> *group, violation of public policy must be so egregious as to lead to an impeachment of the doctrine of separability".*[848]

773. According to the second theory, in particular, not all violations of public policy are the same. Some are more serious than others, and only the serious and grave violations of public policy have the capability of dislodging the *Doctrine of Separability*. Prof. Sayed, in his seminal work on corruption in international arbitration, addresses the issue in the following terms:

> *"in the field of corruption and arbitration, the persistence of separability depends upon the measuring of the gravity of the offense that corruption carries against public policy. To what extent is corruption offensive in such a way as to render fragile the separability barrier?*[849]

774. English courts addressed this problem in the context of *vacatur* proceedings in the *Westacre case*, further to a decision rendered by an international arbitration Tribunal operating under the auspices of the ICC. In *Westacre*, a dispute had arisen between a consultancy company from Panama (Westacre), and the Federal Directorate of Supply and Procurement of the Socialist Federal Republic of Yugoslavia, an articulation of the Yugoslav State (Directorate). The case, regarding the performance of a contract, was instituted by Westacre against the Directorate pursuant to a compromissory clause. According to the terms of the consultancy agreement entered into between Westacre and the Directorate, the Panamanian firm was supposed to provide assistance in the sale of M-84 tanks to the Kuwaiti Ministry of Defence. The fee for the consultancy agreement entitled Westacre to receive from the Directorate an amount equalling to 15% of the orders placed by the Kuwaiti Ministry. The agreement between Westracre and the Directorate also provided that the Directorate would pay to Westacre 10% of the value of any contract for the building of training facilities for the M-84 tanks that Kuwait may have awarded to the Directorate.

775. Soon after the finalisation of these contracts between Westacre and the Directorate, however, the Kuwaiti Ministry issued instructions whereby *contracts*

[848] Uluc, I. «Corruption in International Arbitration.» *Upenn SJD Dissertations*, 2016, 36.
[849] Sayed, A. (2014) *op.cit*., 407.

on the delivery of arms, ammunition, and spare parts [must] be made directly with the [Ministry] without the participation of an agent or intermediary.

776. In order to comply with this requirement and not be excluded from the bidding process, the Directorate terminated the agreement with Westacre and refused to pay the any fees that had been accrued up to that moment. This prompted Westracre to commence international arbitral proceedings against the Department. The Department, as part of its defence strategy, argued that the consultancy agreement with Westacre was in reality a contract whose purpose was that of corrupting Kuwaiti public officials and that, in particular, the object of the contract was bribery. The arbitral Tribunal, on the basis of an analysis of the appropriateness of the fees agreed with the consultant, and ultimately due to the failure by the defendant to provide convincing proof of the allegedly illegal contract put in place with Westacre, dismissed the bribery allegations on evidentiary basis and found in favour of the claimant.[850] An award was consequently rendered against the Yugoslav State to pay to Westacre its fees, and damages ensuing from the termination of the contract.

777. After the award, however, new evidence was disclosed, including in the form of sworn affidavits, which proved beyond any reasonable doubt the illegal object of the contract between Westacre and the Department. In particular, new evidence revealed that high Kuwaiti officials where the principals behind Westacre, and that Westacre was only a vehicle for the bribes to be paid to these officials.[851] In this new factual scenario, Westacre appealed to the *Doctrine of Separability* in trying to have the award enforced in England. It argued before the UK Court that separability rendered the award made by the ICC Tribunal enforceable in England

[850] Martin, T. A. (2006) *op.cit*., 12 "*If the claimant's claim based on the contract is to be voided by the defence of bribery, the arbitral tribunal, as any state court, must be convinced that there is indeed a case of bribery. A mere'suspicion' by any member of the arbitral tribunal, communicated neither to the parties nor to thewitnesses during the phase to establish the fact of the case, is entirely insufficient to form such a conviction of the arbitral tribunal.*"

[851] "*The defendant introduced new evidence in the English High Court proceedings by way of a sworn affidavit of the legal counsel to the Directorate, Miodrag Milosavljevic (M.M.) who was involved in the negotiations for the Consultancy Agreement and the M-84 Contract. In his affidavit, M.M. alleged that Mr. Al-Otaibi, the Secretary General of the Council of Ministers of Kuwait was the principal behind the Westacre. Mr. Al-Otaibi was involved in the deal from the beginning. Apparently, high placed Kuwaiti officials had stated to the Defendant that no contracts for military equipment would be placed with the Defendant unless a consultancy agreement was first entered into with a nominated consultant….the Consultancy Agreement was contract to pay Mr. Al-Otaibi a bribe through the vehicle of Westacre which was set up to maintain the anonymity of Mr. Al-Otaibi and his associates"*. Martin, T. A (2006) *op.cit*., at 43.

even in the face of the public policy rule against corruption. In particular, Westacre argued that:

> *"[i]f there is substantive agreement to commit a criminal offence, say an international contract for the sale and illegal importation of cocaine, which contains an ICC arbitration clause, an ICC award in favour of the seller in respect of the unpaid purchase price of the drugs must be treated as insulated from the substantive agreement for the purposes of the public policy exception to the enforcement of Convention awards and indeed at common law (…) the public policy in finality of an enforcement of an international arbitration agreement displaced any public policy against enforcement of the underlying substantive contract.*[852]

778. In the Westacre case the court had to assess whether the *Transnational Public Policy* against corruption could displace the *Doctrine of Separability* in the context of enforcement proceedings. In enforcement proceedings, the underlying rationale of the *Doctrine of Separability* is that of guaranteeing the finality of the award. The idea is that the arbitral award is based on an arbitral agreement that is separated and insulated from the underlying illegality of the contract. Finality of the award is one of the cornerstones principles of international arbitration, and corresponds to a public policy objective.

779. Outside of the context of enforcement proceedings, separability is not concerned with the necessity of guaranteeing the finality of the award, but rather with the necessity of guaranteeing the viability of international arbitration as an affective mechanism of dispute resolution. And indeed, this was precisely the reason why the *Doctrine of Separability* was developed, and why it has reached the status of general principle of international arbitration that it has now. While this aspect has been discussed earlier, it is appropriate to recall in general that, without the *Doctrine of Separability*, arbitration could not have developed into the well-established mechanism of dispute resolution that it is today. But for the *Doctrine of Separability*, a party wanting to avoid the compulsory jurisdiction of an arbitral Tribunal would simply have to invoke the illegality of the underlying contract on

[852] Westacre v. Jugoimport, [1998] 2 Lloyd's Rep. 111, 117.

which a dispute is based. This is the reason why some scholars have spoken very emphatically that separability guarantees the *sanctity* of the arbitral process.[853]

780. The role that separability plays in insulating the illegality of the contract from the arbitration clause for the purposes of preserving the jurisdiction of an arbitral Tribunal is not less important than the role it plays in the context of enforcement proceedings for preserving the finality of the award. Put it in other terms, if there exists a public policy about the finality of an arbitral award – all the more so there must be a public policy about the preservation of arbitration as a mechanism of international dispute resolution. This consideration constitutes the necessary background to understanding the position of the court in the *vacatur* proceedings of Westacre, and to applying its reasoning in the context of the subject matter of this thesis.

781. With this premise in mind, it is possible to move on to addressing further the decision of the Court in Westacre. The Judge held:

> *"The Court has to strike a balance between, on the one hand, the nature of the illegality alleged, and, on the other hand, the policy of upholding awards. No doubt, if it were proved that the underlying contract was, in spite of all outward appearances, one involving drug trafficking, the alleged offensiveness of the transaction would be such as to outweigh any countervailing consideration. Where, however, the offensiveness is far down the scale as in the present case, I see no reason why the balance of public policy should be against enforcement (...) On balance, I have come to the conclusion that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption.* [854]

782. The decision of the Court was subsequently appealed before the Court of Appeal, which upheld it on the basis of the same reasoning. As noted by Sayed, with its decision, the Court in Westacre ultimately decided that:

[853] Johnson, A. «Illegal Contracts and Arbitral Clauses.» *International Arbitration*, 1999: 1 – 36, 1.
[854] Westacre v. Jugoimport, [1998] 2 Lloyd's Rep. 111, 133.

> *"If the underlying contract is objectively in violation of public policy, it depends upon the degree of offensiveness of such violation to conclude whether to let the separability doctrine be unhampered. If such violation is of low offensiveness, the separability principle would be left unscathed, even if it resulted in an award that would approve such offensiveness. This outcome could be tolerated, in the name of what was found to be an overriding public policy encouraging international commercial arbitration.*[855]

783. The decision of the English Court, and the kind of balancing made therein, may be questionable. It may have been influenced, and perhaps induced, by a general pro-enforcement bias that has characterised the approach of English courts over the past few years. Certainly, this is not a universally shared course and other countries have shown a diametrically different approach, by favouring the *Transnational Public Policy* against corruption over the *Transnational Public Policy* concerning the finality of awards. French Courts are among these. In addition to this, it is also true that grading policy violations according to their degree of gravity or offensiveness may not be an easy exercise, and will always and necessarily fall prey to a certain subjectivism by the judge or the arbitrator. The discussion entertained in previous sections of this thesis show that it is already challenging at times to identify what constitutes *Transnational Public Policy*, due to the fact that this notion is in a state of constant flux; it is all the more difficult to distinguish what provisions of law are of such importance that their violation constitutes a *serious* breach of *Transnational Public Policy* - that trumps over the application of the *Doctrine of Separability* - from those whose degree of offensiveness is not such as to produce a similar result.

784. However, the position of the English Court is instructive in demonstrating that when norms reflecting principles of *Transnational Public Policy* enter into conflict with one another, as is in certain circumstances the case with the anti-bribery provisions and the *Doctrine of Separability*, a careful exercise of balancing is required. This exercise of balancing against competing principles is something in which modern arbitrators have slowly started to become familiar with.

[855] Sayed, A (2004) *op.cit*, 55. Raeschke-Kessler, H. «Some Developments on Arbitrability and Related Issues» *International Arbitration and National Courts*: The Never Ending Story. Van Den Berg, A. J. New Delhi: ICCA Congress Series, 2001: 44 – 62, 50.

Some have described it as an *amazing phenomenon*, both in terms of its scale and in terms of the rapidity and the relative ease by which it has come about.[856] And, as noted by Lehonardsen, with respect to competing policy principles,

> *"[since]international adjudicators are in many respects engaged in international law-making, their choice among conflicting values also includes favouring one policy interest over another. Balancing through proportionality analysis is then a preferable strategy".* [857]

785. While proportionality in international arbitration touches a series of other competing principles, and is in general a broader phenomenon,[858] there is no reason why the separability/anti-bribery discourse should not be included. There is no reason, in particular, to always conclude against the public policy against separability.

786. This is all the more so when the balancing between separability and anti-bribery occurs in the context of a *Defence of Illegality*, because in this area the conflict in terms of policy objectives may be more perceived and formal, than real and substantive. This will be discussed in the Chapter 10 of this dissertation devoted to the policy rationales of the model developed here, but it can be anticipated that allowing arbitrators to address on the merits issues of corruption in investment law is the most effective way to fight corruption in the international sphere. And, just like some scholars note that the tension between separability and finality of awards is in reality only apparent, because ultimately both principles aim at *preven[ting] and sanction[ing](...) injustice in arbitration,* [859] so in investment arbitration, the enforcement of the *Doctrine of Separability* on the one

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[856] Porat, I. «Some Critical Thoughts on Proportionality» in Sartor, G. et Al, *Reasonableness and Law*, Springer: 2009, 243-250, 243.

[857] Lehonardsen, E. «Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration.» *Journal of International Dispute Settlement*, 2012: 95-136, at 111. And indeed, it is very much the case that an analysis of balancing and proportionality has become normal in "*managing disputes between rights involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest*". International arbitration is not exception in this regard. See Sweet Stone, A. and Mathews, J. «Proportionality Balancing and Global Constitutionalism.» *Columbia Journal of Transnational Law*, 2007:73-165, 83.

[858] Sweet-Stone, A. «Investor-State Arbitration: Proportionality's New Frontier» *Law & Ethics of Human Rights*, 2010: 47- 76.

[859]Ma. W. *Public Policy in the Judicial Enforcement of Arbitral Awards, Lessons for and from Australia*, *A thesis submitted to Bond University in fulfillment of the requirements for the Degree of Doctor of Legal Science (SJD)*, December 2005, 112.

hand, and the sanctioning of corruption as conduct against *Transnational Public Policy* on the other, are both tools that can be joined up in the fight against corruption in investment law.

787. There is another angle of analysis that reinforces the proposition that *Transnational Public Policy* arguments used to substantiate a *Defence of Illegality* do not necessarily determine that a Tribunal should dismiss a party's claim as inadmissible, without addressing its merits. Similarly to the Langergren award, the decision of the Court in Westacre was adopted in the context of a contract whose object was bribery (a contract for bribery). As seen, these contracts are null and void *ab initio*. Despite these harsh consequences, the Court in Westacre still found that the bribery tainting the contract was not such as to disable the operation of the *Doctrine of* Separability. What about contracts procured by bribery (as opposed as contracts for bribery), that are more similar to the situation when an investor secures a contract by paying sums of money or other advantages to foreign officials? The question was addressed in two recent cases brought before English Courts: in 2014, in the case *Honeywell International Middle East Ltd v Meydan Group Llc* and in 2016 in the case of *National Iranian Oil Company v Crescent Petroleum.*[860]

788. In the first case, Honeywell, a company incorporated in Bermuda, sued Meydan, a company incorporated in Dubai who was the owner of the Ned al Sheba racecourse, a venue where exhibitions and concerts are hosted.

789. On 7 June 2009, an agreement was signed between Meydan and Honeywell for the execution of certain works at the Ned al Sheba. Honeywell had secured the contract through a public tender process. After a first phase in which payments were regularly made by Meydan to Honeywell, these ceased in February 2010. On 15 July 2010 Honeywell commenced arbitration proceedings against Meydan by submitting a Request for Arbitration to DIAC. On 19 January 2012 Meydan Group LLC commenced arbitration proceedings against Honeywell.

[860] National Iranian Oil Company v Crescent Petroleum Company International, Crescent Gas Corporation Ltd [2016] EWHC 510 (Comm).

790. On 1 March 2012 the Tribunal in the first arbitration found for the claimant and awarded Honeywell the amount due to it under the contract. The Tribunal in the second arbitration refused to reconsider the subject of that award on the grounds of res judicata.

791. On 12 November 2012, Honeywell made an application to the English courts under s.101 (2) of the Arbitration Act 1996 for leave to enforce the Award in the same manner as a judgment or order of the court. By an order made on 12 November 2012 Mr Justice Akenhead gave leave to enforce the Award in the same manner as a judgment or order of the court to the same effect, but ordered that the award should not be enforced for 21 days if Meydan applied within those 21 days to set aside the award, until after such application had been finally decided.

792. The application to set aside the award was submitted by Honeywell within the 21-day limit. It was based, among other things, on the claim that enforcement of the Award *would be contrary to the public policy of the United Kingdom because the Award was allegedly based upon a contract procured by bribing public officials*.[861] The affirmation that the contract had been procured through bribery was substantiated by a series of documents, including a copy of a bribery complaint dated 8 October 2013 made to the Public Prosecutor of the Government of Dubai against Honeywell and a copy of a letter dated 11 November 2013 from the head of the Dubai Public Funds Prosecution Department to the Head of Bur Dubai Police Station requesting that investigations be conducted.

793. In ordering the enforcement of the award, the judge held that even if the contract had been induced by bribery, *the arbitration provision was severable and therefore there was still a valid arbitration agreement between the parties*. It also held that whilst bribery is clearly contrary to English public policy and contracts to bribe are unenforceable, as a matter of English public policy, *contracts which have been procured by bribes are not unenforceable.*[862]

[861] Honeywell International Middle East v Meydan Group [2014] 2 Lloyd's Rep, para 173.
[862] Honeywell International Middle East v Meydan Group [2014] 2 Lloyd's Rep, para 133.

794. A similar outcome was endorsed by English Courts in 2016 in *National Iranian Oil Company*.[863] In April 2011, the claimant, National Iranian Oil Company, had entered into a gas supply and purchase contract with Crescent Petroleum, an upstream oil and gas company from the Middle East. The contract was governed by Iranian law and included a provision whereby all disputes relating to the validity of the contract were to be referred to arbitration. In 2003, Crescent Petroleum decided to assign the contract to Crescent Gas, one of its controlled companies. In 2009, Crescent Petroleum and Crescent Gas commenced arbitration in the UK, claiming breach of contract as a result of National Iranian Oil Company's failure to deliver the amounts of gas agreed under the 2001 contract. National Iranian Oil Company raised objections to the jurisdiction of the arbitrators arguing that the contract had been secured through the payment of bribes by Crescent Petroleum, which also affected the legality of the contract assigned to the Crescent Gas. The Arbitral Tribunal dismissed the respondent's *Defence of Illegality* and found that National Iranian Oil Company was actually in breach of its contract for failing to provide gas as stipulated under the applicable agreement. On the question of its jurisdiction, the Tribunal denied that the contract had been procured through corrupt payments – despite being satisfied that there was evidence of an attempted bribery.

795. National Iranian Oil Company challenged the award in the UK High Court under section 68 of the Arbitration Act 1996, on grounds of serious irregularity, by repeating the argument that the contract was unenforceable owing to its having being procured through bribery and corruption. National Iranian Oil Company argued that that the tribunal had erred in not finding evidence of bribery since the proven discussions and attempts to corruption were enough for the invocation of a *Defence of Illegality*. According National Iranian Oil Company, these discussions and attempts were sufficient for the contract to have been *tainted* by illegality,[864] which tainting made it unenforceable on grounds of public policy.

[863] National Iranian Oil Company v Crescent Petroleum International Ltd & Anor, 4 March 2016, [2016] EWHC 510 (Comm).
[864] National Iranian Oil Company v Crescent Petroleum International Ltd & Anor, 4 March 2016, [2016] EWHC 510 (Comm), para 41.

Both defendants resisted the argument, claiming that even if the contract were to be found as procured through bribery, this would not render it unenforceable on public policy grounds.

796. The central issue for the Court to determine was whether the arbitral award would have been unenforceable due to its contrariness to public policy, had it been possible to establish that the contract had been procured by corruption. Judge Burton J, sitting on the court, held that public policy considerations did not, in this case, preclude the enforcement of a contract procured or *tainted* by bribery or corruption. Expanding on a distinction outlined in the case Honeywell International Middle East Ltd v Meydan Group LLC, Burton J signalled the difference between enforcing *a contract aimed at pursuing an illegal act* such as corruption and *a contract which is illegally procured*. He went on to explain that contracts procured by corruption could be rendered voidable at the election of the innocent party.[865] Consistent with the line of authority established in *Honeywell and Westacre*, Burton J considered that there is no *public policy requiring an English court to set aside a contract procured by illegality*. *A fortiori*, he explained that there is no English public policy rule requiring a court to refuse to enforce a contract which has been preceded, and is unaffected, by a botched attempt to bribe.[866] Despite acknowledging the growing international condemnation of bribery and the international movement against corruption, Judge Burton J was cautious to introduce the concept of *tainting* an otherwise legal arrangement.[867] Ultimately, therefore, the position of the Judge was that enforcing a legal contract that may have been procured by bribery (but that is otherwise legal as regards its scope and purpose) is *not contrary to public policy.*

797. In conclusion, while bribery, *per se* and in general terms, is contrary to *Transnational Public Policy*, there are many nuances to the way in which such a *Transnational Public Policy* breach may present itself. The *National Iranian Oil*

[865] National Iranian Oil Company v Crescent Petroleum International Ltd & Anor, 4 March 2016, [2016] EWHC 510 (Comm), paras 43 ff.
[866] National Iranian Oil Company v Crescent Petroleum International Ltd & Anor, 4 March 2016, [2016] EWHC 510 (Comm), para 49(3).
[867] National Iranian Oil Company v Crescent Petroleum International Ltd & Anor, 4 March 2016, [2016] EWHC 510 (Comm), para 49(3).

Company case demonstrates that these can concern, for instance, the way in which the bribery manifests itself (as a way to secure a contract, or as the object of the contract) and that these modalities can actually have an impact on the very question of the contrariety to public policy of bribery; the *Westacre* case signals the different levels of intensity in the contrariety to public policy of certain conducts and seems to conclude that bribery positions itself at a low level of offensiveness, when compared to other violations. The *Defence of Illegality* in the context of an investor-State relationship is not alien to these nuances and complexities. The complexities are even greater due to the need to balance the public policy against bribery (and the dismissal of a claim at the preliminary level that it would entail) with the public policy in favour of separability (that would require on the contrary the claim to be entertained on its merits). A Tribunal that failed to address a claim on its merits on the basis of the general statement that bribery violates *Transnational Public Policy* would fail to interface itself with these complexities. A Tribunal that automatically assumed that the public policy against bribery trumps the public policy against separability, would not engage in the exercise of balancing competing values that is central to the reasoning and the decision making process of investment arbitral Tribunals.

798. The proposal that this model articulates is therefore that even in the face of bribery on the part of the investor, the response of the Tribunal should not be that of declaring the claim inadmissible; but rather to entertain the claim on the merits. Here, subject to an assessment of the respective level of culpability of the parties, as per the taxonomy proposed in in previous parts of this dissertation, nothing prevents the Tribunal from disqualifying the investment from the substantive protection of the Treaty entirely, and denying any form of redress, if the circumstances so require.

799. The level of gravity of the offensiveness to *Transnational Public Policy* of the conduct of the investor constitutes a useful paradigm also to address the illegality that derives from violating a Host State's laws. As explained earlier, certain violations of the laws of the Host State, while assisted by a criminal

sanction, will not be found to be against *Transnational Public Policy*; others, on the other hand, will be characterised by this enhanced degree of offensiveness.

800. The question of the violation of a law that entails a criminal sanction, but that is not in breach of *Transnational Public Policy*, will be assessed in the next section. For the purposes of the present section, the question is what happens if the violation of law is so serious as to breach *Transnational Public Policy*. As discussed earlier on in the taxonomy of crimes that may appear before the arbitral Tribunal, when the investor violates a domestic norm that is considered to constitute *Transnational Public Policy*, this is normally in the context of a breach of human rights or another *jus cogens* violation[868] (in addition to corruption, indicated previously). The typical case that one may imagine is the one in which the investor resorts to exploitation of slavery as labour force. The prohibition of slavery is certainly a norm of *Transnational Public Policy*, and one that has also reached a *jus cogens* status in international law.[869]

801. How is an international Tribunal to react to such instances? Can the *Doctrine of Separability* allow the Tribunal to become cognizant of the investor's case at the merits phase of proceedings?[870] According to same authors, the answer to this question should be in the affirmative. For instance, Dumberry, surveying scholarly positions on the matter noted that:

> *"A tribunal finding inadmissible a claim submitted by an investor based on human rights violations may be considered too radical*

[868] According to Article 53 of the Vienna Convention on the Law of Treaties [a jus cogens norm] is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a sub- sequent norm of general international law having the same character.
[869] Bassiouni, C. «International Crimes: Jus Cogens and Obligatio Erga Omnes» *Law and Contemporary Problems*, 1996: 63-74, 68. The legal literature considers that the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture. Sufficient legal basis exists to reach the conclusion that all these crimes are part of *jus cogens.* As a general indication of what other rules may have attained jus cogens status in international law, once can mention the Commentary to Article 26 the International Law Commission Draft Articles on State Responsibility, according to which "*those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination*". International Law Commission, Report of the Work of the Commission on its 53rd meeting, 23 April – 1 June and 2 July – 10 August 2001, 85 UN Doc. A/56/10 at 85.
[870] The question has been posed by some scholars, but not thoroughly investigated. See for instance Peterson L. E. (2003) *op.cit*., at 19 : *Whereas there is no question that a treaty or agreement which was incompatible with these jus cogens rights would be invalid, it is less clear how an investor's alleged violation of such norms would impact an investment treaty arbitration. The treaty itself would not be invalidated, but the jurisdiction of the tribunal and the substantive merits of the investor's claims might be invalidated.*

> *by some. Other options exist. At the very least, a tribunal should take into account such allegations when making its determination on the merits of the dispute. These allegations should also have some impact on the tribunal's assessment of compensation for damages claimed by the investor (as well as questions of allocation of costs, fees, etc.). Thus, compensation should be reduced "proportionally to the investor's violation" of human rights obligations".*[871]

802. Assessing the breach by the investor of fundamental human rights in the context of an analysis of the fair and equitable treatment standard is exemplificative of the positions of those who believe that also gross human rights violations should be addressed at the merits stage of a case. It has been held for example that the right to compensation in the case of an illegal expropriation (a matter that concerns the merits of a case, and not its preliminary phases) would not arise if the expropriated investment is made contrary to one of the fundamental norms of the international community, such as *jus cogens* norms. Liberti, for instance, explained that:

> *"Les exceptions générales à la protection des investissements, dans leur formulation la plus récente, ouvrent la voie à une interprétation des dispositions du traité qui est susceptible d'aboutir à la soustraction de l'opération d'investissement du domaine de la protection, si de graves violations de droits de l'homme sont commises dans la réalisation d'un projet d'investissement. (…). Dans cette perspective, l'obligation de protection des investissements devrait céder devant la protection des intérêts supérieurs de la communauté internationale dans son ensemble, dont les normes de protection des droits de l'homme sont l'expression. Ainsi, le refus d'indemniser le préjudice subi par l'investisseur du fait de la révocation d'une concession d'exploitation, réalisée par l'État en exécution de l'obligation d'adopter les mesures nécessaires pour mètre fin au recours au travail forcé par le concessionnaire, est justifié non pas par l'effet de rendre illicite la conduite privée. C'est le caractère impératif et erga omnes de l'obligation qui l'emporte sur la protection des investissements.*[872]

[871] Dumberry P. and Dumas-Aubin, G. «When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration» *The Journal of World Investment & Trade*, 2012: 349–372, 366. Muchlinski (2006) *op. cit*., 530.

[872] Liberti, L. «Investissements et Droits de l'Homme.» *Les Aspects Nouveaux du Droit des Investissements Internationaux*, Walde, T. et Al, Martinus Nijhoff Publishers: The Hague, 2007, 830.

803. However, due to the particular status that *jus cogens* norms enjoy in international law, it is difficult to agree with a solution that sanctions *jus cogens* with mere lack of compensation on the merits. As noted by Hossain, *jus cogens* and fundamental human rights:

> *"Are, in fact, a set of rules, which are peremptory in nature and from which no derogation is allowed under any circumstances (...) In other words, jus cogens are rules, which correspond to the fundamental norm of international public policy and in which cannot be altered unless a subsequent norm of the same standard is established. This means that the position of the rules of jus cogens is hierarchically superior compared to other ordinary rules of international law. (...) Rules contrary to the notion of jus cogens could be regarded as void, since those rules oppose the fundamental norms of international public policy.*[873]

804. Indeed, what distinguishes norms of *jus cogens* from any other norms of international law, including customary rules, is the fact that they are inderogable, and aimed at taking precedence over any other provision of international law. According to the classical theory of *jus cogens*, this is a direct consequence of the hierarchy of norms in international law.[874] Even if one adheres to more modern theories on the supremacy of *jus cogens* over other norms of international law, that do not derive from a merely formalistic hierarchy, but rather from a more contextualised exercise of interpretation, the outcome would not change: any antinomy between a *jus cogens* norm and a non *jus cogens* norm would have to be resolved to the precedence of the norm of *jus cogens*. And, while Arbitral Tribunals operating in the investment field do not always have a chance to confront themselves with the applications of *jus cogens* norms, the rare occurrences that exist in practice attest to the prominence of these categories of principles also in investment law. By way of example, the Arbitral Tribunal in the case *Methanex* explained that:

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[873] Hossain, K. «Jus Cogens and Obligations under the UN Charter.» *Santa Clara Journal of International Law*, 2005, 71 – 98. See also Kolb, R. *Peremptory International Law - Jus Cogens A General Inventory*. Oxford: Hart Publishing, 2015.

[874] Kleinlein, T. «Jus Cogens as the 'Highest Law'? Peremptory Norms and Legal Hierarchies» *Netherlands Yearbook of International Law,* 2015, 173–210, 174: "*The conventional explanation for all these consequences is that peremptory norms, for some of their characteristics, are at the top of the legal hierarchy. They form the 'highest law', and from this, it follows that some further consequences should be attached to this category of norms. Sometimes, a similar argument comes in 'constitutional disguise', namely that jus cogens forms part of international constitutional law"*. For a detailed overview of the hierarchy theory of jus cogens, see the entire article.

