RIGA GRADUATE SCHOOL OF LAW

Effectiveness of Corruption Defence Strategy by the Host States under ICSID Arbitration

BACHELOR THESIS

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DECLARATION OF HONOUR:
I declare that this thesis is my own work, and that all references to, or quotations from the work of others are fully and correctly cited.

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Abstract

The corruption phenomena have been a dominant and well-known challenge for international investment and trade in general. However, this challenge achieved a more tangible scale of problematics due to the host state willingness to bypass investment protection mechanisms such as relevant BIT in order to conduct expropriation without legal and economic consequences. As a result, Corruption Defence Strategy was invented. Such a defence strategy implementation under ICSID Arbitration seemed to be sufficient enough to deny a jurisdiction and make the host state to win a case. Respectively, the core issue that is explored is the evaluation of justice achievement by the ICSID Arbitration in the case of Corruption Defence Strategy appearances.

Keywords: Corruption, ICSID Arbitration, International Investment Law, Corruption Defence Strategy, BIT.

Summary

This bachelor's thesis investigates the topic of international investment law effectiveness in regards to the Corruption Defence Strategy implementation by the host states under ICSID Arbitration. The study explores the level of Corruption Defence Strategy impact on the Tribunal's objectivity. The thesis considers corruption development in relation to the investment procedures, the legal grounds of Corruption Defence Strategy as well as appropriate ICSID precedent analysis. Additionally, political and economic issues of investment procedure are analysed in order to receive a full image of fact and circumstances influence over Tribunal's decision and core motivation of the investor.

It is concluded that corruption phenomena have no solution in the near future and the most crucial anti-corruption development related to international investments is the global criminalisation of such an economic crime. Therefore, investment legality provision, as well as host-states law prevalence in most of the BITs, makes it impossible to use any investment protection mechanisms after bribery discovery. In other scenarios, the Clean Hands Doctrine, as well as other sources of Public International Law, can be used as an instrument to deny Tribunal's jurisdiction after the aforementioned economic crime appearance. As a result, investors fall in the trap of corruption requirement ruining not only their reputation but also Arbitration's protection mechanism.

It is also concluded that Tribunal is looking on *Who Does What* rather on *What Was Done* providing investigations regarding the appearance of an act of corruption rather than actual details and circumstances of such a crime. Subsequently, in the light of lack of Tribunal's ability to properly investigate bribery details, there seems to be manipulation with international norms effect causing the low level of justice achievement. Nevertheless, the negative attitude of national and international law framework towards corruption forces the Tribunal to deny jurisdiction in order to secure its prestige. As a result, such an international atmosphere, as well as difficulties in proof of host state responsibility for corruption crime, creates de facto beneficiary in the face of the host state. Such an effect can be identified as equal with expropriation effect, which creates a lack of equity resulted from Tribunal's decision.

The thesis analyses how recurring implementation of Corruption Defence Strategy can cause harmful effect towards international trade and underlines lack of justice even despite the malicious breach by the investors. The thesis also documented the power of Corruption Defence Strategy under ICSID Arbitration, thus outlining the vulnerability of international investment law and the necessity for specific improvements. Among other issues, it is not clear how exactly develop proportionate and at the same time effective solution, however, research evidenced that such a mechanism has to be invented.

List of Abbreviations

BIT – Bilateral Investment Treaty
ICSID - International Centre for Settlement of Investment Disputes
UNCAC - United Nations Convention against Corruption
ELR - Exhaustion of Local Remedies

Introduction

Investors are aware that unfortunately, not all countries have independent court systems that can operate in the national legal framework without political influence. However, due to the investment protection mechanisms and independent international arbitrations such as International Centre for Settlement of Investment Disputes (hereinafter the "ICSID"), investors can achieve additional guarantees in order to invest in foreign countries more safely. Subsequently, more countries decided to attract foreign investment in order to improve the national economy, and as a result, more and more Bilateral Investment Treaties (hereinafter the "BITs") were concluded.

With time host states have been using more and more sophisticated strategies in order to expropriate the investment and in fact benefit. One of such strategies is the Corruption Defence Strategy. The host states realised that if to promulgate facts related to the committed bribery it could be possible to implement a Clean Hands Doctrine as well as rely on appropriate international law under ICSID Arbitration in order to deny jurisdiction and expropriate the investment without any consequences. More and more precedents under ICSID Arbitration appear, which proves the effectiveness of such a defence strategy. As a result, such a win-win strategy becomes a powerful instrument allowing to bypass international arbitration and achieve the annulment of all investment protection laws.

Thus, corruption is not only a phenomenon with the domestic political effect but also a significant challenge for international investments and trade in general. Most of the investments are usually made in developing countries due to the high demand for foreign investment. However, developing countries have less developed anti-corruption mechanisms and as a result, hold worst corruption indexes.[1] Subsequently, paying a bribe to start a business was constituted an affordable price for the investors in order to receive the support of the government regarding investment promotion.[2] Nevertheless, shadow payments turned against investors raising sufficient doubts regarding international investment law effectiveness.

Furthermore, Corruption Defence Strategy has a harmful effect on international investment development as a whole due to the fact that domestic governmental structures stay corrupted while investors feel more and more fear towards satisfying governmental requirements that result in the decrease of the global investment amount. Ultimately, if investors will start to feel the lack of arbitration effectiveness, the signing of new BITs and the whole international trade development will suffer tangible harm.

The focus of the thesis is aimed at the evaluation of the international investment law effectiveness regarding the implementation of the Corruption Defence Strategy by the host

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[1] Transparency International, *"Corruption Perceptions Index 2018"*.
Available at: https://www.transparency.org/cpi2018
Accessed on 9 April, 2020.

[2] Margareta Habazin, *"Investor Corruption as A Defense Strategy of Host States in International Investment Arbitration: Investors' Corrupt Acts Give an Unfair Advantage to Host States in Investment Arbitration",* Cardozo J. of Conflict Resolution, Vol. 18:805, p. 806.

state in case of a dispute under the ICSID Arbitration. The final purpose of the research is to evaluate the achievement of equity by ICSID Tribunals by answering the research question.

The thesis has to answer the research question that asks - What is the level of equity achievement by the ICISD Tribunal in case of Corruption Defence Strategy implementation by the host state? In that regard, the paper will use a doctrinal methodology by analysing appropriate international conventions, legal mechanisms as well as relevant ICSID awards in order to achieve the objective and reasonable answer to the research question.

The structure of the paper consists of 4 chapters. The first chapter consists of the identification of corruption as an economic crime and description of appropriate international mechanisms aimed against corruption. The second chapter illustrates legal grounds for Corruption Defence Strategy implementation outlining the Clean Hands Doctrine, the principle of equity as well as the jurisdiction and claim admissibility issues. The third chapter shows the implementation of Corruption Defence Strategy on practice relying on relevant ICSID precedents with the critical author's remarks. The final chapter illustrates the importance of political and economic factors in relation to Investor-State Tribunal.

The research has to in a particular way provide a thoughtful analysis of corruption as an economic crime and find proof of intentional use of such a crime publication by the host state to in fact benefit despite the ICSID legal proceedings. In this regard, the paper will evaluate whether the host-state is a de facto beneficiary after ICSID proceedings or not. The de facto beneficiary in the context of this research means that after the expropriation of the investment without any legal and economic consequences even despite ICSID arbitral proceedings the host-state in fact benefits.