> *"As a matter of international constitutional law a tribunal has an independent duty to apply imperative principles of law or jus cogens, and not to give effect to parties' choices of law that are incompatible with these principles."*[875]

805. From the foregoing, two considerations can be made for the purposes of the research question of this thesis. First, when norms of *jus cogens* are at play, the very exercise of balancing competing principles is generally not the most appropriate methodology: the supremacy of *jus cogens* means that its prominence is absolute, and trumps any other consideration that may be enshrined in the norm used as a comparator (unless the other norm also has *jus cogens* status, which is not the case with regard to the *Doctrine of Separability*).[876]International practice provides many example of this. For instance, the right to apply reservations to a Treaty, which is an expression of the principles of liberty and State equality under international law, does not exist if the reservation concerns compliance with a norm of *jus cogens.*[877] Similarly, immunity of foreign officials from prosecution – a State right corresponding to a rule of customary international law and again based on several important principles such as sovereign equality, international comity and *par in parem non habet judicium*[878] gives way when the conduct under scrutiny is a violation of *jus cogens.*[879] Also, the violation of *jus cogens* by a person may permit domestic criminal courts to exercise universal jurisdiction upon that person, even if that is contrary to the rules that protect competing principles such as the one of the jurisdictional connection between the State and the conduct

[875] Methanex Corporation v. United States of America, UNCITRAL, Final Award of the Tribunal of 3 August 2005, at 1345.
[876] On reconciling conflicting jus cogens norms see, for instance, Linnan, D. *Enemy Combatants, Terrorism, and Armed Conflict Law: A Guide to the Issues*: Praeger Security International , London: 2008, 265.
[877] North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), ICJ, Judgment of 20 February 1969, Separate Opinion of Judge Padilla Nervo, at 97; *ibid* Dissenting Opinion of Judge Tanaka, at 182; *ibid*., Dissenting Opinion of Judge Sørensen, at 248; See also Human Rights Committee, General Comment 24, General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para 8.
[878]Caplan, L. «State Immunity, Human Rights, And Jus Cogens: A Critique Of The Normative Hierarchy Theory», *The American Journal of International Law*, 2003: 441 – 781, 748. "*Two leading rationales explain the legal source of the doctrine [of foreign state immunity]. One asserts that state immunity is a fundamental state right by virtue of the principle of sovereign equality. The other views state immunity as evolving from an exception to the principle of state jurisdiction, i.e., when the forum state suspends its right of adjudicatory jurisdiction as a practical courtesy to facilitate interstate relations.*"
[879] Cassese, A. «For an Enhanced Role of Jus Cogens». Cassese A. et Al. *Realizing Utopia*: *the Future of International Law.* Oxford University Press, Oxford: 2012, 158–171; Milanović, M. «Norm Conflict in International Law: Whither Human Rights? » *Duke Journal of Comparative International Law* 20009, 69–131.

complained of. In all these cases, the balancing of competing rules is implicit in the *jus cogens* status of the provision whose violation is alleged, and courts do not need to engage in an exercise of reconciliation.

806. Therefore, for the purposes of this dissertation, in the case of an investment made contrary to *jus cogens*, it would not even be necessary to apply the reasoning of the Court in Westacre, and balance separability with the legal principles and policy rationales of combating illegal transactions: when the illegality of the transaction consists in a violation of a human rights norm, or in another jus cogens violation, separability would certainly have to give way on the basis of the classical theory of hierarchy of norms.

807. However, as seen earlier, a mechanistic application of the hierarchy theory of *jus cogens* has at times been criticised to favour a more contextualised approach based on interpretation. According to some, in other words, even in the case of *jus cogens* an interpretation that is based on a balancing of interest is necessary, provided, of course, that in this balancing, *jus cogens* is given a predominant rule. Professor Bianchi, writing in the context of derogations to State immunity for violations of *jus cogens* norms writes for instance as follows:

> *"By systematically interpreting rules and principles against the wider background of the international normative order, the interpreter may have recourse to 'a balancing of interests on a case-by-case basis, which is more suitable to solving complex cases of potential conflict of norms and values. In this interpretive process, the role of jus cogens must be predominant".*[880]

808. In this scenario, the reasoning of the Court in Westacre, and an analysis of the assessment of the gravity of the breach of the public policy rule, could constitute the parameter for the balancing of interests. It will be remembered that in *Westacre* the Court held that not every violation of public policy is the same

[880] Bianchi, A. «The Magic of Jus Cogens», *European Journal of International Law*, 491– 508, 505. See also, on the same line of thought, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal [2002] ICJ Rep 3, at 85, "*a balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights of the two scales are not set for all perpetuities.*"

and that bribery does not correspond to a violation able to displace the *Doctrine of Separability*. If one applies the test of degree of the offensiveness to violations of *jus cogens*, however, the result would be different. It is in not doubted that at least gross human rights violations and violations of norms of *jus cogens* correspond to the highest degree of severity of the violations of norms of *Transnational Public Policy*. Indeed, already in *Westacre*, the Court was ready to recognise this degree of offensiveness to drug trafficking, a crime that does not correspond to a *jus cogens violation.*

809. Both under the classical hierarchy theory, and under a more contextual interpretation based on the level of offensiveness to public policy, the rule of international law that prescribes separability would have to give way when the investor has committed a grave violation of the kinds specified above. If separability gives way, the result is that the grave illegality affecting the investment reverberates on the ability of the Tribunal to pronounce over the merits of a claim. Indeed, whereas investments made contrary to norms of *jus cogens* would *certainly* not enjoy the substantive protection of a Treaty at the merits stage, there seems to be some agreement that violations of *jus cogens* are gateway issues that act as barrier to bringing the case to the merits stage of the proceedings, and determine its failure already at the preliminary level.

810. On the question that investments against *jus cogens* should, in general, not be protected at the merits level, scholars and Tribunals note that:

> *"Protection should not be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs."*[881]

811. And, similarly, that:

> *"L'obligation de protection des investissements devrait céder devant la protection des intérêts supérieurs de la communauté*

[881] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Decision of 15 April 2009, para 78. Liberti, L. (2007) *op.cit.*, at 836. Peterson, L. E. (2003), *op. cit*.

internationale dans son ensemble, dont les normes de protection des droits de l'homme sont l'expression."[882]

812. However, recently, a paper from the UNCTAD, the U.N. body dealing with trade, investment and development issues coloured this lack of protection of a specific jurisdictional dimension. In other words, it did not limit itself to the somewhat obvious conclusion that illegal investments should not be protected, but it specified that:

"*arbitrators might decline, on jurisdictional grounds, to hear disputes where the investments are predicated on certain grave forms of human rights abuse (e.g. slavery, genocide and human trafficking")*[883]

813. Other authors believe that the breach of human rights norms and *jus cogens* norms is a matter that determines the inadmissibility of a claim, rather than a declaratory of lack of jurisdiction by the Tribunal. For example, Dumberry notes that:

"[breach of human rights norms] is a matter of admissibility rather than jurisdiction. Thus, while a tribunal would have jurisdiction over the investor's claim, it should nevertheless refuse to hear it based on the investor's breach of human rights obligations contained in the BIT. To the extent that recent tribunals have denied admissibility of claims based on bribery or misrepresentations made by the claimant, it is submitted that they should do the same when faced with human rights violations"[884]

814. Between the jurisdictional approach and the admissibility approach, the former is preferable. While this is an area of law still very much in evolution, where definitive decisions are lacking and the general inconsistency of doctrinal and judicial pronouncements does not assist in the distillation of principles, the jurisdictional approach to a *jus cogens* violation by the investor seems preferable for at least two reasons.

[882] Liberti, L. (2007) *op.cit.*, 836.
[883] UNCTAD, "Selected Recent Developments in IIA Arbitration and Human Rights", IIA Monitor No. 2, UNCTAD/WEB/DIAE/IA/2009/7, (2009) p. 15
[884] Dumberry P. and Dumas-Aubin, G. «When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration» *The Journal of World Investment & Trade*, 2012, 349–372, 366.

815. First, for the reasons identified in Chapter 3, a denial of jurisdiction is a more serious sanction than a declaratory of inadmissibility in investment law. If the violation of a norm of *jus cogens* is the most serious breach that international law can suffer, then the sanctioning must correspond to the gravity of the breach. Contrary to Dumberry's position, the fact that, for good or for bad, *recent tribunals have denied admissibility of claims based on bribery or misrepresentations made by the claimant* does not imply that *they should do the same when faced with human rights violations.* Bribery and misrepresentations by the claimant do not have the same level of gravity as a human rights violation or a violation of *jus cogens*. As seen in previous parts of this dissertation, fraud is not a crime against *Transnational Public Policy*, and doubts persist as to certain manifestations of bribery. The same cannot be said with respect to conduct that is in breach of fundamental rights of the individual, such as forced labour, slavery or torture. In this context, if bribery and misrepresentation have been sanctioned with inadmissibility, then human rights violations and *jus cogens* should be sanctioned with the declining of jurisdiction.

816. Second, a declaratory of lack of jurisdiction seems more in line with the solution that international law adopts for sanctioning violations of *jus cogens* under the law of the treaties, as codified by the Vienna Convention. According to Article 53 of the Vienna Convention, a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. The Drafting Conference of the Convention, convened in 1966, expressed itself in the following terms with respect to the case of a Treaty contrary to *jus cogens*:

> *"The Commission, (...) took the view that rules of jus cogens are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of jus cogens, the treaty must be considered totally invalid. In such a case it was open to the parties themselves to revise the treaty so as to bring it into conformity with the law; and if they did not do so, the law must attach the sanction of nullity to the whole transaction".*[885]

[885] Report of the Credetial Committee on the First Session of the Conference, 1968, https://treaties.un.org/doc/source/docs/A_CONF.39_11_Add.2-E.pdf, at p. 59.

817. The idea that the transaction would be null and void, and the very language employed, are reminiscent of legal categories used in the context of a declaratory of lack of jurisdiction, rather than of a finding of inadmissibility. Indeed, if the idea of separability is that it prevents the nullity of a transaction from affecting the jurisdiction of an arbitral Tribunal, then the displacement of the doctrine of separability has, as a consequence, the extension of the nullity of the underlying agreement to the arbitration agreement. The consequence of this is not inadmissibility, but lack of jurisdiction.

818. In light of what has been discussed above, some concluding remarks are in order.

819. First of all, that the question as to whether a violation of *Transnational Public Policy* should have the effect of preventing an arbitral Tribunal from entertaining a case in the merits, will depend on the gravity of the violation of such a norm *Transnational Public Policy*. Only a grave violation of *Transnational Public Policy* will displace the norm on separability, which constitutes a general principle of law and, of itself, a norm of *Transnational Public Policy*. There is more than one doubt that bribery may attain the level of gravity necessary to displace separability. In this state of uncertainly, the preferred approach would be that the sanctioning of bribery should occur at the merits stage of proceedings.

820. Second, in the case of gross human rights violation and norms of *jus cogens*, unlike what some scholars state, it does not seem appropriate that these should be addressed at the merits phase of proceedings, and balanced against the conduct of the Host State. The displacement of the *Doctrine of Separability* by the formal prominence of *jus cogens* norms, and in any event by the particularly grave breach of *Transnational Public Policy* that their violations determine, means that the illegality affecting the investment also affects the ability of the Tribunal to entertain the case at the jurisdictional level.

821. This solution appears appropriate also from the policy perspective adopted in this dissertation, which is developed in Chapter 10. The underlying proposition in this dissertation is that when the crime brought before the Tribunal is *structurally* bilateral in nature, in the sense that it would not occur unless the investor could rely on the complicity of the Host State – a system that allows one of the parties to walk away entirely scot-free, would sit well in the fight against criminality in investment law. In the case of violations of the laws of the Host State that include gross violations of human rights law and *jus cogens* norms, however, the complicity of the Host State is not a necessary structural element for the perfectioning of the crime. On the other hand, it is well possible that the responsibility for the crime is entirely placed on the investor. In this event, from a policy perspective, the need to balance the conduct of the investor with the conduct of the Host State becomes unnecessary or, at least, less pressing.

822. Certainly, there also exists cases in which the Host State may be complicit, or may have condoned, gross violations of human rights in the making of an investment by an investor. As noted by Stephens,

> *"When a business invests in a region with a repressive government and political unrest, it is often impossible to operate without becoming complicit in human rights abuses".*[886]

823. For example, The Enron Corporation has been accused of collaborating with the Indian police to put in place violent acts of repression against local residents opposed to an investment in the energy sector that the company wanted to start.[887] Royal Dutch Shell has been sued for alleged complicity in the killings of activists protesting the company's environmental and development policies in Nigeria.[888] Chevron *committed systematic violations of human rights, including summary execution, torture, and cruel and inhuman and degrading treatment, to*

[886] Stephens, B. «The Amorality of Profit: Transnational Corporations and Human Rights.» *Berkeley Journal of International Law*, 2002: 45 – 90.
[887] A case report is available on the website of Human Rights Watch, at the following link: https://www.hrw.org/reports/1999/enron/.
[888] Baez, C. et Al. «Multinational Enterprises and Human Rights» *University of Miami International et Comparative Law Review*, 1999: 183 – 338.

suppress peaceful protests about Chevron's environmental practices [889] with the complicity of the State. The same is alleged to have occurred with regard to the oil company Shell, in Nigeria.[890] Even if they did not always happen in the context of *the making* of an investment, the cases mentioned above are indicative of how an investor and a Host State may condone, or even be complicit in a gross human rights violation.

824. As explained in the section of this dissertation dedicated to the taxonomy of crimes that can occur before an investment Tribunal, cases of condonation and complicity of crimes may attribute elements of bilateralism to an otherwise unilateral crime. This, in turn, would have the consequence of placing part of the culpability also on the Host State, contrary to what would happen in the ordinary case in which the violation of the law of the Host State is perpetrated by the investor against the knowledge, and against the willingness, of the State. Whereas in the event of condonation and complicity policy considerations would dictate that the respective conduct of the parties be assessed and sactioned at the merits state of the proceedings, just like in the case of inherently bilateral crimes like bribery, it is questionable that investment arbitration should be the appropriate venue to do so.[891] Rather, gross violations of human rights and other violations of *jus cogens* are better addressed - from the perspective of the complicit State - at the level of State responsibility for international crimes. The law of international responsibility is an effective regime and several cases have featured before international Tribunals in which a State has been directly sanctioned for violating norms of *jus cogens*, and for perpetrating gross human rights violations. Resorting to international investment arbitration to sanction conduct with regard to which there is already an effective and dedicated sanctioning regime in place is

[889] Bowoto et al. v. Chevron et al., affaire no C99-2506 (ND Cal. 2000). D'après les villageois nigérians, Chevron et l'armée du Nigeria.

[890] Baez, C. et Al. (1999) *op.cit.*, 233. *« [a]ccording to an investigation conducted by The New York Times, Shell called in the Nigerian military's hit squad, and according to Dr. Owens Wiwa, brother of Ken Saro-Wiwa, the security forces killed 2,000 Ogoni and destroyed approximately thirty villages. Evidently, the New York Times' investigation unveiled that Shell helped to transport troops, provided boats, and even paid salary bonuses to troops that participated in the aggression against the Ogoni people. Subsequently, Mr. Ken Saro-Wiwa and several other activists were arrested, jailed, convicted, and sentenced to death in late 1995 (...) Even though Shell's Chairman sent a last-minute request for clemency based on humanitarian grounds, Mr. Ken Saro-Wiwa and eight other Ogoni peoples activists were executed on November 10,1995*."

[891] Hirsch, M. «Investment Tribunals and Human Rights: Divergent Paths» Dupuy, P.M. and Francioni, F. *Human Rights in International Investment Law and Arbitration*: Oxford, 2009: 107–114, 107.

inappropriate. It is appropriate, on the other hand, with respect to conduct that may otherwise remain unaddressed. For instance, it will be remembered that no State has ever been found responsible for the crime of corruption, and that the mechanism of State responsibility was never activated in this scenario.[892] In the absence of a response to corruption based on the law of State responsibility, the indirect sanctioning through the system of investment protection constitutes a viable alternative.

3.2 Fraud and Violations of Host State Laws that do not entail a violation of *Transnational Public Policy*

825. The scenario that remains to be addressed in the context of the relationship between the *Legality Doctrine* and the *Doctrine of Separability* is that of the violation of the laws of the Host State that do not entail a breach of *Transnational Public Policy*, such as fraud. This scenario is easy in the light of the preceding discussion.

826. In the event of conduct that does not breach public policy there is no balancing to make: the only relevant public policy is the one behind the *Transnational Public Policy*, which requires an assessment of the investor's claim at the merits stage. As noted for example by Douglas,

> *"Such a violation [violation of Host State law] may be relevant to a defence to the investor's claims on the merits but it does not furnish a basis for a declaration of inadmissibility. A plea that the claimant has violated the law of the host State in the procurement of an investment invariably necessitates an analysis of the conduct of both the claimant and the respondent host State. This is not a situation where the domestic norm in question is entitled to automatic international effect".* [893]

827. And, in fact, the denial of the substantive protection due to the illegality of the investment may well occur through an analysis of the conduct of the parties at the merit stage of the proceedings. At that stage, the denial of

[892] Llamzon, A. «State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration», *Transnational Dispute Management*, Vol. 10, No. 3, May 2013.
[893] Douglas, Z. (2014) *op.cit*., 183.

protection could be complete, or only partial, depending on the kind illegality that affects the investment, as the next Chapters shows.

4. Separability and the Clean Hands Doctrine

828. The last scenario that needs to be investigated is the one in which the *Doctrine of Separability* is contrasted with the *Clean Hands Doctrine*, as another route through which the *Defence of Illegality* can operate. This scenario is the one that provides the least complexity, and it can be resolved on the basis of the mere consideration that, while there is a general principle of law regarding separability, no such general principle can be said to exist with regard to the clean hands. Because the *Clean Hands Doctrine* is not recognised in international law as a rule having general status, as demonstrated in the previous pages of this dissertation, it cannot displace the rule on separability. Therefore, the invocation of the doctrine can never have the effect of preventing the Tribunal from addressing an investor's claim affected by illegality at the merits stage of the proceedings.

829. The only (apparent) exception to this rule could be envisaged in the event the investor's hands are *unclean* because the investment has been made contrary to a norm of *jus cogens*, or has resulted in a gross human rights violation. In this case, however, the Tribunal would not have to decline jurisdiction because of the *Clean Hands Doctrine*, *per se*. The *Clean Hands Doctrine* may be the means to bring the violation perpetrated by the investor to the attention of the Tribunal. But the dismissing of the case at the jurisdictional level would be determined by the contrariety of the investment to the norms of *jus cogens* and human rights, and would derive by their supremacy in international law.

830. And indeed, the rare cases of judicial recognition of the *Clean Hands Doctrine* in international law have occurred precisely in the context of *jus cogens violations*. So that it is even more difficult to decide if certain decisions have been dictated by an attempt to recognise the *Clean Hands Doctrine* in international law, or rather have been affected by the special gravity that had *stained the claimant's hands* in the cases at issue. The separate opinion of Judge Scheele in the US v Nicaragua case is significant. According to the Judge:

> *"Nicaragua has not come to the Court with clean hands. On the contrary, as the aggressor, indirectly responsible—but ultimately responsible—for large number of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua had sustained, Nicaragua's hands are odiously unclean".*[894]

831. It is interesting that the conduct to which the Judge refers, and that is said to have stained the applicant's claim, is aggression, a crime that certainly constitutes a breach of *jus cogens*.[895]

[894] Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). 1984 ICJ Reports 169, at 392.
[895] See Commentary of the ILC to Draft Article on State Responsibility, Art 26, para 5: *"peremptory norms that are clearly accepted and recognised include the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the aright to self-determination".*

CHAPTER 9:

THE BALANCING OF THE CONDUCT OF THE INVESTOR AND THE HOST STATE AT THE MERITS STAGE

1. Introduction

832. The consequence of the *narrow Defence of Illegality* advocated in the pages that precede is that investor's misconduct is, for the most part, and except for the exceptional cases of violations of human rights and *jus cogens* norms, a matter to be addressed at the merits stage of the arbitral proceedings. At this stage, the respective conducts of both the investor and of the Host State can be more easily analysed, and balanced against each other. As noted by Tezuka:

> *The outcome of this approach [the application of a broad Defence of Illegality] is rather drastic. The investor is deprived of protection and consequently, the Host State avoids any potential liability. Therefore, (...) it may also be useful to leave (...) for more of a balancing approach involving a case-by-case assessment. One might think that applying such balancing approach would be more appropriate in the merits phase, rather than the gateway phase (...).*"[896]

833. Addressing investor's criminal conduct at the merits stage does not in any way mean turning a blind eye to its criminality, nor does it mean advocating a lax response to crime. If anything, it means assessing criminal conduct in a more thorough and more complete manner, sanctioning all those that take part in the criminal scheme. Also Tribunals that have accepted a *broad Defence of Illegality*, by declining jurisdiction in the face of investor's misconduct, have had to recognise that criminality can also be easily sanctioned at the merits phase of the proceedings. At that stage, in fact, a claimant may be deprived, partly or wholly, of the substantive protections that it would normally enjoy under applicable BITs or general international law. For example, the Tribunal in *Phoenix Action* held that:

[896]Tezuka, M. «Corruption Issues in the Jurisdictional Phases of Investment Arbitration, An Arbitrator's Checklist.» *Addressing Issues of Corruption in Commercial and Investment Arbitration*, Kreindler R. et Al. Paris: ICC, 2015.

> *"There is no doubt that the requirement of the conformity with law is important in respect of the access to the substantive provisions on the protection of the investor under the BIT. This access can be denied through a decision on the merits.*[897]

834. Similarly, some Tribunals have timidly started to recognise the importance of balancing the behaviours of both the investor and the Host State in the context of an assessment of investor's misconduct. In the case *Hesham Talaat v Republic of Indonesia*, that was discussed earlier in the context of the *Clean Hands Doctrine*, the Tribunal seemed to recognise the importance of addressing illegality, especially illegality of a bilateral nature, at the merit phase of the proceedings, so as to allow a holistic assessment of the respective conducts of the parties. In the words of the Tribunal:

> *The Tribunal considers that, […] the Tribunal must look closely at the Parties' claims concerning the allegations of criminal conduct, which include the corruption and money laundering allegations against the Claimant on the one hand, and the solicitation of bribes allegations against the Respondent on the other hand. This is not a question of jurisdiction but of the merits, to be dealt with at the merits phase of this arbitration.*[898]

835. The pages that follow provide examples of how a balanced sanctioning of criminality should occur in practice in an investment case. Three methods are in particular proposed, that correspond to the kinds of orders that an investment Tribunal could pass at the merits stage of the claim. These are: a) the sanctioning of criminality through a balanced apportionment of the damages owned to the investor b) the sanction of criminality through the provision of restitutionary remedies; c) the sanction of criminality through a repartition of the costs related to the arbitral proceedings that again takes into account the respective conducts of both the investor and the Host State in the crime. Each of these options is discussed below.

[897] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award of 15 April 2009, para 104.
[898] Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims of 21 June 2012, at 99.

2. The modulation of damages on the basis of the conduct of both Parties

836. Typically, in an investment claim an investor will seek from the Host State the payment of damages for the illegal conduct that it has suffered. In this sense, the awarding of damages is the remedy *par excellence* in investment law. Here, just like in the broader international law, the general principle that governs the awarding of damages is that the injured party should be entirely indemnified for the loss suffered, and placed in a condition *as if the injury had not occurred*. This position was established for the first time by the Permanent Court of International Justice in the *Factory of Chorzow* case, and has been quoted with approval since then, including in the Draft Articles on State Responsibility of the ILC.

837. In international arbitration terms, this means for example that an investor who suffers an illegal expropriation, should be paid damages that restore it to a situation that is the same as the one in which it would be, had the illegal expropriation not occurred; similarly, if the standard that is breached is the one of fair and equitable treatment, the investor should be indemnified to a point that neutralises the consequences of the unfair and inequitable treatment, as if the investment had been treated in accordance with the relevant provisions imposed by BITs and international law. While the law and the principles on the actual quantification of damages are vast and need not be taken into account in full here, one of criterion is of importance for the purposes of this dissertation. The criterion whereby the actual quantification of damages requires an assessment of all the relevant circumstances, including the conduct of both parties: damages need to be assessed as much as possible from a holistic perspective.

838. Assessing damages in this manner is not something that is appropriate only with regard to the question of investor's misconduct; rather, this approach has established itself in more general terms any time that damages need to be quantified by an international Tribunal. The proposal advanced here is to apply the holistic assessment *also* in the context of the sanction of criminal conduct committed by an investor. The discussion that follows clarifies this proposal. First,

it discusses certain examples concerning the general use of the holistic assessment of damages in international law; then, it explains how similar modalities can be used for what concerns in specifically this dissertation.

839. In international law, one of the methods used to apportion damages between a claimant and a respondent is the *contributory standard of fault*. The term contributory standard of fault is used in general to designate an entire class of regimes whose common feature is that the victim's misconduct is a factor in determining the extent of the wrongdoer's liability. This is a specification of the principle of the holistic assessment: the claimant's own conduct is a circumstance to take into account. Under a contributory standard of fault, the analysis is very much focussed on the causal contribution that the conduct of the claimant has given to the damages suffered by it, and for which it requires compensation. In other words, under the contributory standard of fault *proper*, it is necessary to establish from the etiological perspective, if, and to what an extent, the conduct of the injured party has played a role in the causation of the damage that it has suffered. This is well explained by Ripinsky, according to whom:

> *The current predominant approach centres on the apportionment of liability for damages between the claimant and the defendant where the claimant's fault has materially added (i.e. contributed) to the loss or damage sustained by the claimant due to the conduct of the defendant.*[899]

840. The adoption of a contributory standard of faults in international law is not a novelty. The international law commission in the Draft Articles on the Responsibility of States for internationally wrongful conduct recognised in general that in the determination of reparation for the wrongful conduct, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to which reparation is sought. As an example of this, in the Lagrand case the ICJ recognized that the conduct of the claimant State could be relevant in determining the form and amount of reparation owned to the injured State. In that case, Germany had delayed the

[899] Ripinsky, S. *Damages in International Investment Law*. London: British Institute of International & Comparative Law, 2015, 314.

commencement of proceedings before the Court. The Court noted that "*Germany may be criticized for the manner in which these proceedings were filed and for their timing*", and stated that it would have taken this factor, among others, into account "*had Germany's submission included a claim for indemnification*". It is also instructive that in the survey of case law carried out by Ripinsky, international decisions recognizing the relevance of contributory fault include cases "*where the claimant has engaged in an unlawful or otherwise prohibited act at the time the claim arises*".[900]

841. For what concerns the focus of this thesis, it is sometimes possible that a *proper* contributory standard of fault, with the explained focus *on the causal contribution* by the investor to the causation of the damage, may be used also to address the investor's unlawful conduct. This would be the case when it can be established that the Host State's conduct which has determined the damage to the investor is tied by a causal relation to the investor's misconduct. The case of *MTD v Chile*, for instance, is in this regard revealing. In that case, the investor had failed to comply with certain regulations regarding a project for the development of a city in Chile. The project had been approved by a Chilean investment commission, but, in the end, due to the investor's failure to comply with certain regulations, the permit was not granted and the investor suffered a loss. In this case, failure to grant the permit was a direct consequence of the investor's illegality, and a causal relationship was established between the illegal conduct by the Host State and the illegal conduct by the investor, so that it was possible to say that, had the investor acted legally, the Host State would have also acted legally, and granted the permit. The Tribunal found that the Host State was in breach of the fair and equitable standard treatment for having failed to grant the permit; however, it also determined that the investor had contributed to its own damage due to its failure to comply with the relevant regulations. Consequently, it reduced the amount of damages that the investor was entitled to by 50% in application of a *proper* contributory standard of fault.

842. The causal link that existed between the State's unlawful conduct and the investor's unlawful conduct in the Chilean case, however, is not always easy to

[900] Ripinsky, S. (2015), *op.cit.*, 314.

establish and in fact, most often, the illegal conduct of the Host State does not depend causally, and is entirely unrelated, to investor's illegality. This is especially the case for illegality that occurs at the making of the investment, which is the focus of this thesis. For instance, the fact that a Host State expropriates illegally an investment procured by corruption, does not normally mean that the investment was expropriated *because of* the corruption (that is to say, that the investment would not have been expropriated, had corruption not occurred). Similarly, if the investor breaches the laws and regulations of the Host State, and the investment is denied fair and equitable standard of treatment, it is not always the case that the denial of the standard of protection *is a consequence* of the investor's illegality, and happens *because of it*. In fact, in the vast majority of cases, a *Defence of Illegality* is raised without any reference to the fact that the conduct of the State is determined by the conduct of the investor; the two conducts remain unrelated. And, when the Host State's conduct is dictated specifically by the unlawful conduct of the investor, and constitutes a reaction to it, the Host State does not need to justify its behaviour on the basis of the *Defence of Illegality*. The principle that the investor has to abide by the laws of the Host State would suffice.

843. This is what happened, for instance, in *Alex Genin, Eastern Credit Limited , Inc. and A.S. Baltoil v. The Republic of Estonia*.[901] In this case, the investor was a shareholder in an Estonian Bank (Estonian Innovation Bank). The case brought against Estonia was based on the alleged illegality of the revocation of Estonian Innovation Bank's banking licence. In particular, claimant invoked several breaches of the BIT that governed the investment, including fair and equitable standard, and discriminatory treatment. The respondent, however, managed to successfully justify the otherwise illegal revocation of the claimant's banking licence by pointing to the serious violations of the Estonian Banking Code committed by the investor, that the revocation of the banking licence had the effect of putting to an end.

[901] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2.

844. In a somewhat similar manner, in *Thunderbird v Mexico*[902], Mexican authorities had shut down an investment that turned out to be contrary to the laws of Mexico. The Tribunal found that the closure of the investor's gaming facilities was simply a reaction to the investor's illegal investment, and did not constitute a breach of the fair and equitable standard of treatment. In other words, Mexico did not have to rely on a *Defence of Illegality* to counter the investor's claim and justify its illegal conduct, but could simply explain that its conduct (the closing of the investment's facility) was not illegal in the first place, and not contrary to the standard of equitable standard of treatment.

845. For these reasons, when balancing the conducts of the Host State and of the investor in assessing the amount of owned damages, it is not appropriate to refer to a *proper* contributory standard of fault, with its *etiological* connotation. However, a standard that assesses the involvement of both parties to the misconduct, but that does not focus on the reciprocal contribution in the causation of the damage suffered by the investor, but rather on the reciprocal culpabilities with respect to the crime on which the *Defence of Illegality* is based, is still possible; and it is in line with the principle that the conduct of both parties has to be assessed by international Tribunals.

846. The general approach in this case is the following. If an investor sues a Host State for breach of standards of protection of its investment, the Host State may invoke a defence based on the illegality committed by the investor in making its investment. The investor has committed some illegality, which needs to be sanctioned. Therefore, the investor will not be entitled to the payment of full damages. However, this does not always mean that the investor should receive no compensation at all for the breach of the investment that it has suffered. The Host State's contribution to the crime must also be taken into account in quantifying the damages awarded to the investor. Although an award under the standard of mutual culpabilities will not be the full amount of damages requested, the higher the relative

[902] International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL.

level of culpability on the part of the Host State, the higher the recovery the investor should receive for the injury sustained.[903]

847. From the methodological perspective, the arbitrators should first set the amount of damages that they would have awarded due to a breach of protection of the investment found by the Host State, had criminality not been committed by the investor. On this amount, they should then apply a reduction in percentages determined by the respective culpability of the investor and the Host State in the crime. In this context, the taxonomy proposed in Chapter 2 becomes specifically relevant.

848. Let us imagine that the investor has secured the investment through the corruption of a Host State official, and that the crime is therefore attributable to the Host State as much as it is attributable to the investor. Let also imagine that the investment is illegally expropriated by the Host State and that, had corruption not occurred, the investor would have had the right to the award of full damages (100%) for the illegal expropriation. The bilateral nature of corruption means that, ordinarily, both parties share a degree of culpability with regard to its commission, which is assumed to be, in this basic scenario, 50% each. As a consequence, by default, corruption should mean that the investor is not awarded full damages, but only 50% of what would normally have been due by the Host State. On the other side of the equation, the Host State is not allowed to escape its part of liability for the corruption, but will have to pay only 50% of the damages that it would have had to pay, had the corruption by the investor not occurred. To these basic scenarios, other hypothesis can be added, that determine a further re-apportionment of the respective degree of culpability to the parties. For instance, the situation in which the Host State has not only received the bribe, but rather has solicited it. This would be, for instance, the case of *World Duty Free v Kenya*.[904] In this case, an additional level of culpability could be placed on the Host State, accounting, for instance, for a 10%. The culpability of the investor in the payment of a solicited bribe would be 40%, and the culpability of the Host State, 60%. Correspondingly,

[903] Torres Fawles, Z. (2012) *op.cit*., 1030.
[904] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7.

damages owned to the investor would be 60% (out of the total of 100%). Let us then imagine that bribe solicitation has occurred in the context of what has been called earlier a hostage scenario, namely a situation in which the investor has already certain investments in the country, and the Host State threatens that if a bribe is not paid, adverse consequences may ensue for the assets that the investor has already brought to the country. A situation like this, which essentially corresponds to extortion, bears an even higher disvalue than bribe solicitation, and correspondingly a shift of additional culpability on the Host State, corresponding to another 10 to 20%. In a scenario like this, an investor may be entitled to the reparation of anything from 70% to 80% of the damages suffered by the illegal expropriation, despite having formally engaged in corruption. This corresponds to a low level of culpability, which is well justified when an investor decides to pay not because it wants a better than ordinary treatment of its investment, but only to avoid unjust and illegal consequences that would derive from the non-payment of the bribe.

849. Other scenarios can be imagined, again following the taxonomy presented in Chapter 2. For instance, that the Host State has failed to prosecute the public officials who have received the bribe, and that therefore it seeks to exploit internationally, through a Defence of Illegality, what it has condoned at the domestic level. Or that the Host State has not implemented an international legislative and regulatory framework to deter and properly sanction corruption, as provided by the plethora of norms that constitute the international anti-bribery regime. All these circumstances account for an apportioning of the culpability of the crime more to the Host State, than to the investor. And this is especially the case when the investor, on its part, has implemented a system of company compliance aimed at discouraging and sanctioning the corrupt practices in which its employees could engage.

850. Ultimately, in a situation when a Host State that has not passed domestic legislation to sanction bribery solicits through its officials a bribe to an investor who has an internal policy of compliance with the anti-bribery regime, in the context of hostage scenario and then fails to prosecute domestically those who

have solicited the bribe, the *Defence of Illegality* that such State may raise should fail entirely at the merits stage of the proceedings, so that the investor be compensated in full for the breach of the standards of protection of its investment, perpetrated by the Host State.

851. Ultimately, under this approach,

> *"Rather than holding the investor solely accountable for the bribe, [damages would be awarded] according to the relative levels of culpability as between the investor and the host state in the overall dispute. By doing so, the contributory fault model acknowledges the investor's culpability in breaching international public policy while at the same time mitigating the risk of unjustly enriching the host state for its own wrongdoing."*[905]

852. This modality of the reparation of the culpability between the investor and the Host State, and the apportionment of damages that ensues, can also be applied to the assessment of crimes that, unlike corruption, are unilateral in nature, such as fraud and violations of the laws of the Host State. In this case, however, the Tribunal should not proceed to automatically place half of the culpability on the Host State (and correspondingly require the Host State to pay 50% of the damages own to the investor). On the other hand, the default position will be that the investor is not entitled to any damage is it has committed a violation of law, or if it has committed an act of fraud, except for the cases indicated in the taxonomy of Chapter 2. These are indicated below and further explained.

853. Let us imagine the case in which the investor has violated with intent and knowledge a fundamental provision of law of the Host State, without the knowledge of the Host State, to secure the investment and that the investment is then illegally expropriated. In that case, it is correct that the State's *Defence of Illegality* should succeed fully at the merits stage of the proceedings, and that the investor should not be paid any damage due to the illegality that it has committed. This approach, that assesses the gravity of the violations at the merits stage as a way to determine the amount of damages due, is preferable to approaches that

[905] Torres Fawles, Z. (2012) *op.cit*., 1030.

assess the gravity of the violation as a way to decide if the Tribunal should decline jurisdiction. In *Tokyo Tokeles*, for example, the Tribunal was confronted with the question of the lack of a signature on certain documents and with the fact that a certain company had been registered under the wrong name. The Tribunal held that "*[t]o exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the [BIT]*".[906] This approach was followed by other Tribunals, for example in Quiborax, the Tribunal excluded that minor mistakes in the keeping of a company's book could have an impact on the ability of the Tribunal to hear a certain case.[907] However, no justification or explanation for this approach was provided based on the applicable BITs. In *Lesi and Astaldi Spa v Algeria*, the Tribunal shifted the focus from the minor violations of law, to the major ones, and interpreted the *in accordance with Host State law* provision of the Italy-Algeria BIT to mean that an investment Tribunal should decline jurisdiction (as opposed as addressing a claim in the merits) only when the violation of law is a breach of *"fundamental principles in force"*.[908] However, nothing in the BIT between Italy and Algeria, or in any other Treaty, authorize to conclude that the gravity of the violation should be a matter able to impinge on the decision as to whether exercise or decline jurisdiction. And in fact, Tribunals have concluded exactly in the opposite direction. For instance, in *Teinver v Argentina*, the State had brought a jurisdictional challenge against the claim brought by the investor, on the basis of the fact that the investor's conduct was illegal. In venturing in analysing the conduct of the investor for the purposes of deciding whether to exercise or decline jurisdiction, the Tribunal did not limit its assessment to general or fundamental principles of the forum, but rather extended it to verifying compliance with "*bidding or other procurement requirements*".[909] Also in the context of a jurisdictional assessment, the Tribunal in *Kim v Uzbekistan* held that:

[906] Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18 Award, of 26 July 2007, at 86.
[907] Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction of 27 September 2012, paras 280 – 281.
[908] LESI SpA and Astaldi SpA v Algeria, ICSID Case No ARB/05/3, Decision on Jurisdiction of 12 July 2006, para 83.
[909] Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1, Decision on Jurisdiction of 21 December 2012, para 327.

> *"In the Tribunal's view, the interpretative task [to decide if to decline or affirm jurisdiction in the context of illegality committed by the investor] is guided by the principle of proportionality. The Tribunal must balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of entirely denying the application of the BIT 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".*[910]

854. Assessing the gravity of the illegality and relying on considerations of proportionality is a difficult and somewhat arbitrary at the level of preliminary objections, where the possible responses are only two: allow the claim to the merits, or deny the claim. The kind of complexity that a proportionality analysis and a balanced assessment require cannot be dealt with a binary solution. However, it is on the other hand easily attainable on the merits. For instance, let us imagine that the investor has violated with intent a minor regulatory provision, that does not correspond to a fundamental principle of the forum State. Had the provision not been violated, the investor would have had to receive full compensation for the damages incurred. However, the violation of a minor provision of law means that the investor retains a degree of culpability, that should still be sanctioned, for instance by reducing the amount of compensation to 90%, as opposed as 100%. This seems a better approach than using the only binary approach of declining jurisdiction – exercising jurisdiction to address nuanced scenarios like the one when the investor has committed some illegality (and therefore deserves to be sanctioned for it) but the sanction would be disproportionate if consisted in the outright dismissal of the claimant's claim.

855. Let us now take the case of a violation of law that the investor has not committed voluntarily, but due to a lack of clarity in the laws of the Host State. Once again, while the investor's illegality should certainly be sanctioned, also the Host State retains a degree of culpability for the mistake in which the investor has incurred that has then resulted in its criminal conduct. It seems therefore

[910] Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction of 8 March 2017, para 20.

inappropriate that the Defence of Illegality should fail entirely, but also that it should be entirely successful. Depending on the circumstances of the case, an apportionment of responsibilities at 50% between the parties, and a corresponding reduction of the damages owned to the investor at 50% of what would have been paid had the investment been legal, appears equitable. If the mistake of the investor is entirely inculpable, for instance because the investor has received reassurances by the Host State as to the legality of the investment, and a different assessment is subsequently made, the investor is entirely without faults for its conduct, and the illegal behavior in which it may have engaged is entirely attributable to the Host State (assuming, of course, the blameworthiness of the conduct could was not in other ways apparent to the investor). In this case, if the investor's investment is expropriated, the *Defense of Illegality* raised by the Host State in the ensuing proceedings should fail on the merits, and the Host State still held liable for the totality of the damages owned to the investor.

856. The last scenario to address in this examination is constituted by the case of fraud, as a typical grave violation of law that the investor commits with knowledge and intent (and indeed, without the knowledge and intent of the deceptive nature of the conduct, the legal criteria for the crime of fraud would not be met in the first place). In the case of fraud, the default position is that the investor retains alone the full culpability for the crime, so that no damages should be awarded in the event that the Host State fails to accord to it the protection of which it would normally be entitled under international law and the relevant BIT. The only exception that can be imagined in this situation, and going back to the taxonomy of Chapter 2, is that of condonation. And indeed, if the Host State has at some point discovered the illegality of the investor, and yet has not denounced the investment, but rather has continued to benefit from it, it could not then invoke the Defence of Illegality to the effect of escaping responsibility in full. In a similar manner as in criminal law the principle *volenti non fit iniuria* sometimes is has an exculpatory effect for the author of a materially illegal conduct, so in the case of condonation of fraud, the investor should not be held accountable to a full standard of culpability. In this case, like in all the cases indicated above, the definition of the appropriate percentages for the apportionment of damages is a matter of

judicial interpretation of all the relevant circumstances, and the proposals indicated here are only indicative. However, they are useful for explaining how the modulation of culpabilities can influence the modulation of damages and sanction criminality in a manner that is fair, consistent with criminal law principles and especially in a way that targets all the authors of a crime, and allows them to walk away scot-free despite their responsibilities.

3. Restitutionary remedies and unjust enrichment

857. In addition to a modulation of the damages based on the respective culpability of the parties, the role that the investor and the Host State have respectively played in a certain crime can be considered in the context of restitutionary remedies. The Tribunal in World Duty Free noted that:

> *Illegal contract's non-contractual legal effects are significant under English law in regard to possible restitutionary and proprietary consequences.*[911]

858. The Tribunal thus recognized at least the possibility of some kind of restitutionary redress for a claimant who has engaged in some form of illegality. Later in the Award, the Tribunal concluded its analysis by leaving open the possibility "*of legal consequences following the avoidance of the Agreement*", implying that some form of restitution is possible – although this was qualified by stating that "*restitutio in integrum cannot include the return of the bribe to the Claimant*." But because such "*legal consequences*" were not pleaded by the Claimant, "*they do not form part of this Award*."[912]

859. The proposition of the Arbitral Tribunal in World Duty Free is correct in identifying the possibility that contracts procured by corruption may allow the parties to an entitlement to certain restitutionary remedies. However, the Tribunal failed to consider this possibility in the case brought before it, due to the fact that

[911] World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award of 4 October 2006, para. 162
[912] World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award of 4 October 2006, para. 170.

restitutionary remedies where not in concrete claimed by the parties, and because the case was dismissed before an analysis of it on the merits could be carried out. In this regard, as noted by Halpern:

> *the arbitrators could have examined the more serious merits of the actual dispute. Because the merits of the case were not discussed, the property failed to be returned to WDF; and prosecution of President Daniel arap Moi for his corruption actions was not a matter for the Tribunal to resolve.*[913]

860. In cases characterised by the mutual culpability of both parties, restitutionary remedies may constitute a way to acknowledge, and balance, the respective responsibilities of the parties. And, if a comparative method is used to contrast this proposed approach to what is being done in a number of domestic jurisdictions, it emerges that restitution with respect to contracts tainted by bribery is not at all a rare occurrence. As usual, however, a distinction must be drawn between contracts procured by bribery, and contracts of bribery.

861. In the case of contracts that aim at bribery, in other words, in the case of contracts whose purpose is that of bribing public officials to secure a contract, or an investment, the bribery contract would be null and void in virtually all jurisdictions, as pursuing an objective in contrast to *Transnational Public Policy.*[914]

862. In the case of contracts aimed at bribery, restitutionary remedies are excluded in the vast majority of jurisdictions. This means, essentially, that what has been paid in furtherance of a bribe cannot be recovered by the briber, despite the fact that null and void contracts in general allow the parties to recover what has been paid in pursuance of them.[915] A report of the ICCA 2014 Conference on

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[913] Halpern, M. (2016), *op cit*., 308.

[914] Meyer, O. (2013) *op.cit*., 229, 237. See also, confirming this position, Art. 8(1) Civil Law Convention on Corruption: "*Each Party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void*". In a similar vein, Principle No. IV.7.2(a) of the Trans-Lex Principles states: "*Contracts based on or involving the payment or transfer of bribes ("corruption money", "secret commissions", "pots-de-vin", "kickbacks") are void".*

[915] Albanesi, C (2013) *op.cit*., 27. See Bonell, M. J. and Meyer, O. The Effects of Corruption in International Commercial Contracts, 2014, note 56. Available at http://www.iacl2014congress.com/fileadmin/user_upload/k_iacl2014congress/General_reports/Bonell__Meyer_-_The_Effects_of_Corruption_in_International_Commercial_Contracts.pdf. For another version of this article see Bonell, M. J. et Meyer, O. *The Impact of Corruption on International Commercial Contracts*. Heidelberg: Springer, 2015.

fighting corruption concludes that the exclusion of restitution due the *ex turpi causa* principle is a rule in England, Estonia, France, Germany, Italy, Singapore, Switzerland and Venezuela. In Quebec, Denmark and the USA the approach is more based on a case-by-case analysis; in contrast, the reimbursement of the bribe can, in principle, be demanded in the Czech Republic, Poland, Portugal and the Netherlands.

863. As regards international arbitral awards, restitutionary remedies in the context of contracts tainted by criminality have been addressed a number of times. For instance, in ICC case 13914,[916] regarding a consultancy agreement in an African country, the arbitral Tribunal found that there was convincing evidence that the commission paid by the respondent to the claimant was intended to be used to bribe state officials in order to win the contract. The arbitral tribunal declared the underlying contracts null and void and dismissed all claims. As the respondent knew this was the purpose of the commission, it could not recover the sums paid under the agreement, since "*what has been given with illegal intent cannot be reclaimed under theories of equity or unjust enrichment*"[917]. Similarly, in ICC case 13515 the Arbitral tribunal decided that an agreement for the payment of sums that was intended to enable illicit payments to be made to an State official in an African country in order to secure contracts was null and void, and that a party that had consciously participated in the illicit activities that led to the nullity of the contract could not recover the commission it had paid.[918]

864. In the case of contracts that are not null and void because they are aimed at corruption, but that have been procured by corruption, as would be the typical case before an investment Tribunal, the scenario is however different. First of all, these contracts are not necessarily null and void ab initio, but they could merely be

[916] An extract of the award is available here: http://library.iccwbo.org/content/dr/AWARDS/AW_1142.htm?l1=Supplements&l2=Tackling+Corruption+in+Arbitration, at /Special Supplement 2013: Tackling Corruption in Arbitration, /Final Award in Case 13914 (Extract)

[917] An extract of the award is available here: http://library.iccwbo.org/content/dr/AWARDS/AW_1142.htm?l1=Supplements&l2=Tackling+Corruption+in+Arbitration, at /Special Supplement 2013: Tackling Corruption in Arbitration, /Final Award in Case 13914 (Extract)

[918] Albanesi, C (2013) *op.cit.*, at 27.

voidable at the instance of one party.[919] They may also retain their validity, and maintain their full enforceability. As regards this typology of illegality, restitution of what has been done in pursuance to a contract obtained through bribery should not always be ruled out.

865. There have indeed been cases in which the bribe-payer is allowed to seek the restitution of what has been performed in pursuance of the contract, minus the bribe that has been paid.[920] These can be found both in domestic jurisdictions, and at the international level. ICC Case No. 11307, for example, concerned a situation in which the Parties had entered into a contract, governed by South African law, regarding the maintenance of airplanes. The claimant avoided the contract after discovering that bribes had been paid to secure it and demanded the repayment of the sums already paid, in excess of 50 million dollars. The arbitral Tribunal permitted the claim on these grounds, but gave compensation to the respondent in respect of the services that had been performed. The amount was calculated by deducting from the total price of the contract the bribe-commission paid by the Respondent to an external advisor to secure the contract. This solution is not an isolated one. In *Logicrose Ltd v Southend United Football Club Ltd (No.2),* the English Court recognised that the claimant was entitled to restitution (again, deducting the amount of the bribe) and therefore stated the general principle that a contract that is tainted by illegality is not necessarily a contract that leaves the bribe-giver empty handed. Oftentimes, this outcome is justified on the basis of the doctrine of unjust enrichment, as an equitable doctrine existent in civil law systems and common law systems alike, and autonomously under international law as a general principle.[921] Back in 1957, Schwatzemberger already wrote that:

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[919] Mustill, M. «The New Lex Mercatoria: The First Twenty-five Years.» *Arbitration International*, 1988: 111 - 145. See also Art. 8(2) of the Civil Law Convention of the Council of Europe: *Each Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages*. See also Art. 34(2) of the United Nations Convention against Corruption: "*In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action*.

[920] *Logicrose Ltd v Southend United Football Club Ltd (No.2)*, [1988] 1 WLR 1256.

[921] Friedman, W. *The Changing Structure of International Law*, New York, Columbia University Press 1964, 313. Vohryzek-Griest, A. T. T., «Unjust Enrichment Unjustly Ignored: Opportunities and Pitfalls in Bringing Unjust Enrichment Claims Under ICSID» . *Student Scholarship Papers.* 2008, 1 – 89. https://digitalcommons.law.yale.edu/student_papers/72.

> *"On the fringes of international law, the principle [of unjust enrichment] tends already to be accepted as a general principle of law, recognised by civilised nations"*[922]

866. The principle of unjust enrichment has been invoked *even* to justify the enforcement of illegal contracts (as opposed to the granting of restitutionary remedies), when not to do so would have determined extremely unfair consequences. The Court of Appeal of California held for instance that enforcing an illegal contract would be the only solution "*when to do otherwise would unjustly enrich the defendant*".[923]

867. Referring to the same principle, another Californian court had ruled previously that:

> *"The rule that the courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound. The rule was conceived for the purposes of protecting the public and the courts from imposition. It is a rule predicated upon sound public policy. But the courts should not be so enamored with the Latin phrase 'in pari delicto' that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered."*[924]

868. Actually, the possibility for an arbitral tribunal to resort to restitutionary remedies based on unjust enrichment other than contractual remedies finds significant support in the UNIDROIT Principles 2010, which suggest recognizing

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[922] Schwarzenberger, G. *International Law*: Stevens & Sons:1957, 580. "*It may be asked: What are these 'general principles of law recognized by civilized nations'? Where are they to be found? It is not possible to point to any code or book containing them. Much of the content of public international law proper has been developed by tribunals and by writers out of these general principles, and my view is that the same source will prove equally fruitful in the application and interpretation of thosecontracts which, though not interstate contracts and therefore not governed by public international law stricto sensu, can more effectively be regulated by general principles of law than by special rules of any single territorial system. They will be developed both by contracting parties who realize the suitability of general principles of law and by tribunals which are called upon to adjudicate upon contracts of this type. I do not propose to prepare a list of the rules of law likely to be recognized as 'general principles'. 'Unjust enrichment' has been referred to above in the Lena Goldfields Award, and I shall mention only one other likely candidate, among many, for recognition [Respect for Acquired Rights]".*

[923] Johson v Johnson, Court of Appeal California, 1987, 3d 551 at 556.

[924] Denning v Taber, Court of Appeal of California, 1954, 2d 253, at 280.

restitutionary remedies when reasonable under the circumstances.[925] According to Comment 1 to Article 3.3.2 UNIDROIT Principles 2010:

> *"Even where as a consequence of the infringement of a mandatory rule the parties are denied any remedies under the contract, it remains to be seen whether they may at least claim restitution of what they have rendered in performing the contract."*

869. According to Article 3.3.2 (1) UNIDROIT Principles 2010:

> *"Where there has been performance under a contract infringing a mandatory rule under Article 3.3.1, restitution may be granted where this would be reasonable in the circumstances."*

870. And indeed, the merit phase of proceedings is the stage at which these circumstances would be best addressed. At this point, as noted by Olef and others:

> *"the exclusion of restitution can at most be justified as an instrument that punishes the corrupt bribe-giver and deters others from choosing this illegal path. Such a punishment would certainly have to be taken seriously in light of the conceivable financial consequences. However, what renders this concept unconvincing is its lack of link to the principle of proportionality. The permanent loss of the bribe under the contract providing for corruption can be justified, as the extent of the sum at issue directly correlates to the illegality of the act. Generally, the higher the amount of the bribe, the more criminal energy is invested by the wrongdoer and the more extensive are the losses caused by the act.*
>
> *The performance of the main contract does, however, lack such a relationship. It is merely a matter of coincidence whether the bribery is discovered at the start of the performance of the main contract and the bribe-giver's loss is limited, or whether the bribe is discovered once the contract has already been performed in full. If the extent of the sanction no longer relates to the illegality of the act, then the result can be over-deterrence.*
>
> *In contracts of considerable commercial value, e.g. construction projects or in the armaments industry, the total loss of performance can lead to disastrous consequences for a business.*

[925] Elgueta J. R, (2016), *op.cit*.

> *This would, under some circumstances, require extreme avoidance through implementation of extensive, internal compliance measures. Malfunctions (in the sense of over-deterrence) arise when there is no longer a reasonable ratio between the costs and the benefits of deterring of corruption."*[926]

871. Not only commercial Tribunals, but also investment Tribunals have resorted to arguments based on unjust enrichment and restitution, even if they have shun away from using this exact expression, to avoid its abuse. As noted by Vohryzek:

> *"International lawyers undermine unjust enrichment standards by using it indiscriminately, which in turn ensures that tribunals view the concept as a weak ploy, long depreciated by casual use. Despite this degradation, unjust enrichment remains a useful tool if used precisely and sparingly. Indeed, it is so useful that tribunals such as ADC v. Hungary employ it, even if they call it something else".*[927]

872. ADC had entered into a contract to build airport facilities in Budapest. The contract did not only concern the construction of the terminals, but also the management of a series of land services, such as the management of shops in the airport area, the handling of baggage and other connected services, and the training of personnel. The price that the Hungarian Government was required to pay for the provision of these services amount to a fixed fee every year. However, after the investor completed the construction of the terminal, the Hungarian government reneged on its contractual obligations and passed a law preventing ADC from operating the terminal in an effective and profitable manner. After a few years, when the value of the company's investment appreciated, the Hungarian government sold the airport to a British company (BAA) for $1.2 billion dollars.

873. At that point, the investor brought suit against the Hungarian Government before an ICSID Tribunal, lamenting the expropriation of its investment. The Tribunal found that an illegal expropriation had occurred. As a consequence, it did not apply the remedy provided for under the BIT for legal

[926] Bonell, M. J. and Meyer, O. (2015) *op.cit.*, 28 – 29.
[927] Vohryzek-Griest, Ana T (2008), op.cit., at 3.

expropriations (namely, the payment of the value of the investment at the time of the taking by the Government, but it awarded restitution of the value of the property at the time of the award. As it has been noted:

> *"the tribunal awarded the claimant's portion of the increased value of the terminal. This is not the hypothetical value of what claimant would have earned, nor in any way approximates claimant's loss. Rather, the award was based on disgorgement of what Hungary gained unjustly from claimant's investment".*[928]

874. Also in the light of the case law mentioned above, in the case of bribery, but also in cases of other forms of illegality in which somehow the State has cooperated or contributed as explained in the taxonomy of Chapter 2, restitution in *integrum* (minus the amount of the bribe that has been paid, where applicable) appears to be a fairer and more viable solution than simply dismissing the investor's claim at the preliminary level.

875. Certainly, especially at times when years have passed since the making of the investment, the calculation of the respective amounts owned to the parties under the principles of restitution and unjust enrichment may be challenging. But exercises of evaluation of investments are routinely performed in the field of investment law and arbitration, and the evaluation of an investment for the purposes of *restitutio in integrum* of the parties does not follow different criteria. In this regards, scholars like Michaela Halpern have noted for instance, commenting on the World Duty Free case, that:

> *"restitutio in integrum should be allowed notwithstanding the "complete" Defence. The Tribunal held that restitution in integrum cannot be invoked for the returning of a bribe, but what about the other expenses and assets WDF had in the investment? In relation to voidable agreements, if one party decides to rescind the contract, restitutio in itegrum can put the parties back to the position they would be in had the contract not been performed. Thus restitutio in integrum could act to unwind the contract and place both parties in their prior positions minus the two million paid bribe. A compromise much fairer than what was seen in*

[928] Vohryzek-Griest, Ana T (2008), op.cit., at 33.

World Duty Free in which WDF lost everything for committing a less serious illegal act.[929]

4. Costs repartition

876. Lastly, the standard of mutual faults could be used not only to allocate damages appropriately, but also legal fees or other costs concerning the proceedings brought by the investor against the Host State;[930] As will be remembered, this was the approach followed by the Tribunal in Metaltech, where the arbitrators noted that:

> *"That [the fact that the Host State was not sanctioned for bribery]does not mean, however, that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs."*[931]

877. This outcome appears particularly sensible if one considers that, normally, the standard for the apportionment of arbitration costs follows the rule that the losing party has to pay the costs for the proceedings of the winning party. If, however, damages are apportioned according to a standard of mutual culpabilities, and except for cases in which one party has all the blame, and the other is entirely innocent, it may be difficult to discern with any degree of precision who is the winner and who is the loser. In this sense, a criterion of repartition according to which each party is responsible of its own costs is not only fairer and more in line with the sharing of responsibility for the misconduct, but also more practical.

[929] Halpern, M. (2016) *op.cit*., 303.
[930] Cementownia "Nowa Huta" S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2.
[931] Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/, Award of 4 October 2013, para. 422.

CHAPTER 10

POLICY CONSIDERATIONS AGAINST A BROAD DEFENCE OF ILLEGALITY

1. Introduction

878. This Chapter is not concerned with strict legal arguments, but addresses policy questions. It shows that a model based on the application of the *Doctrine of Separability* to the *Defence of Illegality*, as developed in the previous Chapters, is not only required as a matter of law; but is also advisable as a matter of policy against criminal conduct in investment and trade. This Chapter serves an important purpose: if it could be proven that a narrow *Defence of Illegality*, as limited by the *Doctrine of Separability*, has negative effects on the fight against criminality, it would be more difficult to argue a model based on separability, from a *lege ferenda* perspective. The analysis that follows, however, demonstrates the opposite: that applying a narrow *Defence of Illegality*, and addressing the conduct of both the investor and the Host State at the merits stage of proceedings is an effective way to combat criminality.

879. As noted by Halpern, for example:

> *"Tribunals will perform the much needed balancing test and subsequently adjudicate on the, arguably more important, merits. Such a regime will (1) prevent the favouring of one party, unfairly, over the other; (2) make government officials hesitate about engaging in corruption; and (3) encourage States to uphold and support anti-corruption measures".*[932]

880. Also for these reasons, a model based on the *Doctrine of Separability* as previously discussed is to be strongly advocated.

[932] Halpern, M. (2016) *op.cit*., 314.