In order to evaluate the international atmosphere towards corruption punishment, there is a need to analyse such mechanisms as United Nations Convention against Corruption (hereinafter the "UNCAC"). After the identification of the global effect on the national legal framework, another critical analysis has to show the legality of corruption defence strategy as such. Finally, relevant ICSID Awards analysis is a primary method that can connect theory with practice and subsequently answer the research question. ICSID Awards are chosen on the basis where the Tribunal decided to deny its jurisdiction after corruption discovery during legal proceedings.

The research also has to answer author's concerns that such a defence strategy is nothing more than a skilful manipulation with international norms in order to legitimise expropriation and has nothing familiar with the actual fight against corruption and justice. Therefore, the hypothesis of the paper stresses the vulnerability of international investment law towards Corruption Defence Strategy due to the de facto beneficiary in the face of the host state.
The concluding part of the thesis is not only precisely answering the research question with approval or disapproval of the upraised hypothesis but also a detailed summary of the most relevant corruption defence strategy related elements as well as identification of possible solutions that could be developed in the future.

1. Corruption as an Economic Crime

There could be a case when economic crimes such as corruption appear in an Investor-State dispute. In that case, the host state not only participates in arbitral proceedings but also investigates and prosecutes economic crime on a domestic level. [3] Investigating and prosecuting economic crimes can also breach international obligations of the host state, which can rise a legal claim against it. However, the scenario when the state is responsible for economic crimes is not being analysed in the context of current research.

After the appearance of economic crime, Investor-State Tribunals have to decide the applicability of their jurisdiction and how deep they should investigate the economic crimes.[4] It may be a case that national criminal prosecutions can result in an indirect expropriation.[5] Therefore, the identification of limits of tribunals' respect and trust towards proceedings and decisions made by national courts also is a significant issue that requires appropriate examination by the Tribunal.

In order to apply corruption as an economic crime, it is necessary to provide its definition, which, in most cases, is a bribe. However, it has to be noted that everything from which an official person can benefit can be defined as an act of corruption. Thus, the broad meaning of corruption can be the abuse of office for unofficial purposes.[6] In order to understand which type of corruption act will fall within the competence of the Tribunal, it is useful to divide its classification into petty and grand corruption.[7] It is not a secret that corruption acts appear on an everyday basis in various fields starting from schools till ministries. Thus, petty corruption refers to the abuse of powers that are exercised on an everyday basis by low and mid-level public officials. According to the logic stated in case *Amco Asia Corporation and others v. the Republic of Indonesia*[8], such petty acts of corruption have to be regulated by the national legislative procedures being outside the competence of the Tribunal. As it is described in further chapters regarding appropriate case-law, the grand acts of corruption raised in Arbitration are mainly practised by high officials when leaders decide to use a possibility to de facto benefit from the upcoming flow of investments. An example could be seen in one of the ICSID cases where a representative of World Duty-Free paid the US $2 million to Kenya's President during the investment contract procedure. [9]

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[3] Yarik Kryvoi, *"Economic crimes in international investment law",* I.C.L.Q. 2018, 67(3), pp. 577-578.
[4] *Ibid.*
[5] "*Señor Tza Yap Shum v The Republic of Peru"*, ICSID Case No. ARB/07/6, Award, 7 July, 2011, paras. 95, 103, 113.
Available at: https://www.italaw.com/sites/default/files/case-documents/ita0881.pdf
Accessed on 1 March, 2020.
[6] The Hungarian Gallup Institute, *"Basic Methodological Aspects of Corruption Measurement: Lessons Learned from the Literature and The Pilot Study"*, December 1999, pp.1-2.
Available at: https://www.unodc.org/pdf/crime/corruption_hungary_rapid_assess.pdf
Accessed on: 1 March, 2020
[7] Sagar Kulkarni, *"Enforcing Anti-Corruption Measures Through International Investment Arbitration*", Transnational Dispute Management, Vol. 10, issue 3, pp. 5-7, May 2013. ISSN: 1875-4120.
[8] *"Amco Asia Corporation and Others v. the Republic of Indonesia",* ICSID Case No ARB/81/1, Award in Resubmitted Proceedings, 31 March, 1990.
Available at: https://www.italaw.com/sites/default/files/case-documents/italaw8885.pdf
Accessed on 2 March, 2020.
[9] "*World Duty Free Company v Republic of Kenya"*, ICSID Case No. Arb/00/7 Award, 4

At this point in the research, it is necessary to explain the differences between Bilateral Investment Treaties and Bilateral Investment Contracts. Bilateral Investment Treaties are signed between two countries creating the legal ground for investment protection between these two states. Bilateral Investment Treaty is also a legal ground for Bilateral Investment Contracts which are signed between the investor and the host state. For instance, if Spain and Portugal signed the Bilateral Investment Treaty, it means that companies from Spain will be able to sign investment contracts with Portugal relying on signed BIT. These contracts are more specific, including the clauses regarding specific investment which makes the stage of negotiations one of the most painful and long-lasting investment procedure elements.

Due to the apparent desire to conclude investment contracts on more favourable terms for each contracting party the element of corruption can become a useful tool in order to conclude a contract on more favourable terms for investors by using the weak points of a human being satisfying all financial dreams of authorities which can affect investment contract procedure. However, in most cases, it seems impossible to provide physical evidence of corruption act that was committed during negotiations. It is not a secret that in the light of technology development as well as relevant experience, bribes are practised in more and more smart ways, making it difficult to prove them. However, thanks to the burden of legal proof concept, uncertainty is more comfortable to resolve to require arbitration parties to present relevant evidence in order to support their arguments and claims. Thus, Tribunal can by itself conclude whether all facts and arguments provided by the parties can or cannot be classified as corruption. Nevertheless, in most of the cases, Tribunals look at the substantive evidence collecting the facts regarding investor involvement in economic crimes and subsequently denies its jurisdiction. As a result, for investors, it is a well-known fact that in developing countries, the legal system is less developed, including anti-corruption mechanisms.[10] Such an environment created the well-known notion among the investors that a bribe could be an affordable price for starting a business in a foreign country.[11]

Talking specifically about corruption as an economic crime it has to be admitted that in the past years the attention from the international community increased towards finding collective solutions against this phenomenon not only on a global level but also by signing specific local multinational conventions and appropriate legal mechanism implementation.[12] Some states can include anti-corruption provisions directly in BIT to exclude the corruption appearance at the very beginning.[13]

October 2006.
Available at: https://www.italaw.com/sites/default/files/case-documents/italaw15005.pdf
Accessed on 1 March, 2020.

[10] Habazin, *supra* note 2, p. 810.

[11] *Ibid.*

[12] As an evidence can be provided: United Nations. Economic Commission for Africa (2016-03). Draft Pan-African investment code. UN. ECA Committee of Experts (35th: 2016, Mar. 31 - Apr. 2: Addis Ababa, Ethiopia); AU Committee of Experts Meeting (2nd: 2016, Mar. 31 - Apr. 2: Addis Ababa, Ethiopia); UN. ECA Joint Annual Meetings of the African Union Specialized Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration (9th: 2016, Mar. 31 - Apr. 2: Addis Ababa, Ethiopia). Addis Ababa. © UN.ECA.

[13] *"BIT between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments"*, Article 14 (2), 2016.