2. Arbitration and the Global Fight against Criminality in Transactions

881. Certain scholarship sees international investment arbitration in general as the ultimate arrow to enlist in the global fight against corruption and misconduct.[933]

882. A summary of these positions is presented by Mershel, who reviewed the scholarship with a focus on bribery:

> *"The acceptance by investment arbitration tribunals of a state-invoked corruption defence as grounds for dismissing an investor's claims, either on the basis of jurisdiction or admissibility, may be viewed as advancing anti-corruption objectives. It may lead to the creation of a global anti-corruption standard that could be uniformly applied by arbitral tribunals to foreign investors regardless of the domestic anti-corruption laws they may be subject to, thereby 'level[ing] the [international investment] playing field'. Moreover, this trend may also encourage countries that have otherwise resisted committing to investment protection to sign investment treaties or join institutions such as the International Centre for Settlement of Investment Disputes (ICSID), thereby both promoting international investment and exposing these countries to accepted international practices."*[934]

883. What to make of this position? On the one hand, it is not disputed that international investment arbitration can be a powerful tool to fight corruption and other forms of criminality in international investments. [935] On the other, it is apparent that not all, but only some, of its features can be used for this purpose.[936] Increased transparency of arbitral proceedings is one of these. Let us take the case of *amicus curiae* submissions: arbitral Tribunals have shifted from a position

[933] Odumosu, T. (2011) *op.cit.,* 90; Newcombe A. (2011) *op.cit,* 187-200.
[934] Meshel, T. «'The Use and Misuse of the Corruption Defence in International Investment Arbitration.» *Journal of International Arbitration*, 2013: 267 – 281, at 273. See Moran, T. H. «Combating Corrupt Payments in Foreign Investment Concessions: Closing the Loopholes, Extending the Tools.» Center for Global Development, Washington, D.C, 2008.
[935] Moran, T. H. (2008) *op.cit*.
[936] LLamzon, A. «The Control of Corruption through International Investment Arbitration: Potential and Limitations .» *Proceedings of the Annual Meeting of the ASIL*. 2008. 208-212. Kulic, A. «A Corrupt way to Handle Corruption? Thoughts on the Recent ICISD Case Law on Corruption.» *Legal Issues of Economic Integration*, 2010, 37 – 61.

where *amici curiae* were not admitted in arbitration, due to the original full confidentiality of arbitral proceedings, to a position where they recognise that the interest in confidentiality and the private nature of the proceedings has to be contrasted with the need to take into account the public interest involved in the litigation of certain issues.[937] Allowing *amici curiae* on issues of corruption and crime by specialised bodies that monitor this phenomena, for example, would help arbitral Tribunals avoid overlooking evidence that may be suggestive of criminal conduct; exposure of corrupt practices in the context of international arbitral proceedings, in turn, could work as a deterrent towards bribery, given the stigma and the costs associated to these findings for both Host States and foreign investors.[938]

884. However, does dismissing a claimant's claim at the preliminary phase of proceedings (jurisdiction or admissibility) constitute a disincentive against corruption and other criminal conduct in international investments? [939] Is the resort to a broad *Defence of Illegality* that operates as a gateway barrier to the merits really a means to tackle criminal conduct by the investor effectively?

2.1. The Difference between Domestic Litigation and Investment Arbitration

885. In order to answer this question, it is necessary first to draw a distinction between international litigation and domestic litigation. It will be remembered that broad *Defences of Illegality*, such as the one that derives from the application of the *Clean Hands Doctrine*, originally developed in the context of domestic law. In that context, there may be some evidence that denying jurisdiction over an illegal claim operates as a deterrent towards engaging in an illegal transaction (see however the discussion at Section 4.1 of Chapter 7). The dynamic of domestic litigation, however, is not easily replicable in international

[937] Triantafilou, E. «Amicus Submissions in Investor-State Arbitration: After Suez v. Argentina"» Arbitration International, 2008: 571 – 586.
[938] Lamm, C. (2014), *op.cit.*, 328 - 349.
[939] Litwin, D. (2013) *op.cit.*; Rose, C. «Questioning the Role of International Arbitration in the Fight against Corruption'.» *Leiden Law School Research Paper*, 2013: 53 - 62.

investment arbitration between a State and a foreign investor, for one critical reason. In domestic litigation the two parties entering into a transaction could alternatively find themselves to be either claimant or defendant in a possibly ensuing dispute. In this sense, a doctrine that always sanctions the claimant who acts illegally does not identify in advance who the sanctioned claimant will actually be. As stated by Lord Mansfield in the English contract case *Holman v Johnson* (1775), what justifies the advantageous position that the invocation of the *Defence of Illegality* determines to the claimant, over the respondent - is the fact that the respondent is *respondent only accidentally*. In other words, if the claimant and respondent were to change sides, and the respondent were to bring an action against the claimant, the latter would then have the advantage of a broad *Defence of Illegality*.[940] In a situation like this, both parties potentially face the same risk of being heavily sanctioned for the illegality in which they have engaged.

886. And, even if this outcome may still appear as unfair with respect to crimes like corruption,[941] where both parties play a role in the criminal scheme - and yet one manages to go unsanctioned - the reality is that undermining the trust between the bribe-payer and the bribe-receiver is a fundamental tool for discouraging bribery, because neither side can then have faith in receiving their counter-performance. As noted, this ability to deprive the other party of its expectations has the effect of disrupting the trust in a potentially corrupt relationship, and ultimately discourages such practice.[942]

887. According to Olaf and Meyer, in a situation like the one just described,

> *"[T]here is no incentive for [a] contractual partner to fulfil his part of the agreement, as he does not need to expect either claims for performance or reimbursement; he can thus breach the*

[940] Elgueta, G. R. *The Legal Consequences of Corruption in International Arbitration: Towards a More Flexible Approach*. 2016 01 20. at http://kluwerarbitrationblog.com/2017/03/09/state-corruption-in-icsid-bit-arbitration/ (accessed on 05 05 2018).

[941] This was discussed in the context of contract that are null and void due to corruption in ICC Case No. 6497, para 72: "*the result of such nullity is not necessarily equitable. The enterprise having benefited from the bribes (i.e., having obtained substantial contracts thanks to the bribes) has not a better moral position than the enterprise having organized the payment of the bribes. The nullity of the agreement is generally only beneficial to the former, and thus possibly inequitable. But this is legally irrelevant*2

[942] Lambsrdoff, J. *The Institutional Economics of Corruption and Reform*. Cambridge: Cambridge University Press, 2007, 63.

> *agreement without fear of consequence. Both parties have reason for doubting the honesty of their partners in crime, as both will have already demonstrated that they are willing to use illegal agreements to cheat their joint contractual partner, namely the principal. However, they nonetheless have to trust each other, because the law offers no protection to their agreement. The one-sided distribution of the economic risk of advance performance thus illustrates that the law intends to undermine the relationship of trust between two potentially corrupt parties".*[943]

888. The Court of Appeal of Paris rightly recognised this dynamic in addressing the question of the nullity of contracts that *aim at bribery*. Nullity of a contract of this nature is also normally associated with lack of any restitutionary remedies. When restitutionary remedies are not available, the parties to a corrupt scheme cannot recover what they have paid or performed in pursuance of the contract – so that the one that performs first bears all the risks, in the face of the non performance of the other. As noted by the Court,

> *"The parties' awareness of the immoral or illicit aim of the contract, required by jurisprudence, is not meant (whatever its actual consequences may be) to lessen the rigor of the sanction of nullity; on the contrary, it aims at reinforcing it by protecting the contracting party who has nothing to reproach himself with as to the conclusion of the contract; the application of the abovementioned adage aims at preventing performance of an immoral or illicit contract by depriving the party which first executes it of all protection".*[944]

889. In *World Duty Free*, after placing all the consequences of corruption on the investor, and allowing the Host State to go scot-free despite the fact that the State was also involved in the bribery agreement, the Tribunal held that this outcome would have been equally applicable to Kenya, had it been guilty of bribery and acted as claimant in the case.[945] However, a situation as the one envisaged by the Tribunal is extremely rare. In investment arbitration, the investor is invariably the claimant, and the Host State's position is essentially always that of defendant. If one takes the case of corruption, for example, as the epitomization of

[943] Meyer, O. «The Formation of a Transnational Ordre Public against Corruption: Lessons for and from Arbitral Tribunals» Rose-Ackerman, S. *Anti-Corruption Policy*.Durham: Carolina Academic Press, 2013: 229 – 245, 230.
[944] Cour d'Appel Paris, YbCA XX (1995), 198, 202
[945] World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award of 4 October 2006, para. 188.

criminal conduct in international investment law, it appears that no case of corruption has ever been found to constitute a breach of a BIT, but corruption has in a number of cases being considered as a bar to seeking redress in the case of substantive violations of BITs committed by a Host State.

890. In general, unlike domestic litigation in investment arbitration the roles of the Host State and the investor are essentially fixed and not interchangeable. The risk connected to bribery does not affect both parties equally.

891. As noted in more general terms by one scholar, in investment treaty arbitration the host State is not in the position of respondent *accidentally but structurally*.[946] This means that the principle of *in pari delicto potior est conditio defendentis*, which is the consequence of a broad *Defence of Illegality*, in international investment arbitration has a very special meaning: that *in pari delicto*, the most advantageous position will always be that of the defendant Host State.

2.2. The Broad Defence of Illegality in Investment Law: Theories in Support

892. Some of those who propose a broad *Defence of Illegality* do so even in the awareness that, for the reason explained above, it operates in investment arbitration differently than it does in domestic litigation. For these scholars, the imbalance that an ample *Defence of Illegality* determines, by never allowing an assessment of the Host State's conduct on the merits of a case, is not detrimental to the fight against criminality in international investments. On the contrary, it is unavoidable and even justifiable that the highest burden of the consequences of engaging in illegal practices - or even the entire burden - is placed on investors, rather than Host States. With regard to corruption, for example, these scholars maintain that an approach that deliberately sanctions only the supply-side of

[946]Elgueta, G. R. (2016) *op.cit*.

corruption[947] (the investor), and not the demand side of it (the Host State), is entirely compatible with the purpose of fighting corruption in foreign investments.

893. This position finds support in certain domestic legislations. In the United States, for example, the U.S. Foreign Corrupt Practices Act only sanctions the supply-side of corruption, by outlawing the bribing of foreign officials.[948] It says nothing, however, with regard to the person receiving or soliciting the bribe, namely the demand side of the crime.

894. According to some,[949] the broad application of the *Defence of Illegality* is especially necessary in the case of developing countries, which are in a comparatively more difficult situation than investors in preventing and fighting criminal conduct, particularly of a corruptive nature. The argument proceeds as follows: corporations that invest in foreign countries are sophisticated investors, already spending large sums of money in enforcing within their business structures the anti-corruption standards and the compliance programs that are required by domestic and international legislation.[950] Host States, on the other hand, are often deficient in the implementation phase of anti-corruption legislation. In this regard, being held entirely accountable for corruption is, and should be, another sanction for corporations and businesses that have not been diligent in enforcing the anti-corruption provisions applicable to them.

895. According to the same scholars, in addition, certain systemic considerations would have to be made, that militate in favour of placing the responsibility for the bribery (or other criminality) only on the investor. This approach, for those who sustain it:

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[947] Vogl, F. «The Supply Side of Global Bribery.» *Finance and Development*, 1988, available at http://www.imf.org/external/pubs/ft/fandd/1998/06/vogl.htm The author calls the "demand side of the equation" on corruption as "public officials who abuse their office for private gain", while the "supply side" consists of those "who pay bribes".

[948] On policy considerations related to the US Act see, for instance, Ackerman, S. R. «International Anti-Corruption Policies and the U.S. National Interest» *Proceedings of the Annual Meeting (American Society of International Law) Vol. 107, International Law in a Multipolar World*, 2013: 252-255.

[949] See for instance the comments of Yackee, J. available at http://opiniojuris.org/2012/05/31/vjil-symposium-jason-webb-yackee-responds-to-bjorklundlitwin-and-wong/

[950] Brewster, R. «The Domestic and International Enforcement of the OECD Anti-bribery Convention» *Duke Journal of International Law*, 2014: 84 – 109.

> *"[A]dmittedly lets state actors get away with accepting bribes. But the alternative — allowing tribunals to weigh and balance state and investor fault in a particular corrupt transaction — risks placing tribunals in a dangerous position. Domestic political regimes, especially after political transitions, may depend for their domestic political support in part on their efforts to "clean house," that is, to expose and remedy the malfeasance of the prior regime. Those efforts should be supported to the extent that they may help to start a virtuous circle of self-reinforcing anti-bribery norms within the political system. For an ICSID tribunal to hold that a prior regime's involvement in corruption means that a corruptly-obtained concession can still benefit from BIT protections risks interfering with those efforts to move to a political equilibrium characterized by less frequent corruption".*[951]

896. These positions may be suggestive, but they do not help answer the main question that is fundamental to policymakers. This question is whether holding to some extent the Host State liable for instances of criminality to which it contributed, by sanctioning its conduct at the merits stage of proceedings, can be a helpful tool in fighting illegal practices, or else. In particular, saying that investors are better placed to enforce anti-corrupt practices may be correct, but it is a finding that has no bearing on the question as to whether the anti-corrupt regime is enhanced by the application of a mechanism that sanctions the responsibility of both parties to the crime.

897. In addition, the proposition that new-governments in developing Host States may want to *clean the house* and that interference with this process could hinder the adoption of an up-to-date and effective anti-corruption system is also a finding that is largely unsupported by evidence. If this was actually the case, a new government after a regime change should also actively seek to expose the illicit practices of its predecessors domestically. This is rarely the case. One can take again the case of *World Duty Free*. In delivering the award with which he declined its jurisdiction over the case, the Tribunal noted:

[951] Yackee, J. http://opiniojuris.org/2012/05/31/vjil-symposium-jason-webb-yackee-responds-to-bjorklundlitwin-and-wong/

> *"It remains nonetheless a highly disturbing feature in this case that the corrupt recipient of the Claimant's bribe was more than an officer of the State but its most senior officer, the Kenyan President; and that it is Kenya which is here advancing as a complete defence to the Claimant's [World Duty Free's] claims the illegalities of its own former President. Moreover, on the evidence before this Tribunal, the bribe was apparently solicited by the Kenyan President and not wholly initiated by the Claimant. Although the Kenyan President has now left office and is no longer immune from suit under the Kenyan Constitution, it appears that no attempt has been made by Kenya to prosecute him for corruption or to recover the bribe in civil proceedings".*[952]

898. Clearly, the new Kenyan government of Mwai Kibaki, who succeeded Daniel Arap Moi, the President of the World Duty Free affair, displayed no interest in prosecuting his predecessor despite the clear evidence of corruption, and the finding of the ICSID Tribunal in World Duty Free.[953] The same can be said with regard to the current President of Kenya, Uhuru Kenyatta – a strong political ally to Arap Moi himself. Also in the case of his government, no initiative was taken with respect to the criminalisation and prosecution of the corrupt acts of Arap Moi in connection with the *World Duty Free* bribe. Not addressing Kenya's conduct at the merits of the case, with no possibility of applying a standard of mutual faults, meant total impunity for the Kenyan President and the State. Not only that: there seems to have been no improvement on the front of anti-corruption practices, culture and legislation in Kenya, which is at the basis of the logic of the *cleaning of the house*. And indeed, Kenya anti-corruption legislation remains lacking and ineffective.[954] Transparency's International index of perceived corruption for 2016 places Kenya at the 145th position, out of 176, where the 176th position is that of the country perceived as the most corrupt. In the words of a scholar who studied the situation in Kenya with significant attention, in particular:

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[952] World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award of 4 October 2006, para. 180.

[953] Halpern, M. (2016) *op.cit*., 310: "*In addition, the Kenyan authorities made no attempt to prosecute Moi after leaving office, essentially ratifying the President's actions*".

[954] Anassi, P. N. *Corruption in Africa: The Kenyan Experience*. Victoria: Trafford Publishing, 2004. Gathii, T. J. «Kenya's Long Anti -Corruption Agenda - 1952-2010: Prospects and Challenges of the Ethics and Anti Corruption Commission Under the 2010 Constitution.» *Legal Studies Research Paper Series*, 2010. Otieno, V. «A Critical Appraisal of Kenya's Anti Corruption Law.» *Dissertation/These at Moi University*, 2010.

> *"President Moi's illicit and corrupt, arguably dictatorial, behaviours were well known in Kenya but with the elected President Kibaki in 2002, who won on an anti-corruption platform, as well as the new Constitution in 2010, Kenya has begun to see a change. However, within a few years, allegations of corruption in the state and electoral system began emerging again and many say that the level of corruption in the country is right back where it started. And even with today's government, there little confidence that President Uhuru Kenyatta, elected in 2013, will have the will to fight corruption."*[955]

899. Contrary to the scholarship identified above, it appears that it is precisely in developing countries that a broad *Defence of Illegality* could make the most damages from the perspective of the fight against corruption. Where a corrupt host State is not only permitted to evade liability for having breached a BIT by invoking a broad *Defence of Illegality*, but it is also not reprimanded in any way for its own corrupt behaviour, it is likely that it will have little incentive to alter its corrupt domestic culture or the corrupt practices of its officials.[956]

2.3. The Broad Defence of Illegality as a Hindrance to the Fight against Criminality

900. In fact, Host States appear to be well aware of the comparative advantage that a broad *Defence of Illegality* offers to them, and ready to exploit it. The thesis advanced in this dissertation is that this kind of awareness is responsible for an increase in illegal conduct in investment arbitration; [957] in other words, that, contrary to the opinion of those who believe that a broad *Defence of Illegality* is a weapon is fighting illegality, a broad *Defence of Illegality* only contributes to more illegality.

901. In general terms, there appears to be three mechanisms in which a broad *Defence of Illegality* may determine this outcome:

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[955] Halpenr M (2016), *op.cit*., at 316. Anderson, M. *Corruption In Kenya Is Poisoning Politics, The Guardian* (03 07 2014) http://www.theguardian.com/global-development/2014/jul/03/john-githongokenya- corruption-politics.
[956] Meshel, T. (2013), *op.cit*., at 274.
[957] Pauwelyn, J. «Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-Corruption Policy» Rose-Ackerman, S. *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* Carolina Academic Press, 2013: 247 – 265.

a) as a *disincentive* for Host States *to fight* corruption and other illegal practices;
b) as an *incentive* for Host States *to encourage* corruption and other illegal practices;
c) as an incentive for Host States to breach the protections that international law and BITs offer to foreign investments.

902. These are addressed below.

903. The option under a) refers to a situation of lack of incentives. If a Host State knows that its complicity with an investor in corruption is not sanctioned by an investment Tribunal, there is no incentive on the part of the Host State to crack down on this form of criminality.[958] Certainly, there would be other incentives why a State may want to fight corruption and illegality domestically; from the perspective of international investment arbitration, however, a broad *Defence of Illegality* means that the risk of being found guilty and responsible of criminal conduct by an international tribunal is not one of these.

904. In developing countries, a lack of incentives of this nature can have particularly serious ramifications, and wide ranging effects. An example will clarify this statement. Some studies have found that there is a direct correlation between the existence of BITs and the low quality of domestic legislation and institutions in poor countries. This is so because, at times, developing countries do not use the standards of protection contained in BITs to *complement* their domestic laws and enhance them, but rather let BITs *replace* the domestic legislation entirely. The incentive to adopt legislation aimed at combating corruption and fostering good governance may be hindered when BITs simply substitute

[958] Kulkarni, M. (2009) *op.cit*., at 43: "*Hence for effective prevention of corruption from the investment field the arbitral tribunals need to invent its own control systems and for that matter, declining jurisdiction is definitely not a good alternative to deal with the issue of corruption. By declining jurisdiction the arbitral tribunal is neither assisting in preventing corruption nor is it benefiting the investor who is left with no remedy once the tribunal declines the jurisdiction. The arbitral tribunal also sends a negative message by declining jurisdiction in corruption matters, as the Host States draw an inference that corruption matters will not be dealt with by the arbitral tribunals and the State will not make any efforts to bring corruption under control, and thus declining jurisdiction, in fact promotes corruption"*

themselves to the existing normative framework.[959] Such normative framework, therefore, remains poor, when not lacking in the first place.[960] Speaking in particular of the case of Sub-Saharan Africa, for example, Johnson notes that:

> *"BITs that provide foreign investors with substitutes for weak domestic institutions may lead to a deterioration of local institutions, the rule of law, and overall governance".*[961]

905. This scenario is further aggravated if developing countries start to rely on a broad *Defence of Illegality* that they read in a BITs, as an instrument to escape any liability. This is so because developing countries may be disincentivised in introducing anti-corruption standards in the BITs that they negotiate – because that would in turn prevent them from relying on the broad *Defence of Illegality*. The scenario that would emerge from this is a typical lose – lose situation: BITs with poor anti-corruption standards that replace domestic legislation that, in turn, has not made any progress towards the fight of corrupt practices.[962]

906. Under a broad *Defence of Illegality*, not only would the Host State not be incentivised to fight corruptive conduct, but it may even be encouraged to foster corrupt practices when dealing with foreign investors. This is the option under b), above, which is well described in the words of one author:

> *"Dismissal of all claims by corrupt investors is likely to exacerbate the demand for corruption, as it confers on host States absolute immunity from paying investors compensation for unlawfully expropriating investments, or violating investments protection standards. This "corruption card" plays directly into the hands of kleptocratic regimes – it allows them to enrich their corrupt elites with impunity, and rewards them for doing so by granting them absolution for any wrongful mistreatment of the investor and its investment. The zero tolerance approach this*

[959] Meshel, T. (2013) *op.cit*., at 273.
[960] Ginsburg, T. «International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance.» *U Illinois Law & Economics Research Paper No.* LE06-027, 2005. Kidane, W. «Combating Corruption Through International Law in Africa: A Comparative Analysis.» *Cornell Journal of International Law*, 2007: 691 – 748.
[961] Johnson A. R. (2010) *op.cit.,* 921.
[962] Gilman, E. «Legal Transplants in Trade and Investment Agreements: Understanding the Exportation of U.S. Law to Latin America.» *Georgetown Journal of International Law*, 2009: 263 – 282, 279.

> *further incentivises solicitation of bribes from investors, and reinforces the culture of corruption in these countries."*[963]

907. As a matter of strategy, if the *Defence of Illegality* can operate very broadly and effectively to counter the alleged misconduct by the Host State, Host States may have an incentive to set up the conditions for that defence. Fostering corruption and other criminal practices would be precisely the way to do so. The mechanisms is simple: if, by accepting, or soliciting bribes from an investor, a State may create the conditions for its own successful defence before an arbitral Tribunal, should a dispute with the investor arise, corruption and criminality become litigation advantages, *to be sought, rather than contrasted*.

908. And, once the conditions for the setting up of a *Defence of Illegality* are met, for example because the State has accepted a bribe from the foreign investor, there is even an increased risk that such State, secure in its reliance on the *Defence of Illegality*, may act illegally with regard to the foreign investment, in the awareness of its likely impunity. This corresponds to option c), above. As noted by one author, Host State impunity:

> *"Reduce[s] the costs for a developing host state of reneging on its investment protection obligations, while both the state and the corrupt official avoid any sanctions for their conduct. This is likely to foster a culture of impunity for government officials in the host state, which may in turn undermine respect for fundamental rights, lead to a 'vicious cycle of law-breaking', and erode the public's perception of, and trust in, state institutions."*[964]

909. There are several examples as to how this scenario may manifest itself. A State may for instance have an incentive in *unduly expropriating* the investment of a foreign investor that, with the knowledge of the State, has secured its investment through bribery of foreign officials. The investor's claim, under a broad application of the *Defence of Illegality*, is in fact bound to fail already at the preliminary stage of proceedings, with no chance for the illegal conduct of the Host State to be taken into account by the arbitral Tribunal.

[963] Lim, K. (2016) *op. cit.,* 621.
[964] Meshel, T. (2013) *op.cit*., at 275.

910. And, the incentive for the Host State to interfere illegally with a foreign investment is all the more strong in cases when the corrupt practice of the investor has already emerged, or risks emerging, in the public eyes, for example because corrupt practices are exposed in the context of anti-corruption investigations; or because the State has clear evidence of the corrupt practice in which the investor has engaged and threatens to blow the whistle. In this case, the potential detrimental consequences for the investor are doubled: on the one hand, the consequences of sanctioning by domestic anti corruption agencies; on the other, the facing of an arbitration in which the Tribunal may disregard the culpable conduct of the host State and place all the blame for the corruption on the investor.[965]

911. There is empirical evidence that States exploit the *Defence of Illegality* in the manner indicated above.[966] And, when the defence is not raised directly in the context of judicial proceedings to derail the claimant's claim, the threat of whistle blowing on instances of criminality in which the claimant and respondent have concurrently engaged may be a negotiation leverage, to force a settlement on the claimant.

912. For instance, in *Azpetrol International Holdings v Republic of Azerbaijan*, three Dutch companies had filed suit against the Republic of Azerbaijan for breach of the substantive standard of protection indicated in the BIT.[967] In the context of the cross examination of a witness, certain bribes offered by the representatives of the Dutch companies were exposed by mistake. The claimant decided abruptly to discontinue litigation. There are reports according to

[965]Losco, M. (2014) *op.cit.* at 1233; Fawler Torres Z (2014) *op.cit*, 1000. See Bhojwani, R. «Deterring Global Bribery: Where Public and Private Enforcement Collide» *Columbia Law Review*, 2012: 66 – 111.

[966] Yackee, J. (2012) *op.cit*. "*When it is not possible for the Host State to invoke corruption as a defence (for example because the Tribunal has already passed an award, and the illegality of the investor's conduct is exposed only at a later stage), criminality has in any event been invoked to force the investor into a settlement, in the context of a revision of an Award Already rendered*", 740. See Peterson, L. E. «Siemens Waives Rights Under Arbitral Award Against Argentina; Company's Belated Corruption Confessions Had Led Argentina To Seek Revision of 2007 Ruling.» *Investment Arbitration Report*, 2009: 10 – 14. Fatallah, R. «Corruption in International Commercial and Investment Arbitration: *Recent Trends and Prospects for Arab Countries» International Journal of Arab Arbitration*, 2010: 65-90.

[967] Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan, ICSID Case No. ARB/06/15

which this was decided because the respondent had threatened to expose evidence of further bribes. Clearly, threats of this kind would not be possible, or at least they would not be as effective, if the arbitral Tribunal could engage in a balanced analysis that takes into account the behaviour of both parties, rather than only the behaviour of the claimant.

913. A similar case to *Azpetrol* is *Siemens v Argentina,* which was decided by an arbitral Tribunal in 2007. In 1998, Siemens A.G., the German electronics corporation, won a contract to digitalise Argentina's identity cards. When the Emergency Law was passed in 2001, after the Argentinean national debt crisis, the terms of Siemens' concessions were renegotiated in a manner that was not profitable for Siemens and that Siemens argued was an expropriation of its rights. Argentina brought the dispute to ICSID in 2002 and in 2007 won the case and was awarded $217 million in damages.[968]

914. Shortly after the arbitral decision was made, German authorities found that Siemens had been involved in a number of acts of corruption, encompassing several countries in the world, including Argentina. In particular, internal and international investigations revealed that between 1997 and 2007 Siemens paid over $105 million in bribes to officials of Argentina in order to win the bid on the procurement of the digital IDs. The Government of Argentina therefore sought to have the award render by the Tribunal in favour of Siemens revised, on grounds of the mounting corruption scandal. According to Article 51 of ICSID, in fact, either party may request a revision of the award by an application in writing addressed to the Secretary-General, on the ground of discovery of some fact of such a nature as decisively to affect the award. Corruption was considered a fact to decisively affect the award. Seven months after Argentina's request for revision, Siemens settled with U.S. and German authorities paying $1.6 billion in penalties. Further to this, Siemens also discontinued ICSID arbitration proceedings, which had until that moment being successful, and decided not to recover the moneys that had been awarded to it in the award under revision.

[968] Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8

915. In the absence of publicly available information, it is obviously not possible to second-guess what Siemens' main reason was to decide to abandon ICSID proceedings. It is possible that the reputational damage that would ensue from the further exposure of Siemens' corrupt practices did play a role in the strategic decision.[969] However, it is also possible that Siemens' appreciation of the magnitude of the implication of the *Defence of Illegality* may have played a role. The risk of a Tribunal following the approach exposed in *World Duty Free v Kenya* may have put the investor off continuing the litigation.