The negative global attitude towards corruption economic crime can be documented due to the various international convention ratification. The first global instrument is the United Nations Convention against Corruption which was adopted in 2003.[14] In a considerably short time period, UN Resolution 58/4 reached the necessary amount of ratification by countries and as a result, came into force in 2005.[15] Demonstrable behaviour of countries to ratify the current Convention as quickly as possible clearly shows that despite all economic and political differences, this problem has to be solved. As a result, 183 countries are signatories to this Convention, which shows the truly global and highly significant scale of problematics.[16] Mainly, the core function of UNCAC is to criminalize corruption within member states and provide collective measures in order to fight with it.[17]

UNCAC has a global effect in terms of many ratifications, requiring to criminalize the corruption phenomena. Consequently, corruption criminalization in such a substantial amount of national legal systems can have significant legal consequences related to the Investor-State Arbitration procedure. The criminalization of corruption phenomenon in national legal frameworks illustrates not only international legal concerns regarding this matter but also national harmonization which means that corruption becomes not only an international crime but also national which in the case of investments can have even stronger legal effect.

The effect of global criminalization of corruption achieved thanks to the UNCAC is a crucial factor in regards to the investment procedure since such a crime achieves international distaste. If most of the countries recognize such a phenomenon as the economic crime, it means that it is a crime according to the BITs and Investment Contracts.

There also are a number of relevant international anti-corruption conventions. However, they are not as global and crucial in regards to the investment resolution procedure as UNCAC.[18] However, these conventions are essential in order to show international moral and legal distaste towards such an economic crime.

Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3601/download
Accessed on 20 March, 2020.

[14] UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422, Available at: https://www.refworld.org/docid/4374b9524.html
Accessed on: 20 March, 2020

[15] United Nations Office on Drugs and Crime, "*Signature and Ratification Status"*, October 3, 2017. Available at: https://www.unodc.org/unodc/en/corruption/ratification-status.html
Accessed on 20 March, 2020

[16] *Ibid.*

[17] UNCAC, *supra* note 14, pp. 17-30

[18] *"European Union: Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union",* International Legal Materials 37, no. 1, May 26, 1997: pp. 12–21. doi:10.1017/S0020782900019392.
Organization for Economic Cooperation and Development. 1998, *"Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: and related documents.",* Paris: OECD. Available at: https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf
Accessed on 23 March, 2020.

2. Legal Grounds for Corruption Defense Strategy

In order to understand how defence strategy is implemented, the legal basis has to be identified. Firstly, the Vienna Convention on the Law of Treaties [19] is the primary legal ground for BITs. Tribunals often rely on the *Vienna Convention on the Law of Treaties Article 31(3)(c)* [20]in order to implement rules of international law applicable to the investment parties. Such rules can include the legality of the investment provisions or other relevant norms related to economic crime appearance. However, the issue of legal grounds requires a more detailed analysis. Hence, further chapters more detailed describes the role of clean hands doctrine in Investor-State Tribunal which causes confrontation of the principle of equity with the law and finally the claim admissibility and jurisdiction issues.

2.1. Clean Hands Doctrine

The *"Clean Hands Doctrine"* is a modern and effective mechanism of justice which was developed by Richard Francis, an English attorney, who firstly mentioned doctrine in 1728 by deriving it from nine cases where an unfair plaintiff had been denied assistance.[21] Simply explaining it means: [the one who comes into equity has to come with clean hands].[22] Therefore, the doctrine became the main instrument in order to ensure that if a claimant has itself acted wrongfully or illegally, he or she cannot benefit from the remedies which are available at equity.[23] As a result, the current doctrine has been used as a part of the defence strategy by the defendant.[24]

In order to better understand how it could be exercised in the court, there is a necessity for a more detailed analysis regarding clean hands doctrine structure. Clean Hands doctrine consists of three grounds which are judicial integrity, justice and public interest:[25]

i. **Judicial integrity.** Firstly, if a court will allow a plaintiff who had been attested in unjust and unclean actions to win a case thereof to recover damages it clearly will create a favourable environment in order to practice the plaintiff's inequitable conduct repeatedly in the future.[26] Secondly, and in some cases more importantly, such a

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[19] United Nations, *"Vienna Convention on the Law of Treaties",* United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969.
Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
Accessed on 24 March, 2020.
[20] Ibid, Article 31(3)(c).
[21] T. Anenson, *"Announcing the Clean Hands Doctrine. In Judging Equity: The Fusion of Unclean Hands in U.S. Law",* Cambridge: Cambridge University Press, pp. 12-15, 2018. doi:10.1017/9781316675748.003
[22] G. Virgo, *"The Principles of Equity & Trusts",* Oxford University Press, Third Edition, 2016, pp. 36-37, ISBN: 9780198804710.
[23] *Ibid.*
[24] J. Lawrence, William, *"Application of the Clean Hands Doctrine in Damage Actions",* 57 Notre Dame L. Rev. 673, 1982, pp. 676-678.
[25] *Ibid. pp. 674-675.*
Available at: http://scholarship.law.nd.edu/ndlr/vol57/iss4/4
Accessed on 21 March, 2020.
[26] *"Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*", 324 U.S. 806, 814, 1945.
Available at: https://supreme.justia.com/cases/federal/us/324/806/
Accessed on 21 March, 2020.

scenario can raise significant doubts regarding the presence of justice provided by the court. Hence, logical action would be to deny its jurisdiction before unfair plaintiff and "refuse to interfere on his behalf,"[27] which will allow a court to stay just.

ii. **Justice.** First and the most obvious reason of current doctrine usage is to make the final decision truly fair.[28] In order to make the final decision fair, the doctrine can become a justification for a claim denial. Consequently, in this case, the doctrine serves as a tool for the prevention of a scenario where a felon de facto benefits from his wrongdoing.[29]

iii. **Public Interest.** In some cases, the court can use a clean hands doctrine in order to protect a public right.[30] Subsequently, doctrine creates a possibility to involve a public interest where it is necessary in order to not only prevent a felon from benefiting of his wrongdoings but also protect the public rights and thus achieve true justice.[31] Example can be found in the case *"Morton Salt Co. v. G.S Suppfiger"* where the Supreme Court denied a patentee equitable relief because the plaintiff not only came with unclean hands but also infringed fair competition thus infringing on the public interest.[32]

Therefore, it could be seen that there are more than enough grounds for a tribunal to recognize a Clean Hands Doctrine as a useful instrument in order to achieve justice. However, even despite evident effectiveness, the doctrine has to have legality in order to be applied in International Arbitration. Due to the specific topic of the research, which is only concerning corruption crime, the legality of other crimes such as fraud and others, will not be explained. Even despite differences in BITs in terms of the level of protection, most likely the clause requiring the compliance of investment with the host state laws will be included. The wording and location of such a clause can vary on a case by case basis. However, the primary motivation of contracting parties is to ensure that the substantive protections of the treaty are only applicable in regards to investments complying with the legal framework of the host state.[33]

The UNCAC Convention plays a significant role since more than 180 states have ratified it, which means that all ratified states recognize corruption as illegal in the framework of their national legislation. Consequently, if corruption is illegal in the host state, the investor is breaching current law in the very beginning. However, there could be a case when the legality cannot be exported directly from the relevant BIT, nevertheless, in such a scenario the Clean

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[27] *"Keystone Driller Co. v. General Execavator Co.",* 290 U.S. 240, 245, 1933.
Available at: https://supreme.justia.com/cases/federal/us/290/240/
Accessed on 21 March, 2020.
[28] *Ibid.*
[29] Kryvoi, *supra* note 3, p. 675.
[30] Kryvoi, *supra* note 3, p. 676.
[31] *Ibid.*
[32] *"Morton Salt Co. v. G. S. Suppiger Co.",* 314 U.S. 488, 1942.
Available at: https://supreme.justia.com/cases/federal/us/314/488/
Accessed. On 22 March, 2020.
[33] M. Sornarajach, *"The International Law on Foreign Investment",* p. 318, 2010.