916. In certain cases, a broad *Defence of Illegality* may even constitute a disincentive for investors to pursue ICSID arbitration (or arbitration under other fora) in the first place. In the pre-negotiations phases that normally precede the commencement of arbitral proceedings, the Host State may threaten the investor that, if arbitration is actually commenced, the Host State will denounce the investor's corruption to criminal investigation authorities at the domestic level.[970] The fear of the domestic consequences of a criminal conviction, in addition to the knowledge that arbitral proceedings may actually be frustrated by the recognition of a broad *Defence of Illegality* by the arbitral Tribunal may dissuade the investor from seeking a form of judicial redress. In 2008, for example, a pharmaceutical giant settled a 60 million dollars claim with the Government of the Philippines, without resorting to any mechanisms of dispute resolution, after certain corrupt practices had been exposed by a senator in the Parliament of the Philippines. The Senator had addressed several communications to members of the US Senate, prompting investigations by US authorities into the matter.[971]

2.4. A broad *Defence of Illegality* is also against the Interest of the Host State

917. Scenarios like those depicted above nullify not only the purposes of the antibribery regime; they also undermine the very objectives that a system of

[969] Peterson L. E. (2009), *op.cit*.
[970] Fawler Torres, (2014) *op.cit*., 999.
[971] Fawler Torres, (2014) *op.cit*., 999.

investment law seeks to create, namely fostering development in Host State countries through the creation of a stable regime for foreign investors and a system of dispute resolution that is disconnected from the vagaries and peculiarities of the domestic legal system where the investment is made.[972] By leaving the investor *hostage* to the Host State, the risk is that the flow of investments into developing countries, especially those where corruption is endemic, would decline.[973]

918. Some cases are particularly serious. As noted by some, for example, dismissing all claims of an investor at the level of jurisdiction is particularly unfair and unreasonable once the investor has performed a major part of its obligations with regard to the investment whose illegality is raised. This not only results in clear losses for the claimant, but is a formidable deterrent for other investors, and decreases their willingness to contribute to the inflow of capitals to developing countries. [974] Tamada explained that:

> *"If there was complicity between the investor and the Host State in the establishment of the investment, then the Tribunal's denial of jurisdiction based on the corruption inevitably results in decreased attractiveness of investing in that corrupt State. The denial of jurisdiction does not favour economic development of the Host State, particularly when the Government party is equally responsible for the corruption".*[975]

919. This means, as another author explains, that:

> *"Ultimately while dealing with the issue of jurisdiction, the arbitrators should, in all cases, bear developmental objectives in mind because the policy goals of both anti-corruption laws and investment arbitration can be viewed as seeking the same ultimate goal: the development of the host state."*[976]

920. An approach like this is all the more justified when one considers that the development of the Host State is not only the goal of the system of investment

[972] UNCTAD, The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, 2009.
[973] Raeschke-Kessler, H. & Gottwald, D .(2008) *op.cit.*, 5
[974] Tamada, D. «Host States as Claimants: Corruption Allegations.» In *The Role of the State in Investor-State Arbitration*, Polanco Lazo, R. et Al. Martinus Nijoff, 2014: 113 – 122, at 118.
[975] Tamada, D. (2014) *op.cit*., at 118
[976] Kulkarni, S. (2009) *op.cit*., at 19.

protection, but is also one of the objectives of the global anti bribery regime. As Professor Susan Ackerman explains, for example, the objective of the fight against corruption, domestically and at the international level, is global market efficiency, economic growth, poverty alleviation, and government legitimacy.[977] In this regard, therefore, the aim of the global anti-bribery regime and that of the system of bilateral investment treaties are aligned. As an author has explained:

> *"All three endeavours—fighting corruption, liberalizing trade and protecting foreign investment—are not ends in themselves, but "part of the global focus on improving human well-being and government functioning".*[978]

921. Grave systematic consequences would be determined if an approach that is developed within a certain regime (investment protection) ended up undermining the objectives that are pursued by a connected regime (anti-bribery) which has the same aim. [979]And ultimately, as noted by Llamzon,

> *"If anti-corruption is used to trump all other considerations, zero tolerance scrutiny may potentially invalidate large numbers of foreign investments, and thus upset the machinery of investor protection to the point of breakdown, which would ultimately do more harm than good to host states themselves. Also, this would likely result in unfinished or mal-maintained projects and act against the interests of host state's citizens.*[980]

2.5. The Trend against Sanctioning the Supply-side only of Corruption

922. At the beginning of this Chapter it has been mentioned that those who advocate a broad *Defence of Illegality* find support for their theory in domestic legislations that criminalise the supply side only of corruption. Similarly to the

[977] See generally: Rose-Ackerman, S. *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* Durham: Carolina Academic Press, 2013.
[978] Pauwelyn, J. (2013), *op. cit*., 265: "*the recent emergence of a state 'corruption defence' in investment arbitration, i.e., the reliance of host states on investor misconduct, including corruption, as a complete defence to liability for breach of investment protection obligations may arguably frustrate this cross-fertilization between international investment arbitration and anti-corruption policies and may even prove counterproductive in certain circumstances*".
[979] Wilske, S. et Ober, W. «The "corruption objection" to jurisdiction in investment arbitration. Does it really protect the poor?» *In Poverty and the International Economic Legal System: Duties to the World's Poor?,* Nadakavukaren Schefer, K. Cambridge: Cambridge University Press, 2013: 177 – 188.
[980] Llamzon, A. (2008) *op.cit*., 210 - 211. See also Raouf, M. A. «How Should International Arbitrators Tackle Corruption Issues?» *ICSID Review*, 2009: 116 - 136.

consequences of the broad *Defence of Illegality*, criminalising only the supply side of corruption determines that the fight against corruption is only fought from the active side of the corruptive agreement (the supplier of the bride, the investor) and not also from the passive side (the receiver of the bribe, the Host State).

923. However, the criminalisation of the supply side only of corruption *has been largely ineffective, inefficient, incomplete, and in some cases, inequitable*.[981] One scholar has noted that:

> *"the patchwork of 'supply side' international anti-corruption legislation is a good beginning but has a long way to go if the governments of the world are to become effective in stamping out bribery and corruption"*[982].

924. Indeed, a number of scholars have advocated the need to re-shif the focus of anti bribery approaches, to also pursue the bribe takers.[983] As Joseph W. Yockey has noted:

> "*no matter how elaborate a firm's compliance effort may be, they can do little to curb the market for bribe demands*".[984]

925. The most recent endeavours in fighting corruption, for these reasons, seem to point towards a novel approach that punishes the crime both at the supply side and at the demand side of the scheme.[985] This trend is making its way primarily in the context of domestic legal systems. Indeed, some countries in particular have shown a certain availability to follow this new tendency. For example, in a vast effort in combating bribes in China, the Chinese Government has adopted a new legislation that sanctions both the active and the passive side of corruption; China's approach had originally followed a different path – only

[981] Klaw, B. W. (2013), *op.cit*., at 303.
[982] Thompson, K. «Does Anti-corruption Legislation Work? .» *International Trade and Business Law Review*, 2013: 99 – 135.
[983] Yockey, J. W. «Solicitation, Extortion and the FCPA.» *Notre Dame Law Review*, 2011: 1- 46. .See e.g. Bialos, P. et Hussian, G. *The Foreign Corrupt Practices Act: Coping with Corruption in Transitional Economies*. New York: Oceana Publications, 1997.
[984] Yockey, J W. (2011) *op.cit*., at 3. Litwin, D (2016), *op.cit*. at 16.
[985] Litwin D. (2013), *op.cit*., at 16: "*In recent years, one of the most important developments in the global fight against corruption has been the general consensus amongst international actors that action needs to be taken on the demand-side of corruption*".

criminalising the supply side of corruption.[986] However, the new legislation recognises that the bilateral nature of the crime requires a response that is, indeed, bilateral.[987] A similar approach was followed in the UK, where the Antibribery Act of 2010 prohibits the giving and offering or a bribe (Section 1), as well as the receiving of a bribe (Section 2).[988] Similar considerations can be made with respect to the German new legislation on anti-corruption.[989]

926. Criminalisation and sanctioning of both sides is a view that international organisations that are active in the global anti bribery regime share. The ICC for examples notes that:

> *"[t]he authors of the [OECD] Convention [have] made the assumption that by focusing on the supply-side, the demand-side would dry up. This, however, is not what business is experiencing on the ground, as numerous company executives, frequently exposed to extortion, will confirm.*[990]

927. Internationally, the new course of action has been recognised at a high level by the United Nations Convention against Corruption. Indeed, Article 15 of this Treaty, requires that:

> *"[E]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences (...) the solicitation or acceptance by 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"*[991]

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[986] Chow, D. «How's Crackdown on Corruption Has Led to Less Transparency in the Enforcement of China's Anti-Bribery Laws» *University of California Davis Law Review*, 2016, 685 – 701, 688.

[987] Guanyu Banli Xinghui Xingshi Anjian Juti Yingyong Falu Ruogan Wentide Jieshi ([Interpretations on Several Issues Concerning the Application of the Law for Handling Criminal Cases of Bribe-Offering] (promulgated by Sup. People's Ct. & Sup. People's Proc., Dec. 31, 2012, effective Jan. 1, 2013)

[988] UK Bribery Act 2010, Sections 1 and 2. See also on this aspect Jeremy Horder,Peter Alldridge, Modern Bribery Law: Comparative Perspectives, 2013, 149. (Horder, 2013)

[989] NJ Lord, Responding to transnational corporate bribery using international frameworks for enforcement: Anti-bribery and corruption in the UK and Germany, Criminology and Criminal Justice […]. (Lord, 2014)

[990] International Chamber of Commerce, "ICC note on 'the most important obstacle to the effective enforcement of the OECD Anti-Bribery'", online: Department of Policy and Business Practices <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2007/ICC-note-on-"the-most-important-obstacle-to-the-effective-enforcement-of-the-OECD-Anti-Bribery- Convention"/>.

[991] United Nations Convention against Corruption, Article 15(b). According to Article 16(2) of the Convention, however, the criminalization of the passive side of transnational corruption remains optional.

928. If something is to be learned from the new approaches on anti-corruption is that a system that sanctions both parties to the criminal enterprise appears to be more effective than a system that tries to tackle just one side of the criminal scheme[992] and that, *essentially, the condemnation of bribe payers and receivers is now a component of treaties whose parties are both capital-exporting and capital-importing countries*.[993] There is no reason not to apply this policy rationale also to the relationship between an investor and a Host State. Even from the policy perspective of criminal law, therefore, the position of Tribunals such as the one in *World Duty Free* is no longer in line with the current state of the debate on anti-bribery efforts.

3. Other Policy Considerations against a Wide Employment of the Defence of Illegality

929. There are also other policy considerations that show how a broad *Defence of Illegality* in investment arbitration may end up undermining the global fight against corruption, rather than advancing it. The risk derives from the paradoxical effects that stem from the attempts to counter some of the most problematic consequences of the *Defence of Illegality*.

930. Indeed, aware of the way in which Host States instrumentally exploit a broad use the defence,[994] arbitrators may seek to limit the systemic implications described previously by looking for certain *antibodies* from within the system of investment protection. These antibodies may be developed by acting on the components of the *Defence of Illegality* that do not concern the *consequences* of illegality, but rather the *conditions precedent for the application* of the defence. For example, arbitrators may require a very high standard of evidence to demonstrate corruption on the part of the investor, and hence subject the

[992] See on this aspect, for example, the opinions of Bjorklund and Litwin, available at http://opiniojuris.org/2012/05/31/vjil-symposium-jason-webb-yackee-responds-to-bjorklundlitwin-and-wong/
[993] Litwin, D. (2016) *op.cit.,* 8.
[994] Fatallah, R. (2010), *op.cit*., 90.

application of the *Defence of Illegality* to a very high and restrictive threshold. This is not a pure theoretical risk, but an approach that arbitral Tribunals have followed.

931. For example, in *African Holding Company of America,* the Tribunal held that the standard of proof of corruption should be particularly high, precisely because of the growing use of the *Defence of Illegality*; consequently, it proceeded to apply the standard of *irrefutable evidence* of criminal conduct.[995] By this standard, it also concluded that it had not been possible to prove the corruption perpetrated by the investor.[996] However, the standard applied in *African Holding Company of America* appears to be a particularly high threshold for corruption, and indeed, even those arbitral Tribunals that have applied strict standards, have never spoken of the need to identify irrefutable evidence of corruption.[997] At most, the standard has been that of the clear and convincing evidence.[998] In the majority of cases, however, tribunals proceeded from the premise that the usual standard (*preponderance of evidence* or *balance of probabilities*) is appropriate. Limiting the systemic effects of the consequences of a broad *Defence of Illegality* by raising the standards to prove criminality, therefore, does not help fight crime; it helps criminals, who enjoy the protection of a *probatio criminis* that is extremely difficult to satisfy.

932. Again from the policy side of things, it is very doubtful that dismissing out-right an investor's claim curbs effectively corruption in foreign investments. In some countries, the corruption of foreign officials is a necessary precondition to doing business, to the point that an investor who does not bribe an official may be *a priori* excluded from doing business in the country.[999] In this context, it is likely

[995] African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo, ICSID Case No. ARB/05/21.
[996] EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award of 8 October 2009, para 221 "*In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption. The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing*."
[997] Crivellaro, A. (2005) *op. cit.*

[999] See for instance the stories reported in Amy Handlin, An Encyclopedia of Lobbying, Political Influence, and Corruption, page 271 ff; Summerfield, J. «The corruption Defence in investment disputes: a discussion of the imbalance between international discourse and arbitral decisions.» *Transnational Dispute Management*, 2009: 15.

that an investor may face an *aut - aut* scenario: either bribe the official, and be sure to secure the contract; or not bribe the official, and be certain not to secure the contract. In the face of a present and immediate certainty of securing the investment, and with only a potential and future risk of litigation with the Host State – it is likely that an investor would still accept to run the risk.[1000]

933. Lastly, but not less importantly, there is an argument to be made from the perspective of equity and justice, a policy rationale and an end *per se*, that international investment arbitration is not exempted from promoting. This resonates starkingly in some authors' positions. Halpern, for example, notes that:

> *"If two parties act immorally and illegally in concluding a contract, there is merit to the argument that no court should aid one whose cause of action is based on an immoral or illegal act, ex dolo malo non oritur action. But corruption cases in investor-state disputes are rarely so black and white. How is it equitable to allow a State, whose illegal actions are more serious, to dismiss an investor's claim because of a comparatively minor illegality which was solicited from them on the basis of that is how business works in that country?*[1001]

[1000] Lim, K. (2016) *op.cit*., 625.
[1001] Halpern, M. (2016), *op.cit.* 314.

CONCLUSIONS

934. The circumstance of investors resorting to some form of illegality, including criminal misconduct, to secure an investment in a Host State is ever more frequent in the world of international investments. The classical pattern of criminality that can affect an investment is constituted by the corruption, on the part of the investor, of the officials of a Host State, to secure the possibility to make business in the country; alongside corruption, fraud and violations of the laws of the Host State have become frequent occurrences in which investors engage in order to be able to make an investment in a certain country, or in order to render it more profitable. Many scenarios are reported: the one where the investor fails to disclose important features of its investment, so as to give the impression that the investment operation is compatible with the domestic legislation of the Host State; the one in which the investor exaggerates certain aspects of its organisation, structure and financial capabilities, so as to secure a bid which it would otherwise be impossible to obtain; the one in which the investor fails to comply generally with the legislation of the Host Country, to its own advantage.

935. In tandem with the increase of investor's misconduct, a significant phenomenon has started to present itself with some frequency: the reliance by Host States on a *Defence of Illegality* based specifically on investor's misconduct. In general terms, a *Defence of Illegality* consists in invoking the claimant's illegal conduct to bar, or otherwise defeat, its claim related to a transaction affected by such illegality. In investment arbitration, the *Defence of Illegality* means in particular that the Host State invokes the misconduct committed by the investor in securing an investment in the country as a defence in the context of proceedings brought by the investor against the Host State, for breach of the standards of protection of investments owned under BITs or general international law. By way of example, a *Defence of Illegality* based on investor's corruption could be raised in an investment dispute brought by the investor for violation of the standard of fair and equitable treatment, or for expropriation without due compensation, or

again for any other form of illegal tampering by the Host State with the investor's investment.

936. In concrete terms, the *Defence of Illegality* could be raised by the Host State in three ways in an investment case. First, by reference to certain clauses that can at times be found in BITs, according to which the protection of BITs and of international law in general is reserved only to investments made *in accordance with the laws of the Host State*. In this case, the *Defence of Illegality* would operate on the basis of a direct and textual connection with the BIT, to exclude from protection investments that are criminal and illegal, and hence contrary to the laws of the Host State; second, by reference to a general principle whereby, even in the absence of an explicit *in accordance with Host State law* clause, the system of investment protection should be reserved to those investments that are legal. This position, that is referred to as the *Legality Doctrine*, postulates that an interpretation of the system of BITs that is in line with the principles of the Vienna Convention, including the cardinal notion of good faith, mandates that the protection of international law cannot be granted to investments that are illegal. Third, by reference to the so-called *Clean Hands Doctrine*. The *Clean Hands Doctrine*, in its proper formulation, is a doctrine of judicial abstention which originates from the Latin maxim that *nemo auditur turpitudinem suam allegans*, and according to which a court should not lend its service to a claimant when this has committed an illegality with respect to the transaction (including the investment) for which it seeks protection. According to its proponents, the *Clean Hands Doctrine* would operate as a general principle of law under the rubric of Article 38 of the Statute of the International Court of Justice.

937. If, as seen, the *Defence of Illegality* could be invoked following the three routes identified above, there are also three effects that a defence based on claimant's misconduct could determine on its claim. First, the arbitral Tribunal may decide to treat investor's misconduct as a jurisdictional issue. In this event, an investment procured by corruption, or by fraud, or by violations of the laws of the Host State would mandate the Tribunal to simply decide not to entertain the case, and dismiss it at the jurisdictional level. In the alternative, the Tribunal could

decide that the misconduct by the investor determines the inadmissibility of the claimant's claim, but does not bar the Tribunal's jurisdiction. Both the jurisdictional and the admissibility approach to investor's misconduct have been qualified in this dissertation as a *broad Defence of Illegality,* in the sense that they determine far reaching effects such as the failure of the investor's claim at the preliminary level, before the merits. Lastly, the Tribunal could decide that the misconduct by the investor does not have an impact on either the jurisdiction of the Tribunal, nor on the admissibility of the claim, but that it is an issue reserved for the merits of the proceedings, where the protection normally owned to the investment can be denied - wholly or partly - due to criminality.

938. How is an investment Tribunal in concrete to treat a *Defence of Illegality*? What alternative should it choose, between the jurisdictional, admissibility and merits one? This is the research question that has been investigated in this dissertation. The importance of the research question is strictly correlated to the importance of distinguishing between jurisdiction, admissibility and merits. In international investment arbitration, a declaratory of lack of jurisdiction is the most serious sanction that can be inflicted on an illegal claim: a declaratory of lack of jurisdiction is not curable and the Tribunal can declare itself without jurisdiction without engaging at all with the merits of the parties' claim. A declaration that the claim is inadmissible, while still operating at a preliminary level, is a less serious consequence for the investor than a declaratory of lack of jurisdiction. For example, inadmissibility is curable and, in addition, issues concerning admissibility are oftentimes closely related to issue concerning the merits, so that a Tribunal assessing issues as a matter of admissibility can carry out an analysis, and become cognizant of certain issues, in a manner not dissimilar from the kind of analysis that is carried out at the merits stage. Yet, dismissing a claim as inadmissible still prevents the Tribunal from passing an award that may somehow take into account of the conduct of both parties, and of the substance of their respective positions. Lastly, assessing the illegality of the investor's conduct at the merits stage is what allows the Tribunal to take into account the conduct of both parties in a thorough and complete manner, and balance the respective behaviours of the parties appropriately. Also for this, an investor's claim that is

allowed to proceed to the merits presents a certain incentive for the parties to reach a mutually agreed settlement before a judicial decision is rendered - something that could not happen, logically, with a dismissal of the claim at the preliminary level.

939. Several Tribunals and scholars have proposed an answer to the research question indicated above that is based on a *broad Defence of Illegality*, which in essence tends to consider investor's misconduct as preliminary matter that always prevents the Tribunal from entertaining a claim in the merits. These theories have been based on certain extensive interpretations of the three routes through which, as mentioned earlier, the *Defence of Illegality* is said to operate: a) *in accordance with Host State law clauses*; b) *Legality Doctrine*; c) *Clean Hands Doctrine*. For example, some scholars believe that *in accordance with Host State law clauses* are legality clauses whose purpose is always, and invariably, to tie the protection of an investment with its overall legality, in the sense of its compliance with *all* the laws and regulations in force in the Host State. The argument proceeds that investments that are not made *in accordance with Host State law* are not to be considered investments. Therefore, an arbitral Tribunals' jurisdiction, that only encompasses investments, could not extend *ratione materiae* to these kinds of transactions. In sum, according to this theory, an arbitral Tribunal faced with an illegal investment should always decline its jurisdiction if the applicable BIT contains an *in accordance with Host State law* clause. With regard to the *Legality Doctrine*, some scholars believe that any kind of illegality determines the inadmissibility of the claimant's claim, and hold that this outcome is not related to the degree of offensiveness of the actual violation committed. This is said to be the case because the system of investments protection cannot be seen as advancing illegal investments, of any nature. Lastly, some scholars advocate a *broad Defence of Illegality* by arguing that the *Clean Hands Doctrine* is a general principle of law under Article 38 of the Statute of the International Court of Justice and that therefore international law prescribes that any time a Tribunal is presented with an investment affected by criminal conduct by the investor, it has no alternative but to decline jurisdiction, and abstain to lend its services to a claimant that approaches the court with unclean hands.

940. Proponents of a *broad Defence of Illegality* also believe that a zero tolerance approach to investor's criminality, such as the one that mandates sanction at the level of jurisdiction or admissibility, is appropriate from the policy perspective. It is said for example that sanctioning an investor harshly for corruption, with a declaratory by the Tribunal of lack of jurisdiction, and leaving the claimant to bear all the consequences of a crime to which the Host State has participated as well would be a strong deterrent to investors' illegality and criminal misconduct. Supporters of this idea often rely on certain domestic laws that sanction corruption only at the supply side (namely at the level of the bribe giver, the investor for these purposes) and not also at the demand side (the bribe taker, or the Host State).

941. Contrary to the idea that investor's misconduct should be sanctioned at the jurisdictional or admissibility level as would be required by the application of a *broad Defence of Illegality*, this thesis advocates a *narrow Defence of Illegality*, according to which investor's misconduct should be, save for exceptional circumstances, a matter reserved for the merits stage of the proceedings, where the conduct of the investor and the Host State can be balanced, contrasted and sanctioned. In reaching this conclusion, this thesis a) first assesses critically the three roads through which the *Defence of Illegality* usually operates; and b) then, building on this assessment, creates a hybrid model based on criminal law and international commercial arbitration considerations to address criminality by the investor in a manner that is more in line with the current *lex lata*, and with broader policy considerations on the advancement of the fight against illegal investments.

942. From the first perspective, the thesis demonstrates a number of points.

943. First, that *in accordance with Host State law* clauses are not always legality requirements, that tie the definition of what constitutes an investment with its general compliance with all the laws of the Host State; but that they can also be clauses that simply operate a *renvoi* to domestic legislation for purposes of the definition and identification of what kinds of material assets can constitute an investment under domestic law. In this sense, an in *accordance with Host State law*

clause would simply indicated what assets, and what property rights can be legitimately constituted into an investment, and would therefore not always mandate a Tribunal to decline its jurisdiction *ratione materiae* when faced with an investment which does not comply generally with the laws of the Host State. The actual meaning of *in accordance with Host State law* clauses, out of the two that are possible, is a matter for interpretation to be carried out under the principles of the Vienna Convention, on an *ad hoc* basis and having regard to the actual text of the applicable BIT and its context.

944. Second, as regards the *Legality Doctrine,* that while it is undeniably true that the system of investment law should only aim to protect investments that are legal, the denial of protection must not necessarily occur at the admissibility stage of a case. Quite on the contrary, there is support in arbitral practice that the denial of protection, also in the context of the *Legality Doctrine*, could well occur at the merits stage of the proceedings and that that sanctioning misconduct at the preliminary level under the *Legality Doctrine* should occur only with respect to the most serious violations that an investor may commit.

945. Third, that the basis on which the *Clean Hands Doctrine* is said to operate, namely under the guise of a general principle of law under Article 38 of the Statute of the International Court of Justice, rests on a fallacy. Indeed, the thesis demonstrates, also by means of a comparative law analysis, that the *Clean Hands Doctrine* is, at best, a principle recognised in only few countries, and whose contours are all but clear. Therefore, that it fails to attain any degree of generality that would be necessary for it to operate as a general principle of law. Indeed, the thesis shows that also at the international level, the *Clean Hands Doctrine* has never been applied consistently by international Tribunals, or to the effects of judicial abstention that the *Doctrine*, in its proper formulation, would have.

946. As indicated earlier, building on this assessment of the three roads to which a *Defence of Illegality* operates, the thesis moves on to developing a new and principled model on how to address criminal conduct committed by the investor in the making of the investment. The model's originality relies on the fact

that, unlike the vast majority of models, it is premised on both principles of criminal law and principles of international commercial arbitration: this seems necessary in consideration of the fact that criminality in investment arbitration cannot be addressed only from the perspective of public international law, as most models developed thus far do, but needs to consider both the fact that criminality cannot escape a criminal law analysis and the fact that investment arbitration rests for the most part on the procedural framework of international commercial arbitration. And that, therefore, answering a procedural question such as the stage at which an arbitral Tribunal needs to address investor's misconduct cannot do without looking at international commercial arbitration as a source for solutions.

947. The international commercial arbitration matrix of the model is constituted by a principle that has since long been used in international commercial arbitration: the *Doctrine of Separability*. The *Doctrine of Separability* postulates that the agreement to submit a certain dispute related to a contract to international arbitration is separate from the contract to which it refers. This means, essentially, that the invalidity that may affect the substantive contract, including the invalidity that derives from criminal conduct of one of the parties, does not reverberate on the dispute resolution clause, and hence on the jurisdiction of the arbitral Tribunal. For instance, in the case of a contract that is invalid because it has been procured through corruption, the *Doctrine of Separability* determines that the arbitral Tribunal before which any dispute related to that contract is brought will still be able to exercise jurisdiction on the claimant's case. The thesis has demonstrated that the *Doctrine of Separability* is applied consistently both at the domestic level and at the international level, and that its employment is so wide, general and uncontested that the *Doctrine of Separability* corresponds to a general principle of law under Article 38 of the Statute of the International Court of Justice and to a principle of *Transnational Public Policy*. The public policy behind separability is aimed at preserving international arbitration as a viable mechanism of dispute resolution, and at preventing that the jurisdiction of an arbitral Tribunal may be frustrated simply by the invocation of the claimant's illegal conduct.

948. The thesis has further demonstrated that the *Doctrine of Separability* originally developed in the laboratory of international commercial arbitration, also applies to international investment arbitration: either as a principle directly incorporated in the procedural rules that govern international investment arbitration, or by virtue of its status as a general principle of law under Article 38 of the Statute of the International Court of Justice, and the normative power that derives therein. It has also been shown that the transposition of the *Doctrine of Separability* from international commercial arbitration to international investment arbitration is not hindered by certain differences that characterise the relationship between the two forms of dispute resolution, in particular the privity model that is proper to international commercial arbitration, and the more public character that is a feature of international investment arbitration. While some scholars posit that the private/public divide constitutes a barrier to cross fertilization, this thesis has demonstrated that such divide is not as deep as it is said to be, since elements of privity and publicity feature in both commercial and investment arbitration and that, in any event, the divide is of scarce relevance with regard in particular to the question as to whether the *Doctrine of Separability* can be applied to international investment arbitration.

949. Based on these findings, the *Doctrine of Separability* has been applied to the *Defence of Illegality*, in the three articulations in which it can present itself. In all three cases, the effect of the *Doctrine of Separability* has been that of limiting the operation of the *Defence of Illegality* and the most drastic effects that its broad conceptualization determine on the jurisdiction of an arbitral Tribunal and on the admissibility of the claim. Indeed, the *Doctrine of Separability* is what determines that the *Defence of Illegality* must be applied *narrowly*, as opposed to *broadly*. And that investor's misconduct must be assessed at the merits, as opposed as at the preliminary level.

950. In particular, with regard to the *Defence of Illegality* that operates through an *in accordance with Host State law* clause, the *Doctrine of Separability* constitutes a hermeneutical guidance in the exercise of interpretation of the clauses under the principle of the Vienna Convention. This is so because the *Doctrine of*

Separability, as a general principle of law, operates not only as a source of norms, but also as an interpretive tool under international law. The consequence is that, unless it can be established unequivocally that the *in accordance to Host State law* clause is aimed at disabling the jurisdiction of the Tribunal (or at determining the inadmissibility of the claim in), the *Doctrine of Separability* points towards an interpretation of *in accordance with Host State law* clauses that do not make them general legality requirements, but only clauses that operate a *renvoi* to domestic law as regards the definition of what assets can legally constitute investments under the domestic principles of the forum State; and that, as such, they do not normally mandate a Tribunal to decline its jurisdiction if the investor has procured its investment illegally.

951. The application of the *Doctrine of Separability* to a *Defence of Illegality* that operates through the door of the *Legality Doctrine* has required a somewhat more complex analysis, based on the category of *Transnational Public Policy*. First of all, it has been shown that crimes like fraud and other ordinary violations of the laws of the Host State do not constitute a breach of *Transnational Public Policy*. Therefore, in contrasting the *Separability Doctrine* (which corresponds to a norm of *Transnational Public Policy*), with a *Defence of Illegality* based on conducts that do not breach it, the preservation of the *Transnational Public Policy* on separability means that the *Defence of Illegality* cannot have effects on either the jurisdiction of the Tribunal, or the admissibility of the claim, but rather requires that misconduct not in breach of *Transnational Public Policy* be addressed at the merits stage of the proceedings. The focus has then shifted to the analysis of conducts that constitute a breach of *Transnational Public Policy,* such as corruption and certain serious violations of the laws of the Host State. The *Transnational Public Policy* against these violations has therefore been contrasted with the *Transnational Public Policy* at the basis of the *Doctrine of Separability.* It has been demonstrated, on the basis on an analysis of case law, that the *Transnational Public Policy* against criminality should not always, and automatically, prevail over the *Transnational Public Policy* at the basis of the *Doctrine of Separability*. In particular, it has been show that even among violations of *Transnational Public Policy* it is possible to establish a hierarchy, and

distinguish between more serious, and less serious breaches. Only conduct corresponding to the most serious violations of *Transnational Public Policy* should determine the displacement of the *Doctrine of Separability*, and hence prevent a Tribunal from entertaining a case in the merits. These violations are essentially limited to breaches of human rights and violations of *jus cogens* norms. Corruption, on the other hand, while certainly being a conduct in breach of *Transnational Public Policy*, does not reach the threshold of offensiveness of the breach that is necessary to displace the *Transnational Public Policy* on separability. This finding, although somewhat controversial, is supported by case law of domestic courts that have deal both with contracts aimed at corruption, and with contracts that procured by corruption.

952. Lastly, the *Doctrine of Separability* has been applied to a *Defence of Illegality* based on the *Clean Hands Doctrine*. This is the simplest of the scenarios addressed in this thesis. In fact, since the *Doctrine of Separability* is a general principle of law which corresponds to a norm of *Transnational Public Policy*, and the *Clean Hands Doctrine* does not have this status, and is not recognised as a general principle in international law, the latter must prevail in the conflict between the two. Therefore, also the last way in which the *Defence of Illegality* can operate does not authorise a Tribunal to decline to exercise its jurisdiction, or declare the inadmissibility of an investor's claim.

953. The outcome of the application of the *Doctrine of Separability* to the *Defence of Illegality*, as explained in the paragraphs above, is that in the vast majority of cases, an arbitral Tribunal will have to address investor's misconduct at the merits phase of the proceedings. How is an arbitral Tribunal to sanction investor's misconduct at that stage? The answer to this question is provided by an analysis based on criminal law categories, and in particular on the notions of reciprocal responsibility and culpability of the parties to a crime. This constitutes the criminal law dimension of the hybrid model proposed in this dissertation.

954. In particular, unlike the models proposed by scholars who have investigated criminality in investment arbitration, the model proposed here moves

from the consideration that not all criminality is the same, and that investor's criminal conduct therefore cannot be treated with a unitary response, but rather requires an approach that takes into account the specific, and defining features of the crime committed by the investor. For these purposes, the thesis proposes a basic taxonomy of investor misconduct, by distinguishing crimes that are unilateral in nature, in the sense that they can be committed by the investor alone, without any cooperation on the part of the Host State; and crimes that are bilateral in nature, in the sense that they cannot be completed except with the contribution of both the investor and the Host State (as is the case, typically, in corruption). The thesis elaborates further this basic taxonomy to identify the respective levels of culpability of both the Host State and the investor, in relation to each category of crimes. For example, in the case in which the investor has committed fraud to the detriment of the Host State, the investor will normally retain the full culpability for the crime, since, structurally, fraud is a unilateral crime. However, it may be possible that the Host State has condoned that crime committed against it, for example by exploiting the investment to its advantage, despite being aware of its illegal nature. In this case the level of respective culpabilities of the parties may shift, and a unilateral crime like fraud may nevertheless determine the apportionment of part of the culpability also on the Host State.

955. Also, in the event the investor has unilaterally violated the laws of the Host State to secure an investment, it will normally retain the full culpability for its conduct. However, it is possible to identify circumstances in which, also in the case of a unilateral violation of law, the Host State may have to be allocated a part of the culpability for the violation. For instance, when the investor has committed a inculpable mistake due to the lack of clarity of the law of the Host State, and therefore has not acted with the full intent of violating the law; or when the Host State had represented formally to the investor that its conduct was in line with the laws and regulations of the forum, only to change its mind at a later stage.

956. Despite being a viable method also with regard to unilateral crimes, it is with respect to bilateral crimes that the balancing of the conduct of both the investor and the Host State becomes crucial. In the case of corruption, a

structurally bilateral crime, normally both the investor and the Host State retain a measure of mutual responsibility and culpability. Criteria can also be developed to apportion this shared culpability in more specific terms to each of the parties to the crime. For example, bribe solicitation and bribe extortion correspond to a higher level of culpability on the part of the Host State, and to a lower level of culpability on the part of the investor, when compared to situations in which it is the investor who takes the initiative of offering the bribe. Similarly, failure to prosecute the crime of corruption by the Host State at the domestic level can also signal a marked level of culpability on the part of the State, in a similar manner to failure to implement at the level of domestic legislation the provisions of the international regulatory regime against bribery, to which States are bound. From the perspective of assessing the culpability of the investor, in a similar manner, investors who commit corruption in furtherance of a company culture, or policy, retain a higher level of culpability when compared to investors who have engaged in corruption only occasionally, and due to the *ultra vires* acts of one or more of their employees. Indeed, in this case, the corrupt employee does not act in furtherance of a corruption-prone culture of the investor, but rather against the business culture of the investor.

957. The thesis proposes that the graduation of culpabilities between the investor and the Host State, and the balancing of their respective conducts, should inform the analysis of the Tribunal at the merits stage, and should be the basis for the determination of the appropriate sanction to the misconduct committed by the investor. In particular, that such sanction should be proportionate and adequate to the investor's level of culpability in the commission of the crime, but that also the Host State, when it has engaged in criminal conduct, and when it retains in any event a degree of culpability with respect to the investor's misconduct, should be equally sanctioned.

958. The balancing of the conduct of the parties on the basis of a mutual standard of culpabilities can occur at the merits stage essentially in three ways: a) through an apportionment of damages; b) though the provision of restitutionary remedies; c) through an apportionment of costs. From the first perspective, this

thesis has proposed that the sanction to the criminal misconduct in which the investor has engaged should consist in a reduction of the amount of damages that are awarded to it as a consequence of the Host State having breached the standard of protection owned to the investment under international law. For instance, in the typical situation in which the investor has corrupted the Host State to secure a certain investment that is then expropriated illegally by the Host State, and has therefore found on the other side of the corruptive scheme a willing official of the Host State ready to accept the bribe, the consequence of criminality should not be the outright dismissal of the investor's claim, but rather a substantive reduction of the amount of damages that would have been owned to it, had corruption not occurred. For instance, if 100 is the amount that should have been paid to the investor, had corruption not occurred, the fact that corruption has occurred means that such amount is halved, indicatively, to around 50. In addition, the fact that the investor has taken the initiative of proposing the bribe should account for an additional apportioning of culpability to it, *vis à vis* the culpability of the Host State. The model has proposed that this should account for an additional decrease of the damages to which the investor is entitled owing to the conduct of the Host State, for example by another 10%. In this way, the amount of damages owned to the investor becomes only 40, out of the 100 that it would have been entitled to, had it not engaged in corruption. Now, let us imagine that the act of corruption committed by the investor has not been accidental, and contrary to the investor's policies against corruption; but rather that the act of corruption is the consequence of the lack of an internal anti-corruption system, or, even more seriously, an act that stems from a policy of the investor to bribe foreign officials, in order to secure investments in foreign countries. In this case, the amount of damages recognised to the investor should be diminished further, due to the high level of culpability and the disvalue of its conduct.

959. The reverse situation is constituted by the case in which again, both parties have engaged in the corrupt conduct, but, for example, the investor has adopted an internal system to deter the commission of corruption, and the initiative to bribe has not been the investor's, but rather has derived from a specific request in this sense by the Host State, which has therefore solicited the bribe. In this case,

the investor is also not entitled full damages, but the culpability of the Host State in the bribery scheme is greater than that of the investor. So, once again, the following calculation is proposed: 100 is the amount of damages that the investor would have been entitled to, had corruption not occurred. The bilateral crimes of corruption determines that the damages owned to the investor are reduced to 50, due to its culpability in the crime, but not totally annulled, due to the culpability that also the Host States retains in the criminal conduct. Now, if the Host State has solicited the bribe, an extra layer of fault is apportioned to it, so that the investor is entitled not to 50, but to 60. If the Host State has not limited itself to soliciting the bribe, but it has extorted it by threat, then this circumstance may mean that the investor has paid the bribe under duress, and hence is entitled to the payment of full damages, despite having engaged formally in the payment of a bribe. While all these scenarios, and others, have been discussed in the context of the dissertation, and it is not necessary to go over them in full again, the examples presented above give an idea of how the model based on mutual reparation of culpabilities would work in practice.

960. At the level of remedies, it has been shown that cases exist in which, also in respect of contracts procured by corruption, the parties can be restituted in *integrum*, except as regards the payment of the bribe, which it would be contrary to *Transnational Public Policy* to reimburse to the bribe payor. Also restitutionary remedies are a way to apportion more equitably the respective culpabilities of the parties in the commission of a certain crime.

961. At the level of cost reparation, also, the fact that both the investor and the Host State bear a degree of culpability with regard to certain instances of investor's misconduct means that Tribunals should move away from the criteria according to which the losing party has to bear also the expenses of the winning party. Indeed, an apportionment of culpability and damages as explained in the previous pages means that it might not be possible to decide in each case who exactly the winning party is, and who is the losing party. Especially in cases when both parties share equal or similar levels of culpability with regard to the misconduct by the investor that is invoked as a defence by the Host State, so that

damages owned to the investor are actually reduced to about 50% of what it would have been entitled to, but for corruption, the assessment about who is the winner and who is the loser may be difficult. In the circumstances, it seems more appropriate that each party is left to bear its own costs.

962. The model proposed in this thesis, that rests on the international commercial arbitration principle of separability, and on the criminal law category of culpability in the commission of a crime, is not only based on what seems to be the correct understanding of the *lex lata* that regulates investor's misconduct in international arbitration, but also on policy considerations. Indeed, it has been shown in the last Chapter of this thesis that sanctioning investor's criminality, including bilateral crimes, by placing all the consequences of the misconduct on the investor and by dismissing its claim at the preliminary level (jurisdiction or admissibility), does not produce the effect of drying up criminality in foreign investments, but rather only determines more criminality. The case of corruption, as the archetypical bilateral crime in which an investor can engage, is significant. Empirical studies demonstrate that when States are aware that they will face no consequence for engaging in this crime, they will have no incentive in fighting corrupt practices domestically; indeed, knowing that corruption may constitute a full defence in the context of investment proceedings brought by an investor, States may have an incentive in fostering corrupt practices, and in not complying with the international regulatory regime to fight bribery. And, once a Host State engages in corruption, and hence lays the foundations for a full defence in a possible investment claim, it may even have an incentive in engaging in illegal conduct *vis à vis* the investor's investment (such as expropriation, denial of fair and equitable treatment, etc.), in the knowledge that its conduct will go completely unsanctioned, and the illegal enrichment that derives from it will never be addressed by an arbitral Tribunal.

963. Overall, the thesis concludes that the hybrid model proposed in this work should be preferred to models that treat investor's misconduct at the jurisdictional or admissibility level. This is because the model developed in the previous pages incorporates aspects of criminal law and international commercial

arbitration that cannot be neglected when dealing with criminality in investment law and that allow a better interpretation of the *lex lata*; and because it brings about solutions that, also from the policy perspective, are to the benefit of both the investor, the Host State, and international community at large: fighting criminality in foreign investments, while advancing the system of international arbitration and the flow of foreign investments in Host States.

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Paolo Busco

Résumé en français

***

La "Défense de l'Illégalité" dans l'Arbitrage International des Investissements:

Un Modèle Hybride pour Remédier à la Conduite Criminelle de l'Investisseur, à la Croisée des Chemins entre le Principe de Culpabilité du Droit Pénal et la Doctrine de la Séparabilité de l'Arbitrage Commercial International

***

Cette thèse analyse la question relative au cas où, dans l'arbitrage internationale en matière d'investissements, dont le but principal est l'application des normes visées à la protection des investisseurs, l'Etat défendeur soutient que l'investissement pour lequel la protection est demandée a été obtenu au moyen d'une forme de criminalité. Dans ce contexte, la défense de l'illégalité soulevée par les État dans les contentieux d'investissement est de plus en plus courante. Cette défense fonctionne selon le schéma suivant: un État hôte enfreint les dispositions de fond que le droit international accorde aux investissements effectués dans un pays étranger, par exemple en exproprient un investisseur étranger de son investissement sans indemnité. Dans le différend qui s'ensuit devant un tribunal arbitral d'investissement l'État défendeur invoque l'illégalité commise par l'investisseur lors de la réalisation de l'investissement pour se défendre contre la procédure arbitrale intenté contre lui. Le but principal de cette étude est celui de démontrer que des considérations systématique de nature strictement juridique, aussi bien que de politique juridique, exigent que la défense d'illégalité dans l'arbitrage d'investissement soit strictement restreinte et qu'un tribunal ne puisse décliner d'exercer sa competence/jurisdiction que dans des cas exceptionnels. Cette étude aboutie à la conclusion d'après laquelle les tribunaux d'arbitrage devraient plutôt examiner au cas par cas au stade du fond l'ensemble des circonstances soumises devant lui et procéder à une mise en balance approprié entre les comportements de l'investisseur et ceux de l'État hôte.

Résumé en français (version étendue)

Selon un point de vue commun, l'arbitrage international et le droit pénal sont deux planètes distinctes et distantes, qui ne se croisent jamais. Cette séparation serait corrélée aux caractéristiques intrinsèques de chacun: l'arbitrage est un mécanisme de résolution des différends de nature consensuelle, caractérisé par une procédure privée et conduisant à une détermination finale et contraignante des droits et obligations des parties. Dans sa formulation la plus simple, l'arbitrage est fondé sur le consentement des parties et se caractérise par leur autonomie, par le pouvoir discrétionnaire des arbitres en ce qui concerne la procédure arbitrale et par le principe général de non-ingérence des tribunaux nationaux. Le mécanisme d'arbitrage international a été conçu, du moins à l'origine, pour servir exclusivement les intérêts des parties et non l'intérêt général. C'est un moyen de régler les différends d'une manière qui tienne compte des intérêts particuliers des les marchands, ce qui permet de régler rapidement un différend et de commencer à traiter à nouveau dans les meilleurs délais. Pour ces raisons, les intérêts systémiques n'étaient pas, et ne pourraient pas, être une préoccupation de l'arbitrage international.

Le droit pénal, en revanche, est la personnification de la fonction de l'État. La capacité de criminaliser certains comportements et d'utiliser la force de l'État pour assurer le respect des normes est la manifestation du pouvoir public à son sommet. Le fait de considérer que les systèmes de justice pénale visent, le cas échéant, à porter atteinte aux droits fondamentaux des individus, signifie que non seulement les dispositions de fond, mais également les procédures pénales se caractérisent par des prescriptions non dérogeables. En outre, un système de justice pénale vise, par définition, à préserver et à renforcer le bien public et les droits publics, plutôt que les intérêts privés. Et en effet, une chose apparaît clairement également à un niveau d'analyse superficiel: un système de justice pénale poursuit normalement une multiplicité d'objectifs, qui ont tous une connotation nettement publique. Prenons la raison derrière l'infliction d'une sanction pénale. Les théories varient beaucoup, mais la plupart reconnaissent qu'une sanction pénale poursuit un ensemble d'objectifs.

La question principale dans le discours pénal est donc de savoir quel objectif doit prévaloir ou comment équilibrer les objectifs, plutôt que sur le caractère polyvalent, axé sur le public, de la sanction pénale, qui est pris pour acquis. On pourrait considérer la rétribution, la prévention spéciale et la prévention générale comme les objectifs les plus courants poursuivis par la sanction.

Ces finalités publiques ont des implications importantes au niveau "macro" et leur impact va bien au-delà de l'affaire pénale spécifique qui est portée devant un tribunal pénal.

Cependant, malgré ces différences, la séparation entre l'arbitrage international et le droit pénal est plus apparente que réelle. Comme l'a noté un professeur,

«qu'on déplore ou qu'on approuve, l'irruption du droit pénal dans le monde feutré de l'arbitrage est vraiment une réalité qui doit être observée avec attention»[1].

Il existe de nombreux cas où des intersections entre l'arbitrage en matière d'investissement et le droit pénal peuvent se produire.

Par exemple, la question de savoir si les arbitres doivent décider *ex officio* et éventuellement signaler aux autorités pénales compétentes d'un État du forum tout soupçon de comportement criminel qui leur est présenté est un sujet de débat; ou si le comportement criminel ne doit être invoqué que par les parties dans une procédure arbitrale. De plus, il y a de plus en plus de cas d'abus du processus arbitral, utilisé comme mécanisme pour blanchir de l'argent provenant d'activités illicites. Dans ces cas, l'arbitrage serait une simple simulation et le différend entre les parties serait entièrement fictif: quelles seraient les conséquences dans une situation comme celle-ci?

Les questions de preuve sont également au cœur de la relation générale entre l'arbitrage et le droit pénal: quelle est la norme de preuve requise pour qu'un tribunal soit convaincu qu'un comportement criminel a été commis par un investisseur ou par une partie à un contrat? Quels pouvoirs d'office le Tribunal possède-t-il à cet égard? Et quoi encore, si une partie omet de divulguer certains documents en invoquant une disposition de droit pénal sur le secret qui l'empêche de le faire? Une autre question très discutée est celle qui concerne les procédures arbitrales et pénales parallèles; de plus, la question de savoir comment traiter la criminalité qui affecte les aspects procéduraux de la procédure arbitrale (par opposition à la substance de l'objet en litige, par exemple l'investissement ou le contrat) est une question débattue.

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[1] de Fontmichel, A. L'Arbitre, le Juge et les Pratiques Illicites du Commerce International. Paris: Panthéon-Assas Paris II, 2004, 14.. Fouchard, P. «'Ou va l'Arbitrage International?» Revue de Droit de McGill, 1989: 436 – 453, 436.

Cette thèse concerne l'un des nombreux cas où le droit pénal et l'arbitrage international se croisent: le cas d'investisseurs ayant recours à une forme d'illégalité, y compris une faute pénale, pour obtenir un investissement dans un État hôte. La structure classique de la criminalité pouvant affecter un investissement est constituée par la corruption, de la part de l'investisseur, des fonctionnaires d'un État hôte, afin de garantir la possibilité de faire des affaires dans le pays; à côté de la corruption, la fraude et les violations de la législation du pays d'accueil sont devenues des cas fréquents dans lesquels des investisseurs s'engagent pour pouvoir investir dans un pays donné ou pour rendre un investissement plus rentable. Plusieurs scénarios sont rapportés: celui dans lequel l'investisseur omet de divulguer des caractéristiques importantes de son investissement, de manière à donner l'impression que l'opération d'investissement est compatible avec la législation nationale de l'État hôte; celle dans laquelle l'investisseur exagère certains aspects de son organisation, de sa structure et de ses capacités financières, de manière à obtenir une offre impossible autrement; celui dans lequel l'investisseur ne se conforme généralement pas à la législation du pays hôte, à son avantage.

Parallèlement à l'augmentation du comportement criminel des investisseurs, un phénomène important a commencé à se manifester assez fréquemment: le recours des États hôtes à la "Défense de l'Illégalité" fondée spécifiquement sur le comportement criminel de l'investisseur. En termes généraux, une "Défense de l'Illégalité" consiste à invoquer le comportement illégal du demandeur pour interdire, ou en tout cas rejeter, sa demande relative à une transaction affectée par cette illégalité. Dans l'arbitrage d'investissement, la "Défense de l'Illégalité" signifie notamment que l'État hôte invoque le comportement criminel commis par l'investisseur pour obtenir un investissement dans le pays, à titre de défense dans le cadre d'une procédure engagée par l'investisseur contre l'État hôte, pour violation de les normes de protection des investissements détenus en vertu de TBI ou du droit international général. À titre d'exemple, une "Défense de l'Illégalité" fondée sur la corruption d'un investisseur pourrait être invoquée dans le cadre d'un litige en matière d'investissement intenté par l'investisseur pour violation du principe de traitement juste et équitable, ou pour expropriation sans indemnité en bonne et due forme, ou encore pour toute autre forme de violation illicite.

Concrètement, l'État hôte pourrait invoquer la défense d'illégalité de trois manières différentes dans une affaire d'investissement.

Premièrement, en faisant référence à certaines clauses que l'on trouve parfois dans les TBI, selon lesquelles la protection des TBI et du droit international en général est réservée aux investissements effectués conformément au droit de l'État hôte. Dans ce cas, la "Défense de l'Illégalité" fonctionnerait sur la base d'un lien direct et textuel avec le TBI, afin d'exclure de la protection les investissements qui sont criminels et illégaux et donc contraires aux lois de l'État hôte ("in accordance with State law clauses"); deuxièmement, par référence à un principe général selon lequel, même en l'absence d'une clause explicite "in accordance with State law", le système de protection des investissements devrait être réservé aux investissements légaux. Cette position, appelée "Doctrine de la Légalité", postule qu'une interprétation du système des TBI conforme aux principes de la Convention de Vienne, y compris la notion fondamentale de bonne foi, impose de ne pas protéger les investissements illégaux. Troisièmement, en référence à la doctrine dite "Des Mains Propres". La doctrine "Des Mains Propres", dans sa formulation appropriée, est une doctrine d'abstention judiciaire qui découle de la maxime latine "*nemo auditur turpitudinem suam allegans*" et selon laquelle un tribunal ne devrait pas prêter son service à un demandeur lorsque celui-ci a commis une illégalité en ce qui concerne la transaction (y compris l'investissement) pour laquelle il demande une protection. Selon ses partisans, la docrtine "Des Mains Propres" opérerait comme un principe général du droit au titre de l'article 38 du Statut de la Cour Internationale de Justice.

Si, comme on l'a vu, la "Défense d'Illégalité" pouvait être invoquée selon les trois voies susmentionnées, une défense fondée sur la criminalité du demandeur pourrait également déterminer trois effets sur sa demande.

Premièrement, le tribunal arbitral peut décider de traiter la faute de l'investisseur comme une question de compétence. Dans ce cas, un investissement obtenu par corruption, fraude ou violation des lois de l'État hôte obligerait le Tribunal à simplement décider de ne pas instruire l'affaire et à le rejeter au niveau juridictionnel. À titre subsidiaire, le Tribunal pourrait décider que la faute de l'investisseur détermine l'irrecevabilité de la demande du demandeur, mais n'empêche pas la compétence du Tribunal. L'approche juridictionnelle et la question de la recevabilité de la faute d'un investisseur constituent une "Défense de l'Illégalité" "vaste", en ce sens qu'elles déterminent des effets de grande portée, tels que le non-respect de la demande de l'investisseur au niveau préliminaire.

Comment un tribunal des investissements devrait-il concrètement traiter une “Défense de l’Illégalité”? Quelle alternative devrait-il choisir, entre juridictionnel, recevabilité et mérite? Telle est la question de recherche sur laquelle porte cette thèse. L’importance de la question de recherche est étroitement liée à l’importance de distinguer entre compétence, recevabilité et fond. Dans l’arbitrage international en matière d’investissement, la déclaration d’incompétence est la sanction la plus grave qui puisse être infligée à une demande illégale: une déclaration d’incompétence n’est pas curable et le Tribunal peut se déclarer incompétent sans examiner le fond de la demande de les parties. Une déclaration selon laquelle la demande est irrecevable, même si elle opère à un niveau préliminaire, est une conséquence moins grave pour l’investisseur qu’une déclaration d'incompétence.

Par exemple, l’irrecevabilité est curable et, en outre, les questions relatives à la recevabilité sont souvent étroitement liées aux questions concernant le fond, de sorte qu’un tribunal qui évalue les questions en fonction de la recevabilité puisse procéder à une analyse et prendre connaissance de certaines questions dans semblable au type d’analyse effectuée au stade du mérite. Cependant, rejeter une demande comme irrecevable empêche toujours le Tribunal d’adopter une sentence qui puisse en quelque sorte tenir compte de la conduite des deux parties et du contenu de leurs positions respectives. Enfin, l’appréciation de l’illégalité de la conduite de l’investisseur au stade du mérite permet au Tribunal de prendre en compte la conduite des deux parties de manière approfondie et complète et d’équilibrer convenablement les comportements respectifs des parties. De plus, la demande d’un investisseur qui est autorisée à aller au fond encourage les parties à parvenir à un règlement mutuellement convenu avant qu’une décision judiciaire ne soit rendue - ce qui ne pourrait pas arriver, logiquement, à un rejet de la demande à le niveau préliminaire.

Plusieurs tribunaux et spécialistes ont proposé de répondre à la question de recherche susmentionnée d’une manière qui caractérise le comportement criminel d’un investisseur comme une question préliminaire qui empêche toujours le Tribunal de statuer sur le fond. Ces théories reposent sur certaines interprétations approfondies des trois voies par lesquelles, comme on l’a mentionné précédemment, la “Défense d’Illégalité” est réputée fonctionner: a) in accordance with Host State law clause; b) Doctrine de la légalité; c) Doctrine des mains propres.

Par exemple, certains tribunaux et spécialistes estiment que clauses “in accordance with Host State law” sont des clauses de légalité ayant toujours pour but de lier systématiquement la

protection d'un investissement à sa légalité globale, c'est-à-dire à la conformité à toutes les lois et réglementations en vigueur dans l'État hôte. Il en résulte que les investissements qui ne sont pas réalisés conformément à la législation de l'État d'accueil ne doivent pas être considérés comme des investissements. Par conséquent, la compétence d'un tribunal arbitral, qui ne comprend que les investissements, ne peut s'étendre *ratione materiae* à ce type de transaction. En résumé, selon cette théorie, un tribunal arbitral confronté à un investissement illégal devrait toujours décliner sa compétence si le TBI applicable contient une clause de conformité avec la législation de l'État hôte (in accordance with Host State law clause).

Le Tribunal arbitral a adopté cette approche, par exemple dans l'affaire Inceysa c. El Salvador. Le requérant a introduit une réclamation contre El Salvador, se plaignant d'une expropriation à l'égard d'un contrat attribué au réclamant par la République d'El Salvador. Le défendeur a fait valoir, parmi les moyens de défense qu'il avait soulevés, que l'opération en question ne méritait pas d'être protégé par le TBI, compte tenu du fait qu'elle n'avait pas été faite dans le respect des lois et règlements de l'État hôte. En particulier, El Salvador a expliqué qu'Inceysa avait sécurisé son investissement par la fraude, après avoir soumis de faux états financiers, dénaturé l'expérience du seul administrateur d'Inceysa, dénaturé l'expérience d'Inceysa dans le domaine de l'inspection des véhicules et ses relations avec son supposé partenaire stratégique et a présenté de faux documents à l'appui de l'existence de contrats de plusieurs millions de dollars passés par Inceysa aux Philippines et au Panama. Le Tribunal s'est référé à l'article III du TIB Espagne - El Salvador, qui régissait les relations entre l'investisseur et l'État hôte, en vertu duquel: chaque Partie contractante protège sur son territoire les investissements réalisés, conformément à sa législation. Elle a conclu que l'investissement réalisé par Inceysa n'était pas un investissement protégé, car il n'avait pas été effectué conformément à la législation d'El Salvador. Il a donc décidé de décliner sa compétence.

En ce qui concerne la "Doctrine de la Légalité", certains universitaires et tribunaux estiment que toute forme d'illégalité détermine l'irrecevabilité de la demande du demandeur et que c'est le cas, car le système de protection des investissements ne peut être perçu comme une avancée des investissements illicites. La Doctrine de la Légalité fonctionne également en l'absence d'une clause "in accordance with Host State law". Une première affirmation de la Doctrine de la Légalité en droit des investissements se trouve dans la décision du tribunal arbitral dans l'affaire Phoenix contre République tchèque. Dans cette affaire, même s'il existait une clause "in

accordance with Host State law" spécifique dans le TBI, le Tribunal a déclaré de manière plus générale que:

«Le Tribunal est d'avis que cette condition - la conformité de l'établissement de l'investissement avec le lois - est implicite même lorsque cela n'est pas expressément indiqué dans le traité pertinent».[2]

Le tribunal de Phoenix, dans sa conceptualisation de la condition de légalité implicite, avait à son tour fait référence à une décision rendue par un tribunal arbitral dans l'affaire Plama c. Bulgarie. Dans ce cas, la plainte était fondée sur le traité sur la charte de l'énergie, qui ne contenait pas une "in accordance with Host State law" clause. Le Tribunal a statué que:

«Contrairement à un certain nombre de traités d'investissement bilatéraux, le traité sur la Charte de l'énergie (ETC) ne contient pas de disposition exigeant que l'investissement soit conforme à une loi particulière. Cela ne signifie toutefois pas que les protections prévues par le TCE couvrent tous les types d'investissements, y compris ceux qui sont contraires au droit national ou international (...)»[3]

Le Tribunal arbitral conclut que les protections de fond du TCE ne sauraient s'appliquer aux investissements qui sont faits contrairement à la loi. Pour les partisans d'une Défense générale de l''Lllégalité par le biais de la Doctrine de la Légalité, limiter la protection aux investissements légaux signifie essentiellement qu'un tribunal doit toujours refuser de statuer sur un investissement illégal au niveau juridictionnel, ou au niveau de la recevabilité.

Enfin, certains spécialistes préconisent une «Défense de l'Illégalité » large en recourant à la doctrine dite «Des mains propres ». Comme indiqué précédemment, la doctrine exige en substance qu'un tribunal refuse de mettre l'appareil de justice au service d'un demandeur qui s'est livré à un comportement illégal ou moralement répréhensible. L'effet de la doctrine des Mains Propres a une incidence sur la compétence d'une cour ou d'un tribunal. Elle a pour effet de priver le demandeur de son droit d'accès à la procédure judiciaire. En d'autres termes, un tribunal devrait refuser la qualité pour agir au demandeur s'un demander s'adresse à lui pour

[2] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, 15/04/2009, para 101.
[3] Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, 27/08/2008

demander une protection contre toute violation de ses droits lorsque ce demandeur a été impliqué dans un comportement illégal lié au droit qu'il cherche à protéger. Selon les mots de sir Gerald Fitzmaurice:

«Celui qui a recours à l'équité pour obtenir un soulagement doit venir avec les mains propres».[4]

Les partisans d'une Défense générale de l'Illégalité fondée sur la Doctrine Des Mains Propres croient que la doctrine est un principe général du droit au sens de l'article 38 du Statut de la Cour internationale de justice et que, par conséquent, le droit international prescrit que si un tribunal traite d'un investissement affecté en raison de la conduite criminelle de l'investisseur, le Tribunal n'a d'autre choix que de décliner sa compétence et de s'abstenir de prêter ses services à un demandeur qui aborde le tribunal avec des mains impures.