Hands Doctrine can still be applicable by defining it as a general principle of international law.[34]

If the plaintiff committed corruption with the defendant regarding the investment contract, the jurisdiction of Arbitration could be denied. Ultimately, the lawfulness of investment is a necessary condition in order to protect the investment using international mechanisms. Otherwise, Clean Hands Doctrine can deny Arbitration jurisdiction or admissibility of a claim on the early stage.[35] On the other hand, the counter-argument regarding the necessity to recognize jurisdiction even in case of corruption appearance can also find judicial support. In the light of the paper specification on ICSID Arbitration, the opinion made in the ICSID award will be used as an argument for protection of jurisdiction recognition in case of corruption appearance, which states:

> Likewise, the principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be „legal" or „illegal " made in "good faith" or not, it nonetheless remains an investment. The expressions „legal investment" or „investment made in good faith" is not pleonasms and the expressions „illegal investment" or „investment made in bad faith" are not oxymorons.[36]

Thus, there could be an argument that even despite the possible appearance of investor unclean hands' the investment remains an investment and has to be judged according to international investment law.

Some scholars suggest that the scope of clean hands doctrine has to be limited suggesting the tribunal to recognize such a defence strategy only in limited circumstances when it appears that upraised violation is truly fundamental which includes cases of corruption, fraud and deliberate violations of the host State's law.[37] Thus, suggesting that in each of the other cases, the international tribunal should declare that it has jurisdiction of the dispute. [38] However, even in case of such a blatant breach of fundamental rights as corruption, it should be kept in

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[34] "*Plama Consortium Ltd. v. Republic of Bulgaria"*, ICSID Case No. ARB/03/24, Award of 27 August 2008, par. 140, p. 40.
Available at: https://jusmundi.com/en/document/pdf/Decision/IDS-133-3010892320-148327922/en/en-plama-consortium-limited-v-republic-of-bulgaria-award-wednesday-27th-august-2008
Accessed on 23 March, 2020.
[35] "*Hulley Enterprises Limited (Cyprus), Veteran Petroleum Limited (Cyprus) and Yukos Universal Limited (Cyprus) v. Russian Federation",* PCA Case No. AA226-28, Final Awards, 18 July 2014, para 1358, p. 431.
Available at: https://www.pcacases.com/web/sendAttach/418
Accessed on 32 March, 2020.
[36] *"Saba Fakes v Turkey",* ICSID Case No. ARB/07/20, Award, par. 112, p. 36, 14 July 2010.
Available at: https://www.italaw.com/sites/default/files/case-documents/ita0314.pdf
Accessed on 23 March, 2020.
[37] Mariano de Alba, *"Drawing the Line: Addressing Allegations of Unclean Hands in Investment Arbitration",* Revista de Direito Internacional, p. 334, 2015, DOI: 10.5102/rdi.v12i1.3476.
Available at:
https://www.researchgate.net/publication/282390502_Drawing_the_Line_Addressing_Allegations_of_Unclean_Hands_in_Investment_Arbitration
Accessed on 23 March, 2020.
[38] *Ibid.*

mind that it could be a scenario that a Clean Hands Doctrine becomes the only defence option for the host state.[39]

If after signed Bilateral Investment Contract host state directly or indirectly expropriate the investment, the risk that it can be proven in Arbitration is significantly high. Consequently, if lawyers understand that the most realistic outcome is the loss of the case which will cause the obligation to pay damage compensation, they start to look for all available options in order to get out of such a disadvantageous situation. Subsequently, the denial of Arbitration jurisdiction could be a perfect scenario in order to move proceeding in local courts where the government can have sufficient influence making international investment law invalid regarding investor protection.

Hence, the suggestion regarding limiting the circumstances of doctrine application is exceptionally relevant. However, such a categoric and immediate jurisdiction denial in case of corruption appearance could not be the best solution in order to achieve equity. This point of the paper raises a further question regarding the conflict between the principle of equity (which is the main aim of the Clean Hands Doctrine) and law.

2.2. Law versus Equity

After the notion of Clean Hands Doctrine, it is necessary to analyse whether it is indeed reasonable to use the principle of equity above the law. As it was concluded by the Tribunal in the United States-Norway Arbitration, the equity means general principles of justice eminent from any jurisdictions or laws of municipalities.[40] Hence, the term equity can be defined from everything which can cause core justice. It could be whether general principles recognised by civilised nations as it is stated in Article 38(1) of the Statute of the International Court of Justice,[41] or any other globally accepted moral standards even if they are against local laws. In the current research, the term equity will be used as a confrontational towards law.

There seems to be a lack of international consensus regarding fundamental substantive principles of justice, in the way in which they arise for application by Tribunals.[42] Nevertheless, in reality, equity is not about substance, on practice, it is about Who Does What, rather than about What Is Done.[43] Thus, in case of corruption appearance discovery

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[39] Kryvoi, *supra* note 3, pp. 684-685.
[40] Permanent Court of Arbitration, *"Award of the tribunal of arbitration between the United States of America and the Kingdom of Norway under the special agreement of June 30, 1921",* p. 23, The Hague, 13 October 1922.
Available at: https://pcacases.com/web/sendAttach/642
Accessed on 23 March, 2020.
[41] United Nations, *"Statute of the International Court of Justice",* Article 38, 18 April 1946.
Available at: https://www.icj-cij.org/en/statute
Accessed on 23 March, 2020.
[42] Nader L., Starr J., *"Is Equity Universal",* Equity in the World's Legal Systems: A comparative study, p.125, 1973.
[43] V. Lowe, *"The Role of Equity in International Law"*, 12 Australian Yearbook of International Law, p. 78, 1989.
Available at: http://classic.austlii.edu.au/cgi-bin/download.cgi/cgi-

under ICSID Arbitration, the court will be more concentrated on who made an act of corruption (plaintiff) rather than circumstances and exact details of what was done. There is no need to start a further investigation regarding corruption act details if the appearance of such a crime by itself already gives a possibility to deny jurisdiction.

There may, indeed, be an argument to be made out for the view that a further corruption act investigation would discover details that could prove the same or even higher level of responsibility of the defendant and it could create a different final image where the effect of Clean Hands Doctrine, for instance, would not result in equity.

Ultimately, an argument could be that more proper examination should be provided in order to achieve true justice. To provide an example, according to international law, the use of force that will overthrow the government of other States is prohibited,[44] however, what if equity will override it, and allow a humanitarian intervention? Thus, if the legal structure of the sovereign State becomes an obstacle to equity, which laws should be followed? A logical conclusion can arise, which causes the creation of a particular hierarchy of fair principles raising the question which should prevail? [45] The law stated in a treaty or jus cogens? The law documented in investment contract or Clean Hands Doctrine? And if in a hierarchical order one general principle is over another but in case of choice of the prevailing principle, the true justice is not achieved? To provide an example: The host state expropriated the investment, but the claim of the investor was denied relying on a Clean Hands Doctrine in International Arbitration in the light of fact appearance which proves that there was an act of corruption made by the investor. However, both parties participated in the corruption act but only one-party de facto benefits which is the host state that expropriated the investment without paying any damages. Could it be true justice? Most likely not, which puts the core objective of Clean Hands Doctrine under a question.