Les défenseurs d'une Défense générale d'Illégalité estiment également qu'une approche de tolérance zéro à l'égard de la criminalité des investisseurs, telle que celle qui impose une sanction au niveau de la juridiction ou de la recevabilité, est appropriée du point de vue de la "politique". Il est dit par exemple que le fait de condamner sévèrement un investisseur pour corruption, avec une déclaration d'incompétence du tribunal, et de laisser le demandeur assumer toutes les conséquences d'un crime auquel l'État hôte a également participé, constituerait un puissant moyen de dissuasion de l'illégalité et l'inconduite criminelle des investisseurs.[5] Selon ces spécialistes, l'application à grande échelle de la défense d'illégalité est particulièrement nécessaire dans le cas des pays en développement, qui se trouvent dans une situation comparativement plus difficile que les investisseurs pour prévenir et combattre les comportements criminels, en particulier de nature corrompue. L'argument est le suivant: les entreprises qui investissent dans des pays étrangers sont des investisseurs avertis, dépensant déjà d'énormes sommes d'argent pour faire respecter au sein de leurs structures commerciales les normes anticorruption et les programmes de conformité requis par la législation nationale et internationale. En revanche, les États hôtes sont souvent déficients dans la phase de mise en œuvre de la législation anticorruption. À cet égard, être entièrement responsable de la corruption est et

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[4] Fitzmaurice, G. «The General Principles of International Law considered from the Standpoint of the Rule of Law» 92 Recueil des Cours, 1957-II: 1 -227,119.

[5] Yackee, J. http://opiniojuris.org/2012/05/31/vjil-symposium-jason-webb-yackee-responds-to-bjorklundlitwin-and-wong/

devrait constituer une autre sanction pour les sociétés et les entreprises qui n'ont pas fait preuve de diligence dans l'application des dispositions anticorruption qui leur sont applicables.

Selon les mêmes spécialistes, il faudrait en outre tenir compte de certaines considérations systémiques qui militent en faveur d'une responsabilité exclusive de la responsabilité de la corruption (ou d'une autre criminalité) vis-à-vis de l'investisseur. Cette approche, pour ceux qui la soutiennent:

«[A] certes laissé les acteurs de l'État s'empêcher d'accepter des pots-de-vin. Mais la solution de rechange, qui consiste à permettre aux tribunaux de peser et d'équilibrer les fautes de l'État et des investisseurs dans une transaction corrompue particulière, risque de les placer dans une situation dangereuse. Les régimes politiques nationaux, en particulier après les transitions politiques, peuvent dépendre pour leur soutien politique intérieur en partie de leurs efforts pour «nettoyer la maison», c'est-à-dire pour dénoncer et corriger les abus du régime précédent. Ces efforts doivent être soutenus dans la mesure où ils peuvent contribuer à créer un cercle vertueux de normes anti-corruption auto-renforçant au sein du système politique. Pour un tribunal du CIRDI, juger que la participation d'un régime antérieur à la corruption signifie qu'une concession obtenue par la corruption peut toujours bénéficier des protections offertes par le TBI risque de nuire aux efforts visant à atteindre un équilibre politique caractérisé par une corruption moins fréquente»[6]

Contrairement à l'idée selon laquelle la faute d'un investisseur devrait être sanctionnée au niveau de la juridiction ou de l'admissibilité, comme le demanderait l'application d'une Défense de l'Illégalité, cette thèse préconise une défense étroite de l'illégalité, selon laquelle la faute de l'investisseur devrait être réservée à la phase de la procédure au fond, où le comportement de l'investisseur et de l'État hôte peut être équilibré, contrasté et sanctionné. En tirant cette conclusion, cette thèse a) commence par évaluer de manière critique les trois voies par lesquelles la défense d'illégalité opère habituellement; et b) ensuite, sur la base de cette évaluation, crée un modèle hybride basé sur des considérations de droit pénal et d'arbitrage commercial international pour traiter la criminalité de l'investisseur d'une manière plus conforme à la lex lata actuelle et

6 Yackee, J. http://opiniojuris.org/2012/05/31/vjil-symposium-jason-webb-yackee-responds-to-bjorklundlitwin-and-wong/

aux considérations de politique plus générales relatives à promotion de la lutte contre les investissements illégaux.

De la première perspective, la thèse démontre plusieurs points.

Premièrement, les clauses “in accordance with Host State law” ne sont pas toujours des clauses de légalité liant la définition de ce qu’est un investissement à sa conformité générale avec toutes les lois de l’État hôte; mais elles peuvent aussi être des clauses qui renvoient simplement à la législation nationale aux fins de la définition et de l’identification des types d’actifs matériels pouvant constituer un investissement en vertu du droit interne. En ce sens, une clause “in accordance with Host State law” indiquerait simplement quels actifs et quels droits de propriété peuvent être légitimement constitués en un investissement, et ne donnerait donc pas toujours à un tribunal le droit de décliner sa compétence ratione materiae devant un investissement qui n’est généralement pas conforme à la législation de l’État hôte. Conformément à la Convention de Vienne, la signification de “in accordance with Host State law”, sur les deux possibles, doit être interprétée sur une base *ad hoc* et en tenant compte du texte même de le TBI applicable et son contexte. Selon une approche conforme aux règles d’interprétation de Vienne, il y aura certains cas où la clause de conformité avec la législation de l’État hôte est une clause de légalité; et d’autres, dans lesquels ce n’est pas. C’est précisément parce qu’une interprétation ad hoc de clauses de droit interne est nécessaire, il serait également faux de conclure automatiquement qu’une clause “in accordance with Host State law” est une clause de légalité concernant la conformité générale de l’investissement avec les lois de l'Etat hôte en vigueur.

Deuxièmement, s’agissant de la Doctrine de la Légalité, bien qu’il soit indéniable que le système du droit des investissements ne devrait viser qu’à protéger les investissements légaux, le refus de protection ne doit pas nécessairement se produire au stade de la juridiction ou de l’admissibilité de la cause. Le scénario qui se présente sous la doctrine de la légalité est en fait différent du cas d’une clause de légalité conforme à la législation du pays hôte: dans une telle situation, un investissement illégal ne serait pas qualifié d’investissement, et le Tribunal serait obligé de décliner sa compétence ratione materiae. De même, la doctrine des mains propres, qui constitue un autre moyen par lequel la Défense d’Illégalité opère, relie directement l’illégalité d’un investissement à une déclaration d’incompétence prononcée par un tribunal. En effet, comme indiqué plus haut, l’un des motifs de la doctrine Clean Hands est de préserver l’intégrité du

tribunal de l'exploitation de ceux qui demandent réparation, bien qu'ils aient commis un tort; et le seul moyen pour un tribunal de préserver son intégrité face à un comportement illégal est de décliner sa compétence et de ne pas connaître du tout.

Ce droit de "sortie juridictionnel" n'est toutefois pas obligatoire en vertu de la Doctrine de la Légalité. Au contraire, cela n'est que facultatif. Nier la protection du système des TBI contre les investissements illégaux ne signifie pas que le Tribunal doit le faire en déclinant inévitablement sa compétence. La position du Tribunal dans l'affaire Yukos c Russie est significative à cet égard. Dans cette affaire, le Tribunal a reconnu l'existence d'une règle générale de légalité, implicite dans le système de protection des investissements. Mais aussi, elle a fait valoir que:

"[...] le Tribunal n'a pas besoin de décider ici si l'exigence de légalité qu'il lit dans le TCE constitue un obstacle à la compétence ou, (...) doit priver les demandeurs de la protection de fond de l'ECT."[7]

En adoptant cette position, le Tribunal a reconnu qu'en vertu de la Doctrine de la Légalité, il était possible de faire plus d'une réponse pour traiter un investissement illégal; l'un, est de décliner sa compétence. Mais une autre alternative est disponible: empêcher le demandeur d'accéder à la protection matérielle du traité. Selon la pratique arbitrale, le déni de protection, y compris dans le cadre de la Doctrine de la Légalité, pourrait bien se produire au stade de la procédure quant au fond et la sanction de l'inconduite au niveau préliminaire dans la doctrine de la légalité ne devrait concerner que les violations les plus graves qu'un investisseur peut commettre.

Troisièmement, la base sur laquelle la doctrine "Clean Hands" est réputée fonctionner, à savoir sous l'apparence d'un principe général de droit énoncé à l'article 38 du Statut de la Cour Internationale de Justice, repose sur une erreur. Une analyse comparative montre que la doctrine n'est, au mieux, présente que dans certains systèmes de common law, notamment au Royaume-Uni et aux États-Unis. Même dans ce cas, cependant, les limites et le champ d'application réel de la doctrine ne sont pas clairs, mais il est certain que l'application de la règle n'est ni inconditionnelle ni incontestée. La Commission du droit de l'Angleterre et du pays de Galles a qualifié la Doctrine des Mains Propres un corpus jurisprudentiel complexe comportant des

[7] Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 226, 18/07/2014, para 1353.

distinctions techniques difficiles.[8] Les doutes qui entourent l'application de la Doctrine des Mains Propres en common law ne permettent pas de passer la norme à principe général selon l'Article 38 du Statut de la Cour Internationale de Justice. En même temps, même s'il pouvait être prouvé que la Doctrine des Mains Propres constitue un principe incontestable dans les systèmes de common law, il serait difficile d'imaginer qu'une doctrine inconnue des juridictions de droit civil puisse atteindre le niveau de généralité selon l'Article 38 du Statut de la Cour internationale de Justice.

À cet égard, la Cour Internationale de Justice n'a jamais reconnu la doctrine Clean Hands en droit international. Dernièrement, le Tribunal international dans l'affaire Yukos contre la Fédération de Russie devait examiner la question de l'existence d'une doctrine des mains propres en tant que principe général du droit international. En particulier, après avoir établi qu'une clause de légalité implicite ne pouvait pas être lue dans le TCE, le Tribunal s'est penché sur la question de savoir si la Doctrine des Mains Propres pourrait plutôt être appliquée en tant que principe général du droit. Il a déclaré:

"*le Tribunal doit examiner la proposition plus générale du défendeur selon laquelle un demandeur qui comparaît devant un tribunal international avec des mains impures "est empêché de le faire sur la base d'un principe général du droit". Le Tribunal n'est pas convaincu qu'il existe un «principe général de droit reconnu par les nations civilisées» au sens de l'article 38 (1) c) du Statut de la Cour internationale de Justice, qui interdirait à un investisseur de faire valoir son droit devant un tribunal arbitral en vertu d'un traité d'investissement. Les principes généraux du droit exigent un certain niveau de reconnaissance et de consensus. Cependant, sur la base des cas cités par les parties, le Tribunal a estimé qu'il existait une quantité de controverse importante quant à l'existence d'un principe de "main impure" en droit international*.[9]

S'appuyant sur cette évaluation des trois voies par lesquelles une Défense d'Illégalité opère, indiquant la raison pour laquelle une défense générale d'illégalité n'est pas mandatée par l'une d'elles, la thèse passe à l'élaboration d'un nouveau modèle fondé sur des principes permettant de traiter les comportements criminels commis par l'investisseur dans la réalisation de

[8] Law Commission of England and Wales, The Illegality Defence: A Consultative Report, 2009, para 3.55.
[9] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Award of 18 July 2014, para 1358

l'investissement. L'originalité du modèle repose sur le fait que, contrairement à la grande majorité des modèles, il repose sur des principes de droit pénal et sur des principes d'arbitrage commercial international: cela semble nécessaire compte tenu du fait que la criminalité dans l'arbitrage des investissements ne peut être abordée uniquement de la perspective du droit international public, comme le font la plupart des modèles développés jusqu'à présent. Elle doit plutôt tenir compte du fait que la criminalité ne peut échapper à une analyse de droit pénal et du fait que l'arbitrage en matière d'investissement repose en grande partie sur le cadre procédural de l'arbitrage commercial international. C'est pourquoi, pour répondre à une question de procédure telle que le stade auquel un tribunal arbitral doit juger le comportement répréhensible d'un investisseur, il faut examiner l'arbitrage commercial international en tant que source de solutions.

La matrice d'arbitrage commercial international du modèle est constituée par un principe qui est utilisé depuis longtemps dans l'arbitrage commercial international: la doctrine de la séparabilité. La doctrine de la séparabilité postule que la convention de soumettre un certain différend relatif à un contrat à un arbitrage international est distincte du contrat auquel elle se réfère. Cela signifie essentiellement que l'invalidité pouvant affecter le contrat de fond, y compris l'invalidité résultant du comportement criminel de l'une des parties, ne se répercute pas sur la clause de résolution des litiges ni sur la compétence du tribunal arbitral. Par exemple, dans le cas d'un contrat invalide parce qu'il a été obtenu par corruption, la doctrine de la séparabilité détermine que le tribunal arbitral devant lequel tout litige relatif à ce contrat est soumis pourra toujours exercer sa compétence sur le cas du demandeur.

La doctrine de la séparabilité est appliquée de manière cohérente tant au niveau national qu'au niveau international. L'utilisation de la doctrine est si large, générale et incontestée que la doctrine de la séparabilité correspond à un principe général de droit énoncé à l'article 38 du Statut de la Cour Internationale de Justice et à un principe d'ordre public transnational.

Selon Luzzato, le principe d'autonomie est aujourd'hui si largement reconnu qu'il peut être qualifié de principe général du droit international de l'arbitrage.[10] De même, Dimolitsas a estimé que la séparabilité était un principe général de l'arbitrage international. Selon Fouchard, Gaillard

[10] Draetta, U. et Al. The Chamber of Arbitration of Milan Rules: A Commentary. Milan: Jurispub, 2012: 185

et Goldman, la séparabilité est une règle véritablement transnationale de l'arbitrage commercial international. Henry Motuslky a indiqué que la doctrine de la séparabilité était symptomatique de l'émergence d'un ordre juridique international. Et d'autres chercheurs, comme le professeur Douglas, soutiennent que la doctrine de la séparabilité est intégrée aux principes transnationaux qui sous-tendent l'arbitrage international.

En ce qui concerne l'ordre public qui sous-tend la séparabilité, l'objectif est de préserver l'arbitrage international en tant que mécanisme viable de résolution des litiges et d'empêcher que la compétence d'un tribunal arbitral ne soit contrariée par la simple invocation du comportement illégal du demandeur.

La thèse démontre en outre que la doctrine de la séparabilité initialement développée dans le laboratoire de l'arbitrage commercial international s'applique également à l'arbitrage international des investissements: soit en tant que principe directement incorporé dans les règles de procédure régissant l'arbitrage international des investissements, soit en vertu de son statut de principe général de droit énoncé à l'article 38 du Statut de la Cour internationale de Justice et du pouvoir normatif qui en découle. Bien que certains spécialistes aient dénoncé une incompatibilité structurelle entre l'arbitrage international en matière d'investissement et la doctrine de la séparabilité, il existe une jurisprudence confirmant qu'il n'existait aucun obstacle structurel à l'application de la doctrine de la séparabilité à l'arbitrage.

Dans l'affaire Plama c. Bulgarie, le Tribunal était saisi d'une plainte au titre du TCE pour violation par la Bulgarie des normes de protection d'un investissement effectuées en vertu du Traité. L'investisseur, cependant, avait commis une certaine illégalité dans la réalisation de l'investissement (déclarations fausses et fraudes) et l'État défendeur a tenté de faire valoir un moyen de défense d'illégalité ayant pour effet d'invalider la compétence du Tribunal. En rejetant la défense, le Tribunal a formulé l'analyse suivante:

"[L] e prétendue fausse déclaration a trait à la transaction impliquant la vente des actions de Nova Plama par EEH à PCL et à l'approbation donnée par la Bulgarie dans l'accord de privatisation et ailleurs. Ce n'est pas dans ces documents que l'accord d'arbitrage est trouvé. L'accord d'arbitrage de la Bulgarie se trouve dans le TCE, un traité multilatéral, un document complètement séparé. Le défendeur n'a pas allégué que la prétendue fausse déclaration du

demandeur avait annulé l'ECT ou son consentement à l'arbitrage contenu dans l'ECT. Ainsi, non seulement les dispositions du règlement des différends du TCE, y compris l'article 26, sont autonomes et séparables de la partie III de ce traité, mais elles sont indépendantes de l'ensemble de la transaction Nova Plama; Ainsi, même si l'accord entre les parties concernant l'achat de Nova Plama est sans doute invalide en raison de fausses déclarations du demandeur, l'accord d'arbitrage reste en vigueur."[11]

Encore plus récemment, le 30 août 2018, le tribunal arbitral dans l'affaire Chevron contre l'Équateur a défini la relation entre l'accord d'arbitrage et le TBI en termes de séparabilité. Elle a déclaré:

"Le consentement des parties figure dans la convention d'arbitrage distincte entre les demandeurs et le défendeur, (...). En droit international, le contrat d'arbitrage conclu en vertu de l'article VI.2 du Traité est juridiquement autonome ou «dissociable» d'autres dispositions du Traité."[12]

Dans des termes encore plus explicites aux fins de la présente thèse, le Tribunal dans l'affaire Malincorp c. Égypte a reconnu la pleine applicabilité du principe de l'autonomie de la clause d'arbitrage de l'arbitrage commercial, ainsi que de l'arbitrage en matière d'investissement. Il s'est servi de ce fondement pour exclure que l'illégalité de l'investisseur puisse priver le Tribunal de sa compétence. Il a déclaré:

"*La solution découle d'abord du principe de l'autonomie de la convention d'arbitrage, principe tellement fondamental qu'il a également sa place dans l'arbitrage en matière d'investissement. Selon ce principe, les vices qui nuisent à la validité du lien juridique de fond, qui fait l'objet du litige au fond, ne nuisent pas automatiquement à la validité du contrat d'arbitrage. Ainsi, un tribunal arbitral est compétent pour décider sur le fond même si le contrat principal a été conclu à la suite d'une déclaration inexacte ou corruption. Seuls les défauts liés au consentement à l'arbitrage peuvent priver le tribunal de sa compétence. En l'espèce, rien n'indique que le consentement à l'arbitrage, par opposition au consentement aux garanties de fond énoncées dans*

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[11] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jusridiction of 8 February 2005, para 130.

[12] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23

l'accord bilatéral, ait été obtenu par fausse déclaration ou corruption, voire par erreur. Les allégations du défendeur ont trait à l'octroi de la concession. Cependant, ce n'est pas le contrat qui constitue la base du droit d'arbitrage, mais l'offre d'arbitrage de l'État contenue dans l'accord et l'acceptation de cette offre par l'investisseur. L'offre d'arbitrage couvre ainsi tous les litiges pouvant survenir concernant cet investissement, y compris sa validité".[13]

Cette thèse montre également que certaines différences qui caractérisent la relation entre les deux formes de résolution des litiges, en particulier le modèle de privity propre à l'arbitrage commercial international, ne font pas obstacle à la transposition de la doctrine de la séparabilité de l'arbitrage commercial international à l'arbitrage international. Bien que certains spécialistes avancent que la division entre public et privé constitue un obstacle à la fertilisation croisée, cette thèse montre que cette divergence n'est pas aussi profonde qu'on le dit, dans la mesure où des éléments de confidentialité et de publicité figurent dans les arbitrages commerciaux et d'investissement. De plus, en tout état de cause, la fracture n'a guère de pertinence en ce qui concerne en particulier la question de savoir si la doctrine de la séparabilité peut être appliquée à l'arbitrage international des investissements.

Sur le premier aspect, on peut dire en résumé que l'arbitrage commercial international est une méthode privée de résolution des conflits, avec un rôle déterminant pour l'autonomie des parties et une certaine limite quant à son utilisation pour les conflits caractérisés par une composante publique évidente. La volonté des parties est fondamentale tant pour la décision d'arbitrage que pour les modalités de déroulement de la procédure arbitrale. Cependant, récemment, la nature strictement contractuelle de l'arbitrage commercial international a cédé le pas à une conceptualisation de ce mode de règlement des litiges auquel des considérations de droit public et d'intérêts collectifs ne sont pas étrangères. Cela se reflète non seulement dans l'évolution de la théorie de l'arbitrage commercial international, mais aussi à un niveau plus pratique. Les lois publiques et les considérations d'intérêt public se sont lentement introduites dans ce mécanisme de résolution des conflits. La qualification correcte du discours public / privé en matière d'investissement international et d'arbitrage commercial relève donc de la prépondérance, et non de l'incompatibilité structurelle de l'arbitrage commercial international pour régler des différends caractérisés par un certain intérêt public. Tout au plus, on peut dire que: «Le degré d'intérêt public

[13] Malicorp Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/08/18, 07/02/2011, para 119.

dans les procédures d'arbitrage est normalement plus élevé dans les arbitrages d'investissement que dans les arbitrages commerciaux ordinaires». En outre, alors que l'arbitrage de investissements comporte un volet public, comme décrit ci-dessus, il n'a pas perdu son lien avec l'arbitrage commercial international, dont il conserve plusieurs caractéristiques privées, pas seulement en termes de procédure.

En fin de compte, dans le flou de la distinction entre privé et public, l'incompatibilité entre les paradigmes ne doit pas être extrémisée, au point de le transformer en un obstacle automatique à la fertilisation croisée entre l'arbitrage commercial et l'arbitrage international: cette distinction est en réalité un microcosme d'un problème fondamental qui touche tous les domaines du droit. Se demander si le régime d'investissement international est un régime de gouvernance publique transnational ou un système privé de règlement des différends revient à poser la mauvaise question. Le droit international des investissements est à la fois ni l'un ni l'autre. Ce sont les deux faces d'une même pièce.

Sur le deuxième aspect, la thèse explique que, même si la division entre public et privé peut être pertinente dans de nombreux aspects de la relation entre l'arbitrage commercial international et l'arbitrage international en matière d'investissement, ce n'est pas le cas en ce qui concerne la question de savoir si la fertilisation croisée, du point de vue de la doctrine de la séparabilité, peut se produire.

Sur la base de ces découvertes, dans cette thèse, la doctrine de la séparabilité a été appliquée à la défense d'illégalité, dans les trois articulations dans lesquelles elle peut se présenter. Dans les trois affaires, la doctrine de la séparabilité a eu pour effet de limiter le fonctionnement de la défense d'illégalité et les effets les plus dramatiques que sa conceptualisation au sens large détermine sur la compétence d'un tribunal arbitral et sur la recevabilité de la demande. En effet, c'est la doctrine de la séparabilité qui détermine que la défense d'illégalité doit être appliquée de manière étroite, et non au sens large. Et la faute de cet investisseur doit être évaluée au fond, par opposition au niveau préliminaire.

En particulier, s'agissant de la défense d'illégalité qui repose sur une clause in accordance with Host State law, la doctrine de la séparabilité constitue un principe herméneutique dans l'exercice de l'interprétation des clauses conformément à la Convention de Vienne. En effet, la doctrine de

la séparabilité, en tant que principe général du droit, constitue non seulement une source de normes, mais également un outil d'interprétation en droit international. Cela est particulièrement vrai dans le contexte de l'arbitrage en matière d'investissement, dans lequel les principes généraux jouent un rôle important. Et, comme l'a noté un spécialiste,

"*les principes généraux du droit sont une source de droit qui joue un rôle marginal dans la plupart des domaines du droit international public. On pourrait toutefois s'attendre à ce que ces principes jouent un rôle important dans le droit international des investissements. Une des raisons est qu'il existe une relation de fond étroite entre le droit international public, le droit international privé et le droit national en matière d'investissements internationaux. De plus, les tribunaux du CIRDI sont souvent compétents pour prendre des décisions conformément au droit international, au droit interne et aux obligations contractuelles*."[14]

La conséquence est que, sauf s'il peut être établi sans équivoque que la clause in accordance with Host State law vise à invalider la compétence du Tribunal (ou à déterminer l'irrecevabilité de la demande), la doctrine de la séparabilité recommande l'interprétation de manière à ne pas en faire des clauses de légalité, mais uniquement des clauses qui renvoient au droit interne en ce qui concerne la définition des actifs qui peuvent légalement constituer des investissements au sens des principes nationaux de l'Etat du for; et que, en tant que tels, ils n'obligent normalement pas un tribunal à décliner sa compétence si l'investisseur s'est procuré son investissement illégalement.

L'application de la doctrine de la séparabilité à une défense d'illégalité qui opère à travers la doctrine de la légalité nécessite une analyse un peu plus complexe, basée sur la catégorie de l'ordre public international. La première question à déterminer en particulier est celle de savoir quels crimes aboutissent à la violation d'une norme de l'ordre public international et quels crimes ne conduisent pas à une telle violation. On peut certes dire qu'une politique publique transnationale contre la corruption existe. Il existe en fait une convergence des lois nationales, des conventions pénales internationales, des décisions arbitrales et des articles de recherche: la corruption, dans sa manifestation en tant qu'utilisation des ressources publiques à des fins privées, constitue un affront à la moralité qui manifeste ses effets sur l'économie, la société et la

[14] Fauchald O. K. (2008), *op.cit.*, 312

société, et aussi sur la dimension démocratique des pays impliqués. Comme le déplore le professeur Edmundo Bruti Liberati:

"*La corruption est un délit pénal grave, qui menace l'état de droit, la démocratie et les droits de l'homme, mine la bonne gouvernance, l'équité et la justice sociale, fausse la concurrence, entrave le développement économique et met en danger la stabilité des institutions démocratiques et les fondements moraux de la société."*[15]

Si l'on se concentre sur les conventions internationales, le grand nombre d'instruments adoptés pour criminaliser la corruption témoigne du degré de condamnation plus élevé que cette conduite a suscité par rapport à la fraude. De plus, il est difficile d'identifier les instruments internationaux qui criminalisent la fraude de manière directe - le plus souvent, la fraude est sanctionnée indirectement, dans le contexte de dispositions visant à dissuader un comportement corrompu. Par exemple, la Convention de l'OCDE contre la corruption contient des normes qui exigent de conserver des enregistrements financiers complets et précis pour éviter des comptes ou transactions secrets ou secrets, des descriptions de dépenses inexistantes ou trompeuses et l'utilisation de faux documents. Alors que le comportement décrit des comportements typiquement frauduleux, ceux-ci sont abordés dans le contexte de l'incrimination plus large de la corruption dans les transactions commerciales internationales.

S'agissant de la violation des lois de l'État hôte, si elles n'entraînent normalement pas la violation d'une norme de l'ordre public international, lorsque la norme transgressée constitue une violation flagrante des droits de l'homme ou du jus cogens, elle est certain que l'infraction constitue également une violation de l'ordre public international.

L'analyse ci-dessus fournit la méthode permettant de définir quand la défense d'illégalité qui s'applique à travers une défense d'illégalité doit aboutir à une déclaration d'incompétence, et quand elle ne devrait pas. En opposant la doctrine de la séparabilité (qui correspond à une norme de l'ordre public international) à une défense d'illégalité fondée sur des comportements qui n'en constituent pas une violation, le maintien de l'ordre public international sur la séparabilité signifie que la défense d'illégalité ne peut avoir aucun effet sur soit la compétence du Tribunal, ni la

[15] Bruti Liberati, E. «Inquires, Prosecutions and Penalties in Corruption Cases.» 5th European Conference of Specialised Services in the Fight Against Corruption. Istanbul, 2000

recevabilité de la demande, mais exige plutôt que toute inconduite non contraire a l'ordre public international soit traitée au stade du fond de la procédure. Les choses sont différentes dans le cas de comportements constituant une violation de l'ordre public international, tels que la corruption et certaines violations graves de la législation de l'État d'accueil. L'ordre public international contre ces violations doit être comparée à l'ordre public international à la base de la doctrine de la séparabilité. La thèse démontre que l'ordre public international contre la criminalité ne devrait pas toujours, et automatiquement, prévaloir sur l'ordre public international à la base de la doctrine de la séparabilité.

En particulier, même parmi les violations de l'ordre public international, il est possible d'établir une hiérarchie et de faire la distinction entre les violations les plus graves et les moins graves. Seuls les comportements correspondant aux violations les plus graves de l'ordre public international devraient permettre de déterminer le déplacement de la doctrine de la séparabilité et d'empêcher ainsi un tribunal de statuer sur une affaire au fond. Ces violations sont essentiellement limitées aux violations des droits de l'homme et aux normes du jus cogens. La corruption, en revanche, bien qu'elle soit certainement un comportement contraire à l'ordre public international, n'atteint pas le seuil d'offensive de la violation qui est nécessaire pour remplacer la politique publique transnationale sur la séparabilité. Cette constatation, bien que quelque peu controversée, est corroborée par la jurisprudence des tribunaux nationaux qui traitent à la fois des contrats de corruption et des contrats obtenus par corruption.

La question a été abordée dans deux affaires récentes portées devant des tribunaux anglais: en 2014, dans l'affaire Honeywell International Middle East Ltd contre Meydan Group Llc et en 2016 dans l'affaire National Iranian Oil Company contre Crescent Petroleum. Dans le premier cas[16], Honeywell, une société constituée aux Bermudes, a poursuivi Meydan, une société constituée à Dubaï, qui était propriétaire du champ de courses de Ned al Sheba, lieu où sont organisées des expositions et des concerts. Le 7 juin 2009, Meydan et Honeywell ont signé un accord portant sur l'exécution de certains travaux au Ned al Sheba. Honeywell avait obtenu le contrat par le biais d'un appel d'offres public. Après une première phase au cours de laquelle des paiements ont régulièrement été effectués par Meydan à Honeywell, ceux-ci ont cessé en février 2010. Le 15 juillet 2010, Honeywell a engagé une procédure d'arbitrage contre Meydan en

[16] National Iranian Oil Company v Crescent Petroleum Company International, Crescent Gas Corporation Ltd [2016] EWHC 510 (Comm). Honeywell International Middle East v Meydan Group [2014] 2 Lloyd's Rep, para 173.

adressant une demande d'arbitrage à la DIAC. Le 19 janvier 2012, Meydan Group LLC a engagé une procédure d'arbitrage contre Honeywell. Le 1er mars 2012, lors du premier arbitrage conclu par le Tribunal, le Tribunal accorda à Honeywell le montant qui lui était dû au titre du contrat. Dans le cadre du deuxième arbitrage, le Tribunal a refusé de réexaminer l'objet de cette sentence pour des motifs de chose jugée. Le 12 novembre 2012, Honeywell a demandé aux tribunaux anglais, en vertu de l'article 101 (2) de la loi de 1996 sur l'arbitrage, d'obtenir l'autorisation d'exécuter la sentence de la même manière qu'un jugement ou une ordonnance du tribunal. Par une ordonnance rendue le 12 novembre 2012, le juge Akenhead autorisa l'exécution de la sentence de la même manière qu'un jugement ou une ordonnance du tribunal dans le même sens, mais ordonna que la sentence ne soit pas exécutée pendant 21 jours si Meydan appliquait ces 21 jours pour annuler la sentence, jusqu'à ce que la demande soit finalement réglée.