Additionally, there is an issue questioning the necessity for states to agree to the application of acceptable norms to them or not. One of the arguments could be that treatment to equity involves not more than the skilful manipulation of legal rules as well as the implementation of general principles of law recognized by civilized nations without any special permissions for its use.[46] Equity is applied as part of the law. Hence, any tribunal which is authorized to apply international laws can also implement equitable principles and appropriate procedures.[47] However, the dilemma is how to implement equity in such a way to exclude possible manipulations. Otherwise, justice can be not a final destination. Therefore, if the international community is willing to further develop the influence of international cooperation through the lens of supranational institutions the appropriate formula has to be developed in order to prove that supranational institutions are not only independent and objective but also able to achieve a true justice without manipulation of different norms and moral aspects.

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bin/download.cgi/download/au/journals/AUYrBkIntLaw/1989/4.pdf
Accessed on 23 March, 2020.

[44] United Nations, *"Charter of the United Nations",* 1 UNTS XVI, Article 2(4), 24 October 1945. Available at: https://www.un.org/en/sections/un-charter/chapter-i/index.html
Accessed 23 March, 2020.

[45] Lowe, *supra* note 43, p. 80.

[46] *Ibid,* p. 81.

[47] *Ibid*, p. 82.

The issue of supranational institutions' further development is raised due to their fight against corruption[48] as well as a possible lack of true justice in International Arbitration's which negatively affects international trade. If companies and influential corporations which for many years paid bribes in order to start a business in developing countries will start to lose cases in International Arbitration, the further development of International Trade will slow down. The more precedents will appear, the more host states will discover corruption acts in order to expropriate investment without any legal and economic consequences easily. On the one hand, the necessity to pay bribes in developing countries is a well-known fact for investors, on another, it turned out that corruption is a trap that can result in the annulment of all investment protection rights.

Concluding equity concept analysis, it should be stated that it is a practical instrument to fight with the law in a significant amount of cases. However, the broad scale of different international principles gives a possibility to manipulate with norms. It is not a secret that if judges do not strictly prosecute corruption appearance at an early stage of the proceedings, it will cause a favourable environment for further development of corruption phenomena in the future. Therefore, if judges will decide to close eyes on corruption appearance, it may breach not only international laws prohibiting such phenomena but also an appropriate treaty clause which could be stated directly in the relevant BIT.

In author's opinion, the solution requires adaption of the mechanism in order to achieve justice without closing eyes on the corruption act made by investors but at the same time without adamant jurisdiction denial at an early stage of the proceedings.

2.3. Jurisdiction and Admissibility

The borderline between the jurisdiction and admissibility can be recognized as a disputable issue. Regulations of ICSID Arbitration do not specifically state the term "admissibility" when it comes to referring to the claims of the dispute parties and allusions to admissibility in arbitration rules usually are regarding the admissibility of evidence.[49] Some of the tribunals have stated that the appearance of economic crimes, such as corruption requires a detailed examination at the merits rather than dealing with them in the jurisdictional stage.[50]

Alternatively, some of the tribunals do not feel the need to distinguish between them stating that there is [no need to go into the possible and somewhat controversial the distinction

[48] Fight against corruption could be a matter of not only international conventions but also of such supranational organizations as UN according to Chapter I.
[49] ICSID Rules, Chapter IV, *"Written and Oral Procedures",* Rule 34 (1).
Available at: http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partf-chap04.htm#r34
Accessed on 1st April, 2020.
[50] "*Hesham T. M. Al Warraq v Republic of Indonesia",* UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of Claims, 21 June, 2012, 2, par. 99, p. 38.
Available at: https://www.italaw.com/sites/default/files/case-documents/italaw3174_0.pdf
Accessed on 1st of April, 2020.

between jurisdiction and admissibility].[51] Taking look on other international law sources the ILC on State Responsibility Article 44[52] can be the relevant source which states that claims may be inadmissible in case if they are not brought in accordance with applicable in relation to the nationality of claims. In the case of BITs, nationality is limited due to its structure which includes nationals only of 2 particular states. In case of investment arbitration, it means that if any applicable rule to the host state is not respected, the tribunal is able to deny its claim admissibility.

Another interesting mechanism used by the host state in accordance with the aforementioned Article 44[53] is the *Exhaustion of Local Remedies* (ELR) rule provision inclusion which denies the claim if local remedies have not yet been exhausted.[54] That is to say, that the inclusion of ELR rule provision in BITs has become a trend by more and more host states and such a desire for ELR rule inclusion is understandable due to the fact that in that scenario legal proceedings firstly have to go through all of the instances of national courts and only after that the tribunal can apply its jurisdiction when it is clear that host state exhausted all of its local remedies.[55]

What is favourable for the host state usually is contrary to the investor, to make an example: If the host state breached the contractual obligations and indirectly expropriated the investment the investor is losing money every day. Moreover, if in host states political regime, the government has any of the political influence over the court system the legal proceedings can last forever. Consequently, adding ELR rule provision in BITs gives more ways for the host state how to enforce breaches of the international investment law without consequences. There could be an argument, that even so, at the very end, the legal proceedings will be brought into International Arbitration. However, it should be kept in mind that legal proceedings under the Investor-State tribunal lasts for many years and if to calculate total losses both received during national and international legal proceedings the sum can be truly huge making the investment ruinous. Nevertheless, the ELR rule which has a sufficient effect on claims admissibility is decided in BIT negotiations, hence, the state is free to not agree with such provisions.

Some scholars differentiate between jurisdiction and admissibility, stating that jurisdiction relates to the scope of the competence of the tribunal,[56] relying on the agreement of the state

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[51] "*Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic"*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July, 2006, par. 54, p. 16.
Available at: https://www.italaw.com/sites/default/files/case-documents/ita0616.pdf
Accessed on 1st April, 2020.
[52] UN General Assembly, "*Responsibility of States for internationally wrongful acts: resolution"*, adopted by the General Assembly, 8 January 2008, A/RES/62/61, Article 44.
available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf
accessed on 2nd April, 2020.
[53] *Ibid.*
[54] Martin Dietrich Brauch, *"Exhaustion of Local Remedies in International Investment Law IISD Best Practices Series - January 2017",* International Institute for Sustainable Development, 2017, pp. 1-3.
Available at: https://www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf
Accessed on 1st April, 2020.
[55] *Ibid.*
[56] Z Douglas, *"The International Law of Investment Claims",* Cambridge University Press, par. 293, 2009.

for to arbitration, while admissibility relates to the competence of the tribunal to make a decision regarding the case at a particular time in the light of possible temporary or permanent deficiency of the claim.[57]
Thus, relying on this point of view, admissibility refers to the question of whether the claim is ready for decision at this stage. This approach to admissibility is similar to so-called *ratione temporis* jurisdiction requirements that can be met in some of the investment treaties, where certain preconditions for the application of the arbitration are stated.[58] An example could be the case of the ELR rule inclusion which was described shortly before.