Honeywell a présenté sa demande d'annulation de la sentence dans le délai de 21 jours. Elle se fondait notamment sur le grief selon lequel l'exécution de la sentence serait contraire à la politique publique du Royaume-Uni, la sentence étant supposément fondée sur un contrat passé en corruption de fonctionnaires publics. La corruption a été confirmée par une série de documents, notamment une copie d'une plainte pour corruption déposée le 8 octobre 2013 auprès du procureur général du gouvernement de Dubaï contre Honeywell et une copie d'une lettre datée du 11 novembre 2013 émanant du chef du bureau de Dubaï. Le ministère public, chargé des poursuites, a demandé au chef du commissariat de police de Dubaï de mener une enquête.

En ordonnant l'exécution de la sentence, le juge a estimé que même si le contrat avait été induit par corruption, la disposition relative à l'arbitrage était dissociable et il existait donc toujours un accord d'arbitrage valide entre les parties. Elle a également estimé que, bien que la corruption soit clairement contraire à l'ordre public anglaise et que les contrats de corruption soient inexécutables, les contrats obtenus au moyen de pots-de-vin ne sont pas inexécutables.

Les tribunaux anglais ont entériné un résultat similaire en 2016 dans l'affaire National Iranian Oil Company. En avril 2011, le requérant, National Iranian Oil Company, avait conclu un contrat de fourniture et d'achat de gaz avec Crescent Petroleum, une société pétrolière et gazière en amont du Moyen-Orient. Le contrat était régi par le droit iranien et comprenait une disposition selon laquelle tous les litiges relatifs à la validité du contrat devaient être soumis à l'arbitrage. En 2003, Crescent Petroleum a décidé de céder le contrat à Crescent Gas, une de ses sociétés contrôlées.

En 2009, Crescent Petroleum et Crescent Gas ont entamé un arbitrage au Royaume-Uni, alléguant une rupture de contrat résultant de l'incapacité de National Iranian Oil Company à livrer les quantités de gaz convenues dans le contrat de 2001. La National Iranian Oil Company a soulevé des objections concernant la compétence des arbitres, affirmant que le contrat avait été garanti par le versement de pots-de-vin par Crescent Petroleum, ce qui affectait également la légalité du contrat attribué à Crescent Gas. Le tribunal arbitral a rejeté la défense d'illégalité de l'intimé et conclu que la National Iranian Oil Company était en réalité en violation de son contrat pour non-fourniture du gaz comme stipulé dans l'accord applicable. Sur la question de sa compétence, le Tribunal a nié que le contrat ait été passé sous la forme de versements frauduleux - alors même qu'il était convaincu qu'il y avait une preuve de tentative de corruption. La National Iranian Oil Company a contesté la sentence devant la Haute Cour du Royaume-Uni en vertu de l'article 68 de la loi de 1996 sur l'arbitrage, en invoquant de graves irrégularités, en réitérant l'argument selon lequel le contrat était inexécutable du fait de sa corruption. La National Iranian Oil Company a affirmé que le tribunal avait commis une erreur en ne trouvant aucune preuve de corruption, car les discussions et les tentatives de corruption avérées étaient suffisantes pour invoquer une défense d'illégalité. Selon National Iranian Oil Company, ces discussions et ces tentatives ont été suffisantes pour que le contrat soit entaché d'illégalité, ce qui l'a rendu inapplicable pour des raisons d'ordre public. Les deux défendeurs ont résisté à l'argument, affirmant que même si le contrat devait être trouvé tel qu'il avait été conclu à l'aide de la corruption, cela ne le rendrait pas inapplicable pour des motifs d'intérêt public.

La question centrale que la Cour devait déterminer était de savoir si la sentence arbitrale aurait été inapplicable en raison de sa contradiction avec l'ordre public, s'il avait été possible d'établir que le contrat avait été obtenu par corruption. Le juge Burton, siégeant au tribunal, a estimé que les considérations d'ordre public n'empêchaient pas, en l'espèce, l'exécution d'un contrat obtenu ou entaché de corruption. En développant une distinction soulignée dans l'affaire Honeywell International Middle East Ltd contre Meydan Group LLC, le juge Burton a souligné la différence entre l'exécution d'un contrat visant la poursuite d'un acte illégal tel que la corruption et un contrat obtenu illégalement. Il a ensuite expliqué que les contrats liés à la corruption pouvaient être annulés au choix de la partie innocente. Conformément à la ligne d'autorité établie dans Honeywell et Westacre, le juge Burton a estimé qu'il n'existait aucune politique publique obligeant un tribunal anglais à annuler un contrat obtenu illégalement. A fortiori, il a expliqué qu'il n'existait pas de règle d'ordre public anglaise imposant à un tribunal de refuser d'appliquer

un contrat qui a été précédé et qui n'est pas affecté par une tentative de corruption bâclée. Tout en reconnaissant la condamnation internationale croissante de la corruption et du mouvement international de lutte contre la corruption, le juge Burton était prudent d'introduire le concept de ternir un arrangement par ailleurs légal. En définitive, la position du juge était donc que faire respecter un contrat légal ont été achetés par corruption (mais cela est par ailleurs légal en ce qui concerne sa portée et sa finalité) n'est pas contraire à l'ordre public.

En conclusion, si la corruption, en soi et en termes généraux, est contraire à l'ordre public international, la manière dont une telle violation de l'ordre public international peut se présenter présente de nombreuses nuances. L'affaire de la National Iranian Oil Company montre qu'elles peuvent concerner, par exemple, la manifestation de la corruption (en tant que moyen de garantir un contrat ou en tant qu'objet du contrat) et que ces modalités peuvent en réalité avoir une incidence sur la question même de la contradiction de corruption avec l'ordre public; L'affaire Westacre témoigne des différences d'intensité dans la contrariété de certains comportements de la part des pouvoirs publics et semble conclure que la corruption se situe à un faible niveau d'offensive par rapport à d'autres violations. La défense d'illégalité dans le contexte d'une relation investisseur-État n'est pas étrangère à ces nuances et complexités. Les complexités sont encore plus grandes du fait de la nécessité d'équilibrer l'ordre public contre la corruption avec l'ordre public en faveur de la séparabilité. Un tribunal qui aurait omis de traiter une réclamation sur le fond en se fondant sur la déclaration générale selon laquelle la corruption violerait une politique publique transnationale ne parviendrait pas à faire face à ces complexités. Un tribunal qui présumait automatiquement que la politique publique de lutte contre la corruption prenait le pas sur la politique publique en matière de séparabilité ne s'engagerait pas dans un exercice d'équilibre essentiel pour le raisonnement et le processus décisionnel des tribunaux arbitraux en matière d'investissement.

Enfin, la thèse appliquera la doctrine de la séparabilité à une défense d'illégalité fondée sur la doctrine des mains propres. C'est le plus simple des scénarios abordés dans cette thèse. En fait, comme la doctrine de la séparabilité est un principe général du droit qui correspond à une norme de politique publique transnationale et que la doctrine des mains propres n'a pas ce statut et n'est pas reconnue comme un principe général en droit international, ce dernier doit prévaloir dans le conflit entre les deux. Par conséquent, le dernier moyen par lequel la défense d'illégalité peut agir

n’autorise pas un tribunal à refuser d’exercer sa compétence, ni à déclarer irrecevable la demande d’un investisseur.

L’application de la doctrine de la séparabilité à la défense de l’illégalité, comme expliqué dans les paragraphes ci-dessus, a pour résultat que, dans la grande majorité des cas, un tribunal arbitral devra traiter de la conduite répréhensible de l’investisseur au fond. Comment un tribunal arbitral peut-il sanctionner la faute d’un investisseur à ce stade? La réponse à cette question est fournie par une analyse fondée sur les catégories de droit pénal, et en particulier sur les notions de responsabilité réciproque et de culpabilité des parties à un crime. Cela constitue la dimension de droit pénal du modèle hybride proposé dans cette thèse.

En particulier, contrairement aux modèles proposés par les spécialistes qui ont enquêté sur la criminalité dans l’arbitrage en matière d’investissement, le modèle proposé ici part du principe que tous les crimes ne sont pas identiques, et que le comportement criminel de l’investisseur ne peut donc pas être traité de manière unitaire, mais exige plutôt une approche qui prend en compte les spécificités et définit les caractéristiques du crime commis par l'investisseur. À ces fins, la thèse propose une taxonomie de base du comportement criminel des investisseurs, en distinguant les crimes de nature unilatérale, en ce sens qu'ils peuvent être commis par l'investisseur seul, sans aucune coopération de la part de l'État hôte; et les crimes de nature bilatérale, en ce sens qu'ils ne peuvent être complétés qu'avec la contribution à la fois de l'investisseur et de l'État hôte (comme c'est généralement le cas dans le cas de la corruption). La thèse élabore cette taxonomie de base afin d'identifier les niveaux de responsabilité respectifs de l'État hôte et de l'investisseur, en relation avec chaque catégorie d'infractions. Par exemple, dans le cas où l'investisseur a commis une fraude au détriment de l'État hôte, il conservera normalement l'entière responsabilité du crime, dans la mesure où, structurellement, la fraude est un crime unilatéral. Cependant, il est possible que l'État hôte ait toléré le crime commis à son encontre, par exemple en exploitant l'investissement à son avantage, bien qu'il soit conscient de son caractère illégal. Dans ce cas, le niveau de culpabilité respectif des parties peut varier et un crime unilatéral tel qu'une fraude peut néanmoins déterminer la répartition d'une partie de la culpabilité également sur l'État hôte.

En outre, si l'investisseur a violé unilatéralement les lois de l'État hôte pour obtenir un investissement, il conservera normalement l'entière responsabilité de son comportement. Cependant, il est possible d'identifier les circonstances dans lesquelles, même en cas de violation

unilatérale du droit, l'État hôte pourrait devoir se voir attribuer une partie de la responsabilité pour la violation. Par exemple, lorsque l'investisseur a commis une erreur inculpable en raison du manque de clarté du droit de l'État hôte, il n'a donc pas agi dans l'intention de le violer; ou bien lorsque l'État hôte a officiellement déclaré à l'investisseur que son comportement était conforme aux lois et règlements du forum, pour changer d'avis par la suite.

Bien qu'il s'agisse d'une méthode viable également en ce qui concerne les crimes unilatéraux, c'est en ce qui concerne les crimes bilatéraux que l'équilibre entre le comportement de l'investisseur et celui de l'État hôte devient crucial. En cas de corruption, crime structurellement bilatéral, l'investisseur et l'État hôte conservent généralement une part de responsabilité mutuelle et de culpabilité. Des critères peuvent également être développés pour répartir cette culpabilité partagée en termes plus spécifiques entre chacune des parties au crime. Par exemple, la sollicitation de pots-de-vin et l'extorsion de pots-de-vin correspondent à un niveau de culpabilité plus élevé de la part de l'État hôte et à un niveau de culpabilité moins élevé de la part de l'investisseur, par rapport aux situations dans lesquelles c'est l'investisseur qui décide offrir le pot-de-vin. De même, le fait de ne pas engager de poursuites contre l'infraction de corruption perpétrée par l'État hôte au niveau interne peut également être le signe d'un niveau de culpabilité marqué de la part de l'État, de la même manière que l'absence de mise en œuvre au niveau de la législation nationale des dispositions de la régime réglementaire international contre la corruption, auquel les États sont liés. Dans la perspective d'évaluer la culpabilité de l'investisseur, de la même manière, les investisseurs qui offrent des pots-de-vin, conformément à une culture ou une politique de l'entreprise, conservent un niveau de culpabilité plus élevé par rapport aux investisseurs qui ont offert des pots-de-vin "ultra vires", en raison d'actes non autorisés de leurs employés. En effet, dans ce cas, l'employé corrompu n'agit pas en faveur d'une culture de l'investisseur sujette à la corruption, mais contre la culture d'entreprise de l'investisseur.

Cette thèse propose que la graduation des culpabilités entre l'investisseur et l'État hôte et l'équilibrage de leurs comportements respectifs alimentent l'analyse du Tribunal au stade du fond et servent de base à la détermination de la sanction appropriée à inconduite commise par l'investisseur. En particulier, cette sanction devrait être proportionnée et adaptée au niveau de responsabilité de l'investisseur dans la commission du crime, mais également à l'État hôte, lorsqu'il a commis un comportement criminel. Après tout, même les tribunaux qui ont conclu que la conduite criminelle d'un investisseur devrait être sanctionnée au niveau juridictionnel de la

procédure ont manifesté un certain malaise avec cette approche, en raison de son inéquité intrinsèque. À titre d'exemple, le tribunal arbitral dans l'affaire World Duty Free v Kenya, refusant sa compétence sur une affaire dans laquelle l'investisseur avait versé un pot-de-vin spécialement sollicité par le président du Kenya, a déclaré ce qui suit: «Cela reste néanmoins très inquiétant, dans ce cas, le destinataire du pot-de-vin du demandeur était plus qu'un officier de l'État mais son officier le plus haut placé, le président du Kenya; et que c'est le Kenya qui avance ici comme une défense complète des revendications du demandeur [World Duty Free] contre les illégalités de son propre ancien président. De plus, d'après les éléments de preuve soumis à ce Tribunal, le pot-de-vin aurait été sollicité par le président kényan et non entièrement initié par le demandeur. Bien que le président kenyan ait maintenant quitté ses fonctions et qu'il ne soit plus à l'abri de la Constitution kenyane, il semble que le Kenya n'ait pas tenté de le poursuivre en justice pour corruption ou de récupérer le pot-de-vin dans une procédure civile ».

De même, certains tribunaux ont timidement commencé à reconnaître l'importance de trouver un équilibre entre le comportement de l'investisseur et celui de l'État hôte dans le contexte d'une évaluation de la faute de l'investisseur. Dans l'affaire Hesham Talaat contre République d'Indonésie, le Tribunal semblait reconnaître l'importance de s'attaquer à l'illégalité, en particulier bilatérale, au stade du mérite de la procédure, afin de permettre une évaluation globale du comportement respectif des parties. Selon les termes du Tribunal: Le Tribunal estime que [...] le Tribunal doit examiner de près les allégations des parties concernant les allégations de comportement criminel, notamment les allégations de corruption et de blanchiment de capitaux dirigées contre le Demandeur, et la sollicitation d'allégations de corruption à l'encontre de l'intimé, d'autre part. Ce n'est pas une question de compétence mais de fond, à traiter lors de la phase de fond de cet arbitrage.

La situation inverse est constituée par le cas où, encore une fois, les deux parties se sont livrées à la corruption, mais l'investisseur a par exemple adopté un système interne pour dissuader la corruption et l'initiative de corruption n'a pas été prise par l'investisseur, mais a plutôt découlé d'une demande spécifique en ce sens de la part de l'État hôte, qui a donc sollicité le pot-de-vin. Dans ce cas, l'investisseur n'a pas droit à l'intégralité des dommages et intérêts, mais la responsabilité de l'État hôte dans le cadre du mécanisme de corruption est plus grande que celle de l'investisseur. Donc, encore une fois, le calcul suivant est proposé: 100 est le montant des dommages auxquels l'investisseur aurait eu droit, si la corruption n'avait pas eu lieu. Les crimes

de corruption bilatéraux déterminent que les dommages causés à l'investisseur sont réduits à 50, en raison de la culpabilité du crime, mais pas totalement annulés, en raison de la culpabilité que les États hôtes conservent également dans le comportement criminel. Maintenant, si l'État hôte a sollicité le pot-de-vin, une couche supplémentaire de faute lui est imputée, de sorte que l'investisseur a droit non pas à 50, mais à 60. Si l'État hôte ne s'est pas limité à solliciter le pot-de-vin, il extorqué par menace, cette circonstance peut signifier que l'investisseur a versé le pot-de-vin par contrainte et a donc droit au paiement de l'intégralité des dommages-intérêts, bien qu'il se soit engagé formellement dans le paiement d'un pot-de-vin. Les exemples présentés ci-dessus donnent une idée de la manière dont le modèle fondé sur la réparation mutuelle des fautes fonctionnerait dans la pratique. Au niveau des recours, cette thèse montrera qu'il existe des cas dans lesquels, même en ce qui concerne les contrats conclus par corruption, les parties peuvent être restituées in integrum. Cela ne s'appliquerait pas au paiement du pot-de-vin, car il serait contraire à la politique publique transnationale de rembourser à une personne qui a versé le pot-de-vin.

Les recours en restitution sont également un moyen de répartir plus équitablement les responsabilités respectives des parties dans la commission d'un crime donné. Outre une modulation des dommages fondée sur la culpabilité respective des parties, le rôle joué respectivement par l'investisseur et l'État hôte dans un crime donné peut être examiné dans le contexte des recours en restitution. Dans l'affaire World Duty Free, le Tribunal a noté ce qui suit:

"Les effets juridiques non contractuels d'un contrat illégal sont importants en droit anglais en ce qui concerne les conséquences possibles en matière de restitution et de propriété."[17]

Le Tribunal a donc au moins reconnu la possibilité d'une forme quelconque de réparation en dédommagement d'un demandeur qui s'était livré à une forme illégale. Plus tard dans la sentence, le Tribunal a conclu son analyse en laissant ouverte la possibilité «de conséquences juridiques suite à la non-application de l'accord», laissant entendre qu'une certaine forme de restitution est possible - bien que cela ait été nuancé par l'affirmation que «la restitutio in integrum ne peut pas retour du pot-de-vin au réclamant."

[17] *World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award of 4 October 2006, para. 180.*

Dans certains cas, le payeur de pots-de-vin est autorisé à demander la restitution de ce qui a été exécuté en vertu du contrat, moins le pot-de-vin versé. Ceux-ci peuvent être trouvés à la fois dans les juridictions nationales et au niveau international. Le cas n ° 11307 de la CCI, par exemple, concernait une situation dans laquelle les Parties avaient conclu un contrat, régi par le droit sud-africain, concernant la maintenance des avions. Le requérant a évité le contrat après avoir découvert que des pots-de-vin avaient été versés pour le sécuriser et avait demandé le remboursement des sommes déjà versées, d'un montant supérieur à 50 millions de dollars. Le tribunal arbitral a fait droit à la demande pour ces motifs mais a indemnisé le défendeur pour les services rendus. Le montant a été calculé en déduisant du prix total du contrat la commission de pot-de-vin versée par l'intimé à un conseiller externe pour la sécurisation du contrat. Cette solution n'est pas isolée. Dans l'arrêt Logicrose Ltd c. Southend United Football Club Ltd (n ° 2), le tribunal anglais a reconnu que le demandeur avait droit à une restitution (encore une fois, après déduction du montant de la pots-de-vin) et a donc énoncé le principe général selon lequel un contrat illégal n'est pas nécessairement un contrat qui laisse le fournisseur de pots-de-vin avec rien. Souvent, ce résultat est justifié sur la base de la doctrine de l'enrichissement sans cause. En tant que doctrine équitable, elle existe aussi bien dans les systèmes de droit civil que dans les systèmes de common law et de manière autonome en droit international en tant que principe général.

Schwatzemberger écrivait déjà en 1957: «*En marge du droit international, le principe [de l'enrichissement sans cause] a déjà tendance à être accepté comme principe général du droit, reconnu par les nations civilisées*»[18]

Le principe de l'enrichissement sans cause a été invoqué même pour justifier l'application de contrats illégaux, faute de quoi des conséquences extrêmement injustes en auraient résulté. La Cour d'appel de Californie a par exemple conclu que l'application d'un contrat illégal serait la seule solution «quand une solution différente enrichirait injustement le défendeur». Faisant référence au même principe, un autre tribunal californien avait précédemment déclaré ce qui suit:

"*La règle selon laquelle les tribunaux ne contribueront pas à l'application d'un accord illégal ou contraire à l'ordre public est fondamentalement valable. La règle a été conçue dans le but de*

[18] Schwarzenberger, G. International Law: Stevens & Sons:1957, 580

protéger le public et les tribunaux. C'est une règle fondée sur une politique publique saine. Mais les tribunaux ne devraient pas être tellement épris de la phrase latine "in pari delicto" qu'ils élargissent aveuglément la règle à tous les cas où l'illégalité figure quelque part dans la transaction. Il faut toujours garder à l'esprit et l'objectif fondamental de la règle et tenir compte des réalités de la situation".[19]

En fait, la possibilité pour un tribunal arbitral de recourir à des recours en restitution fondés sur un enrichissement sans cause autre que les recours en contrat est largement étayée par les Principes d'UNIDROIT 2010, qui suggèrent de reconnaître des recours en restitution lorsque les circonstances le justifient. Selon le commentaire 1 relatif à l'article 3.3.2 Principes d'UNIDROIT 2010:
«Même si, du fait de la violation d'une règle impérative, les parties se voient refuser tout recours en vertu du contrat, il reste à savoir si elles peuvent au moins demander la restitution de conformément à l'article 3.3.2, paragraphe 1, Principes d'UNIDROIT 2010: «Lorsque l'exécution en vertu d'un contrat enfreint une règle impérative prévue à l'article 3.3.1, une restitution peut être accordée si cela est raisonnable. dans les circonstances.»

Et effectivement, la phase de la procédure au fond est celle à laquelle ces circonstances seraient le mieux traitées. À ce stade, comme l'ont noté Olef et d'autres: «*l'exclusion de la restitution peut tout au plus être justifiée en tant qu'instrument punissant le corrupteur corrompu et dissuadant les autres de choisir cette voie illégale. Une telle sanction devrait certainement être prise au sérieux compte tenu des conséquences financières envisageables. Cependant, ce qui rend ce concept peu convaincant est son manque de lien avec le principe de proportionnalité. La perte définitive du pot-de-vin en vertu du contrat prévoyant la corruption peut être justifiée, dans la mesure où le montant de la somme en cause est directement lié à l'illégalité de l'acte. En règle générale, plus le montant du pot-de-vin est élevé, plus le malfaiteur investit de l'énergie criminelle et plus les pertes causées par l'acte sont importantes. L'exécution du contrat principal manque toutefois d'une telle relation. C'est une simple coïncidence si la corruption est découverte au début de l'exécution du contrat principal et si la perte du corrupteur est limitée, ou si le pot-de-vin est découvert une fois que le contrat a déjà été exécuté intégralement. Si l'étendue de la sanction ne concerne plus l'illégalité de l'acte, il peut en résulter une dissuasion excessive. Dans*

[19] Denning v Taber, Court of Appeal of California, 1954, 2d 253, at 280.

les contrats d'une valeur commerciale considérable, p. Ex. projets de construction ou d'industrie de l'armement, la perte totale de performance peut avoir des conséquences désastreuses pour une entreprise. Dans certaines circonstances, cela nécessiterait une extrême évitement grâce à la mise en œuvre de mesures de conformité internes exhaustives. Les dysfonctionnements (au sens de dissuasion excessive) surviennent lorsqu'il n'existe plus un rapport raisonnable entre les coûts et les avantages de la dissuasion de la corruption."[20]

Non seulement les tribunaux commerciaux, mais aussi les tribunaux des investissements ont eu recours à des arguments fondés sur l'enrichissement et la restitution injustes, même s'ils se sont abstenus d'utiliser cette expression exacte pour en éviter les abus. Comme le notait Vohryzek:

«Les avocats internationaux sapent les normes d'enrichissement sans cause en les utilisant sans discernement, ce qui garantit que les tribunaux voient le concept comme un déploiement faible, longtemps déprécié par un usage occasionnel. Malgré cette dégradation, l'enrichissement sans cause reste un outil utile s'il est utilisé avec précision et avec parcimonie. En effet, il est tellement utile que des tribunaux tels que ADC c. Hongrie l'utilisent, même s'ils l'appellent autrement»[21].

ADC avait signé un contrat pour la construction d'installations aéroportuaires à Budapest. Le contrat ne concernait pas seulement la construction des terminaux, mais également la gestion d'une série de services terrestres, tels que la gestion de magasins dans la zone aéroportuaire, la gestion des bagages et autres services connexes et la formation du personnel. Le prix que le gouvernement hongrois était tenu de payer pour la fourniture de ces services équivaut à une redevance fixe chaque année. Cependant, une fois que l'investisseur a achevé la construction du terminal, le gouvernement hongrois a renoncé à ses obligations contractuelles et a adopté une loi empêchant ADC d'exploiter le terminal de manière efficace et rentable. Après quelques années, lorsque la valeur de l'investissement de la société s'est appréciée, le gouvernement hongrois a vendu l'aéroport à une société britannique (BAA) au prix de 1,2 milliard de dollars. À ce moment-là, l'investisseur a engagé une action en justice contre le gouvernement hongrois devant un tribunal du CIRDI, déplorant l'expropriation de son investissement. Le tribunal a conclu à une expropriation illégale. En conséquence, il n'a pas appliqué le recours prévu par le TBI pour les expropriations légales (à savoir le paiement de la valeur de l'investissement au moment de la prise

[20] Bonell, M. J. and Meyer, O. (2015) op.cit., 28 – 29.
[21] Vohryzek-Griest, Ana T (2008), op.cit., 3.

de possession par le gouvernement), mais il a accordé la restitution de la valeur du bien au moment de l'attribution.

Toujours à la lumière de la jurisprudence susmentionnée, dans le cas de la corruption, mais également dans le cas d'autres formes d'illégalité dans lesquelles l'État a coopéré ou contribué, restitutio in integrum (moins le montant du pot-de-vin versé) semble être une solution plus juste et plus viable que le simple rejet de la demande de l'investisseur au niveau préliminaire.

En ce qui concerne la réparation des coûts, le fait que tant l'investisseur que l'État hôte assument une part de culpabilité en ce qui concerne certains cas de faute de l'investisseur, signifie que les tribunaux doivent s'éloigner des critères selon lesquels la partie perdante doit supporter aussi les frais de la partie gagnante. En effet, une répartition de la culpabilité et des dommages-intérêts, comme expliqué dans les pages précédentes, signifie qu'il pourrait ne pas être possible de décider dans chaque cas qui est exactement la partie gagnante et qui est la partie perdante. Particulièrement dans les cas où les deux parties partagent des niveaux de culpabilité égaux ou similaires en ce qui concerne l'inconduite de l'investisseur invoquée comme moyen de défense par l'État hôte, de sorte que les dommages causés à l'investisseur soient en réalité réduits à environ 50% de ce qu'il serait mais pour la corruption, il peut être difficile de déterminer qui est le gagnant et qui est le perdant. Dans les circonstances, il semble plus approprié que chaque partie supporte ses propres coûts.

Le modèle proposé dans cette thèse, qui repose sur le principe de séparabilité fondé sur l'arbitrage commercial international et sur la catégorie de culpabilité pénale du fait de la commission d'un crime, ne repose pas uniquement sur ce qui semble être la bonne compréhension de la lex lata réglemente l'inconduite des investisseurs dans l'arbitrage international, mais aussi sur des considérations politiques. En effet, cette thèse montre que sanctionner la criminalité des investisseurs, y compris les crimes bilatéraux, en imputant à l'investisseur toutes les conséquences de l'inconduite et en rejetant sa demande au niveau préliminaire (compétence ou recevabilité) ne produit pas pour autant un assèchement de la criminalité, mais plutôt seulement détermine plus de criminalité. Le cas de corruption, en tant que crime bilatéral archétypique dans lequel un investisseur peut se livrer, est significatif. Des études empiriques démontrent que lorsque les États sont conscients qu'ils ne subiront aucune conséquence de ce crime, ils ne seront aucunement incités à lutter contre les pratiques de corruption à l'intérieur du pays; en effet, sachant que la

corruption peut constituer une défense complète dans le cadre d'une procédure d'investissement engagée par un investisseur, les États peuvent être incités à favoriser les pratiques de corruption et à ne pas se conformer au régime réglementaire international en matière de lutte contre la corruption. Et, une fois qu'un État hôte se livre à la corruption et jette dès lors les bases d'une défense intégrale contre une éventuelle demande d'investissement, il peut même être incité à se livrer à un comportement illégal vis-à-vis des investissements de l'investisseur (comme l'expropriation, le déni de justice et traitement équitable, etc.), sachant que sa conduite ne sera absolument pas sanctionnée et que l'enrichissement illégal qui en découle ne sera jamais traité par un tribunal arbitral.

Dans l'ensemble, la thèse conclut que le modèle hybride proposé dans ce travail devrait être préféré aux modèles qui traitent de la faute des investisseurs au niveau de la juridiction ou de l'admissibilité. En effet, le modèle développé dans cette thèse intègre des aspects du droit pénal et de l'arbitrage commercial international qui ne peuvent être négligés dans le droit des investissements et qui permettent une meilleure interprétation de la lex lata; et parce qu'elle apporte des solutions qui, d'un point de vue politique également, profitent à la fois à l'investisseur, à l'État hôte et à la communauté internationale dans son ensemble: lutter contre la criminalité liée aux investissements étrangers, tout en faisant progresser le système d'arbitrage international et le flux de transactions des investissements étrangers dans les pays hôtes.