If economic crime appeared afterward the investment was concluded the jurisdiction and admissibility are becoming less disputable. Such a conclusion has been made due to the ability of the host State to properly respond by using appropriate domestic law mechanisms[59] and if the investor decides to challenge the legality of such mechanisms, it should have the ability to realize it in accordance with the relevant treaty. Consequently, if the relevant misconduct occurs after the establishment of the investment, or if the relevant instrument contains no legality requirement, then the matter as a question of admissibility is decided at the merits phase rather than the jurisdictional phase.[60]
Example can be found in case *Plama v Bulgaria*, where the tribunal decided to not rely on a requirement of legality stated in the Energy Charter Treaty to deny the investor's application on jurisdictional grounds and tribunal concluded to take the hearings regarding the claim of the dishonest misrepresentation of the facts on the merits.[61]
In conclusion, it is clear, that a significant role in the borderline examination between the jurisdiction and claim admissibility plays the substance of relevant treaty, as well as other mechanisms, in which the parties put their legal consent to arbitration. These mechanisms can include a *"legality requirement*" which can be a requirement for the tribunal's jurisdiction, which usually is considered as a jurisdictional issue. Otherwise, the tribunal's commission of economic crimes when receiving the investment could lead to recognition of the claim as inadmissible at the phase of merits. Nevertheless, it could be concluded that the autonomous character of the international arbitration agreement means that Investor-State tribunals should stand up for their jurisdiction, even despite the possible breaches of investor obligations at the stage of acquiring the investment.

Ultimately, the legislative behaviour of the tribunal in case of economic crime appearance depends not only on investor level of protection in the relevant BIT but also on other relevant provisions that can affect the jurisdiction applicability procedures.

3. ICSID Investment Awards Reconsideration

After theoretical analysis, it is necessary to analyse appropriate case law under ICSID Arbitration to understand how corruption defence strategy is implemented in practice. Further

[57] M Waibel, *"Investment Arbitration: Jurisdiction and Admissibility"*, Cambridge Legal Studies Research Paper Series, Paper No. 9/2014, pp. 7-9, February 2014.
[58] Kryvoi*, supra* note 3, p. 579.
[59] Yukos case, *supra* note 35, paras. 1354-1355, p. 430.
[60] Waibel, *supra* note 57, pp.7-8.
[61] Plama case, *supra* note 34.

analysis includes a case summary with relevant facts in order to draw a basic image of the case. Significant attention of award reconsideration being drawn regarding the procedural history, responsibility of those who participated in corruption crime, the arguments of the tribunal in order to deny its jurisdiction, breach of investor and host state legal obligations as well as the examination of investigation element presence.

Achievement of true equity by the Tribunal in authors opinion is the main final destination of every Tribunal and main instrument to evaluate the effectiveness of international investment law in general. The final element of case analysis includes remarks of the author with critical analysis.

3.1. World Duty Free Company Limited v. The Republic of Kenya

This case is a clear example of how such economic crimes as corruption are committed at the highest level of governmental authorities and the behaviour of the tribunal of corruption act appearance during the legal proceedings. Moreover, this case supports the trend of increasing the importance of investor legal obligation not only towards relevant contracts but also towards public international law.

3.1.1. Summary

In June 2000, World Duty-Free Company Limited, a company incorporated in the United Kingdom (hereinafter the "Claimant"), started ICSID proceedings versus the Republic of Kenya (hereinafter the "Respondent").[62]

The claimant stated that Kenya had breached the contractual obligations and expropriated the property of the claimant after the appropriate order of the Kenyan officials in 1989 when the court arranged to take acquisition over management and take the actual control over World Duty-Free.[63] Claimant asked the court for a remedy, restitution, and damages, including lost profits and exemplary damages.[64]

Arbitral proceedings were in relation to a 1989 investment contract (hereinafter "investment contract") between the plaintiff and Kenya and in accordance with it the plaintiff should construct, maintain and operate relevant duty-free infrastructure please at two airports in Kenya.[65] The investment contract also included an arbitration clause stating that in case of the dispute it has to be settled under ICSID Arbitration.[66]

In December 2002, the claimant revealed the document according to which Duty-Free Limited had made a covert payment to the former President of Kenya, Daniel Arap Moi, due to the necessity to conclude the investment contract.[67] After the reveal of such information,

[62] Duty-Free case, *supra* note 9, par. 4, p. 2.
[63] *Ibid.*
[64] *Ibid.*
[65] *Ibid*, par. 62, p. 14.
[66] *Ibid.*
[67] *Ibid*, par. 167, p. 40.

Kenya requested to annul the proceedings relying on grounds of illegal signature of the contract through the bribe, which made the contract unenforceable according to public policy.

Based on these facts, in December 2004, the Tribunal declared certain fundamental issues such as a) Actual payment of to the former president by the claimant b) in case of "(a)" issue confirmation, whether the Investment Contract was concluded as a result of a bribe c) In case of confirmation of both previous issues it has to be examined whether the contract is valid or null and void in accordance with appropriate national law as well as public international law.[68]

Another important fact relating to the discussion of this paper is that the person who was paid a bribe had no legal consequences:

> "former President of Kenya, Mr. Daniel Arap Moi, was not a party to these arbitration proceedings and was not legally represented in these proceedings. He was not heard as a witness. This Tribunal has no jurisdiction over the former President. The Tribunal decided on the dispute submitted to it on the evidence adduced and the submissions made by the parties to the case."[69]

According to the tribunal assessment of relevant facts and principles of national and international law, it is stated that the investment contract is a result of bribery with former Kenyan President, hence, the plaintiff has no right to achieve investment protection based on its claims in order to somehow recover relying on relevant investment contract.[70]

Subsequently, in terms of the corruption-related legal issues, this case is a useful source in order to see how a tribunal is able to rely upon general principles of international law as well as obligations of investment parties in order to justify its evaluation of relevant claims. Moreover, this case illustrates that investors have legal obligations to comply with not only domestic but also with international law relevant for the host state receiving the investment as well as illustrate how investor unclean hands in certain circumstances can influence its rights for investment protection.

3.1.2. Legal Issues

First of all, it has to be stressed that according to the relevant investment contract, the law of Kenya and the United Kingdom applies.[71]

Secondly, the Tribunal concluded that principles of public international law also have to be applied, due to the fact that other international tribunals implemented their decisions in accordance with international values.[72]

Nevertheless, in the Tribunal's point of view, the preliminary examination has to be made before the application of [universal values]. More specifically, this examination has to ensure

[68] *Ibid*, par. 129, p. 27.
[69] *Ibid*, par. 3, p. 2.
[70] *Ibid*, par. 179, p. 44.
[71] *Ibid*, paras. 158-159, p. 36.
[72] *Ibid,* paras. 137-141, pp. 31-32.

the presence of [objective existence of a particular transnational public policy rule] on the relevant subject.[73]

In order to conclude the presence of [transnational public policy rule] or [accepted norms of conduct that must be applied in all fora][74], the Tribunal looked for a reference at all relevant legal sources such as international conventions, legal declarations, decisions of relevant national courts and arbitral awards convicting corruption[75]. Subsequently, relying on these sources, it stated that [bribery is contrary to to…transnational public policy], therefore tribunal has to deny all [claims based on contracts of corruption or contracts obtained by corruption].[76]

Additionally, the Tribunal documented that even in such a case when corruption is [widespread] or [common practice] in the host state the investor still is bound and obliged to comply with international norms and laws.[77] Therefore, it creates the conclusion that investors are obliged to comply with what can be identified as an [objective minimum standard of conduct] which means a certain standard that has to be complied with, even if it appears that relevant host state does not respect and comply with it.[78]

Evidently, after the interpretation of principles of international law, the Tribunal had examined the appropriate domestic laws both of Kenya and England.[79] The conclusion of Tribunal documented that both relevant legal frameworks identified actions of the claimant as illegal making the contract null and void.[80]

After the corruption act reveal in the arbitration proceedings Kenya did avoid the concluded contract and there was no evidence in order to claim Kenya for deed of its president.[81] The main argument of the Tribunal regarding unfair leave of the Claimant without investment protection from wrongful acts by Kenya was relying on public policy principles stating that it is more important to protect [not the litigating parties but the public].[82]

Another important legal conclusion drafted from this case is that investors not only have their protection mechanisms but also certain legal obligations in relation to international public policy formed from the international norms supported by international laws, awards and legal sources stated in the relevant investment contract.[83] However, the formula of significance and scope of the investor obligations was not set in this case while the only examination included the evaluation of whether an economic crime had been enforced to illegally get its investment protection rights.[84]

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[73] *Ibid,* par. 141, p. 32.
[74] *Ibid,* par. 139, p. 31.
[75] *Ibid,* paras. 141- 157, pp. 32-36.
[76] *Ibid,* par. 157, pp. 36.
[77] *Ibid*, par. 156, p. 36.
[78] *Ibid,* paras. 156, 172, pp. 36, 41.
[79] *Ibid,* par. 182-185, p. 45.
[80] *Ibid.*
[81] *Ibid.*
[82] *Ibid,* par. 181, pp. 44-45.
[83] *Ibid,* par. 157, p. 36.
[84] *Ibid,* par. 129, p. 27.

This case supports a trend that the obligations of foreign investors are increasing which forces investors to stick in borders of certain standards and comply with so-called [ethics of international trade].[85]

3.1.3. Remarks

First of all, the fact that the former president of Kenya has not felt any legal consequences creates some doubts regarding the principle of equity even in the light of the argument of the Tribunal that it has no jurisdiction regarding this particular matter.

The Tribunal still has the authority to put the decision in such a way to oblige the host state for further domestic criminal prosecutions in order to satisfy their claim denial. Subsequently, on the one hand, Tribunal relies on international norms stating that corruption is [prohibited in most if not all of the states], underlining [good morals] and [ethics of international trade], analysing various relevant legal sources which end with a jurisdiction denial on the grounds of international public policy. However, at the same time, on the other hand, Tribunal is making zero effort in order to show the actual support for the fight against corruption and include at least any requirement for further criminal proceedings in a domestic court. It is not a task and competence of the court to fight against corruption and demand further domestic investigations. However, if such international norms are strong enough to close eyes on violations of the defendant, there should be further intention to achieve protection of these norms.

Secondly, the Tribunal argued that even despite not-compliance with the host-state with international norms the investor still is bound by them, and there is no evidence that Kenya has to answer for deed of its former president. Such a conclusion in author opinion does not result in justice due to the following reasons:

i. There seems to be a discriminating effect on the investor because Tribunal puts obligations on him which are not explicitly stated in the investment contract, and more importantly, these obligations do not refer to the defendant. Investment is at least bilateral procedure, which means that all parties are interested and all parties have to be prosecuted equally. Investors' apparent desire is to start a business and gain profit, no matter which requirement will be put by the host state, however, it still is judged maximally strict at the early stage of the proceedings without additional investigations.
ii. If Tribunal refers to the international conventions, it should be stressed that Kenya has ratified UNCAC, which creates certain legal obligations (Kenya ratified Convention in 2003, proceedings ended in 2006). Is it fair to judge the investor relying on international norms while closing eyes on the defendant who has ratified the United Nations Convention against Corruption and at the same time been caught in a bribe? Tribunal argues that there is no evidence that Kenya has to be responsible for deed of the former president, however, if a corruption act made by the governmental highest official cannot be classified as a failure to implement appropriate criminalization of corruption what could be recognized as evidence? How could national anti-corruption mechanism be made if the highest authority's income is a bribe? All international

[85] *Ibid,* par. 141, p. 32.

conventions become useless in a case when the highest authorities of a member state are not only caught on corruption without any consequences but also double profiting from committed crime afterwards. Fish begins to stink at the head; consequently, if the international community is genuinely willing to fight against corruption, it should show all the countries that in case of incompliance, the consequences will be tangible. If the effects of corruption discovery resulted in additional financial losses for the Kenyan government, it would be forced to pay more attention to anti-corruption instrument development due to the apparent desire to escape a repetition of such a scenario. Instead of that, the decision of the Tribunal leads to creating favourable conditions of corruption development in the future in the name of protection of international norms.

iii. It was the investor who revealed appropriate materials regarding bribery. However, the judgment was strict at the very beginning. There could be a future effect where the investor will not be revealing corruption act evidence. Moreover, further bribes will be made in more and more secrecy which will cause an increase of corruption in the future and make a sufficiently adverse effect on the global fight against corruption.

iv. There seems to be manipulation with international norms by the defendant due to the obvious international moral distaste towards corruption. However, in this case, the eminence of morality over other legal sources does not lead to equity due to the de facto profit for one party.

Ultimately, the defendant which de facto not only breached international investment law but also participated in the bribery de jure stays with clean hands. At the same time, the claimant that complied with all contractual obligations revealed evidence of corruption and following all legal norms asked for investment protection is being illustrated as unclean hands entity. In the author's point of view, this is not justice, and this is not what the goal of ICISID Arbitration should be.

3.2. Metal Tech Ltd. v. The Republic of Uzbekistan

This case illustrates the scenario when the host state reveals the act of corruption and Tribunal examines whether the relevant facts can or cannot be identified as bribery in accordance with domestic laws. Moreover, this case is a striking example of how provision in relevant BIT regarding the legality of the investment can play a key role in the Tribunal's decision.

3.2.1. Summary

In December 1998, Metal-Tech Ltd. incorporated under the laws of the State of Israel (hereinafter the "claimant")[86] and the Republic of Uzbekistan (hereinafter the "defendant")

[86] *"Metal-Tech Ltd. v. Republic of Uzbekistan",* ICSID Case No. ARB/10/3, Award, 4 October 2013, par. 1, p. 7.
Available at: https://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf
Accessed on 10 April, 2020.

stepped in the negotiations regarding a joint venture to build and operate a [modern plant for the production of molybdenum products].[87]
The joint venture formation was decided to be concluded between the Claimant, on the one hand, and two companies owned by the Defendant which were "Uzbek Refractory and Resistant Metals Integrated Plant" (hereinafter the "UzKTJM") and "Almalik Mining Metallurgy Combinate" (hereinafter the "AGMK") on the other hand.[88]

AGMK is the producer of molybdenum concentrate and sells it to the product producers while UzKTJM is the main producer as well as exporter of molybdenum products of Uzbekistan.[89] Due to the lack of appropriate technology AGMK was not able to export its concentration in the light of the failure to comply with world market standards, therefore appropriate technical know-how, access to the international markets as well as part of the financing for a new plant was provided by the claimant.[90]

On 18 January 2000, the Cabinet of Ministers issued resolutions No. 15 and No. 29-F which resulted the creation of the joint venture called "Uzmetal Technology" (hereinafter "Uzmetal").[91] After, the official *Uzmetal* registration on 23 March 2000 several contracts were concluded:[92] a) *Contract No. 0150500/U* (hereinafter the "EPC contract") regarding the sale of goods and services by the defendant to *Uzmetal* and under the Construction Contract, the defendant agreed to build a new roasting plant;[93] b) *Export Contract No. 180800EX* (hereinafter the "export contract") according to which *Uzmetal* agreed to sell its goods to the claimant, while claimant further was supposed to sell it on the world market and pay proceeds of these sales back to the *Uzmetal*;[94] c) *Consulting Contracts* were concluded with a company MPC International Investments and Consultants GmbH incorporated in Switzerland (hereinafter the "MPC"), its daughter enterprise MPC-Tashkent (both companies hereinafter "MPC Companies") as well as individuals with a consultation purpose.

On 1 October 2004, the defendant entered into three individual consulting agreements with Messrs Victor Mikhailov, Uygur Sultanov and Igor Chijenok (hereinafter the "consultants").[95] Payments in accordance with this contract were made to the company "Lacey International".[96] The legitimacy of consulting agreements was disputed by the parties where the defendant argues that de facto purpose was to make illegal payments to the governmental officials.[97]

[87] *Ibid,* par. 7, p. 9.
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid*, par. 10, p. 10.
[91] *Ibid*, par. 13, p. 10.
[92] *Ibid*, par. 23, p. 13.
[93] *Ibid*, par. 24, p. 13.
[94] *Ibid*, par. 27, p. 13.
[95] *Ibid*, par. 28, p. 14.
[96] *Ibid*, par. 29, p. 14.
[97] *Ibid*, par. 30, p. 14.

On 12 June 2006, the Public Prosecutor's Office for the Tashkent Region initiated criminal proceedings on the ground that [officials of *Uzmetal* had abused their authority and caused harm to Uzbekistan].[98]

As result, the adoption of Resolution No. 141 by Cabinet of Ministers annulled the exclusive rights of the defendant regarding the purchase of raw materials.[99]
The following actions included claims regarding unpaid dividends which ended with bankruptcy legal proceedings initiated on 31 July 2007 by UzKTJM against *Uzmetal* before the Economic Court of Tashkent Region.[100]

Subsequently, on 30 December 2009, *Uzmetal* vanished from the list of the state registry of legal entities while all its assets are de facto controlled by the Uzbekistani government according to the claimant.[101] After appropriate examination and investigation procedure the Tribunal denied its jurisdiction due to the corruption appearance.

3.2.2. Legal Issues

The claimant in its arbitration request included fourteen breaches including breaches of Israel-Uzbekistan Bilateral Investment Treaty (hereinafter the "BIT").[102]

The Respondent shared Tribunal information regarding details concerning a criminal investigation prosecuted by the Prosecutor General's Office of Uzbekistan into the activities of *Uzmetal*.[103] More specifically, [The alleged criminal enterprise involved kickback payments to individuals, including Uzbek government officials and individuals affiliated with the Claimant and *Uzmetal*].[104]

The claimant argued regarding the breach of fair and equitable treatment, Uzbek law and expropriation due to the resolution No. 141 adaption.[105] More specifically, there was clear discrimination based on nationality, failure to comply with legitimate expectations clause, illegitimate bankruptcy procedure, and other breaches, however, a more important argument in relation to the corruption act is the argument stating that:[106] the legality requirement in the BIT must be interpreted as a [bar to the jurisdiction only where the establishment of the investment was tainted by illegality] and [It does not apply where the unlawful act is committed in the course of the operation of the investment]. Thus, the claimant concludes that it has not violated Uzbek law because *Uzmetal* was constituted and operated in accordance with Uzbek law.[107]

[98] *Ibid*, par. 37, p. 15.
[99] *Ibid*, par. 38, pp. 15-16.
[100] *Ibid*, paras. 43-52, pp. 16-18.
[101] *Ibid*, paras. 53-54, p. 18.
[102] *Ibid*, paras. 55, p. 19.
[103] *Ibid*, paras. 76, p. 22.
[104] *Ibid.*
[105] *Ibid*, par. 107, pp. 29-32.
[106] *Ibid.*
[107] *Ibid.*

In contrast, counter-arguments of the defendant stated that a) act of corruption is a breach of the law of Uzbekistan, b) claims are inadmissible under clean hands doctrine, c) The defendant has complied with all its legal obligations under the BIT due to the fact that Resolution No. 141 has no expropriation effect of the Claimant's investment because has no "taking" effect. It has not deprived the defendant of substantially all of its investment, in reality, it merely voided Article 3 of Resolution No. 15 that gave *Uzmetal* the exclusive privilege to purchase all of AGMK's products.[108]

Evidence collection procedure recording possible corruption act, first of all, has documented the truthfulness of the payment to the consultants and concluded that payment total amount within consulting contracts was near to 20% of the total investment sum and amount of payments is inadequate in comparison with local salaries as well as the incomes of the consultants.[109]

Secondly, after the questioning of relevant individuals and the claimant, no proofs of provided services were provided.[110] Subsequently, the appropriate investigation showed that the consultants' qualifications and background have no connection with the molybdenum industry. As a result, the Tribunal concluded that these contracts are [Sham Consulting Contracts].[111]

Thirdly, the Tribunal documented a lack of transparency regarding payment procedure due to the fact that the majority of payments were made to the shell companies located in Switzerland and the British Virgin Islands.[112] Ultimately, Tribunal fixed consultants' connection with the governmental officials which had authority to influence the investment procedure.[113]

All facts and circumstances considered the Tribunal hereby stated that:
The appropriate analysis showed that corruption elements are tangible enough to violate [Articles 210-212 of the Uzbek Criminal Code] in relation to the establishment of the Claimant's investment in Uzbekistan.[114] As a result, the investment has not been [implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made] as required by Article 1(1) of the BIT.[115]

Finally, Tribunal lacks jurisdiction over the defendant's [treaty claims as well as over the defendant's claims based on the law of Uzbekistan].[116]

[108] *Ibid*, par. 110, p. 34.
[109] *Ibid*, paras. 197-203, p. 63-65.
[110] *Ibid*, paras. 204-207, p. 65-67.
[111] *Ibid*, paras. 208-218, p. 67-72.
[112] *Ibid*, paras. 219-224, p. 72-74.
[113] *Ibid*, paras. 225-227, p. 74-75.
[114] *Ibid*, par. 351, p. 121
[115] *Ibid*, par. 372, p. 128.
[116] *Ibid*, par. 389, p. 132.

3.2.3. Remarks

Firstly, in contrary with Duty-Free case, the corruption act investigation was started by appropriate domestic criminal authorities which at the very beginning shows the compliance of Uzbekistan with appropriate international instruments such as UNCAC thus complying with its international legal obligations.

Secondly, the Consultants who committed the bribe with the investor have not enough connection with the government making it impossible to collect appropriate evidence in order to force the government to answer for consultants' deeds.

Thirdly, the investment legality requirement was clearly stated in the relevant BIT stating that investment has to be implemented in accordance [with the laws and regulations of the Contracting Party in whose territory the investment is made]. Therefore, due to the appropriate evidence collection, the corruption act illegality in the framework of the host state legal system was proved by the Tribunal which results in a lack of Tribunal's jurisdiction even without the Clean Hands Doctrine implementation.

In the author's opinion, equity still is not reached in this case, due to the de facto beneficiary in the face of the claimant. However, in the light of all circumstances, facts and legal obligations, it seemed impossible for the Tribunal to conclude otherwise.

As it was described in Chapter Two, the Tribunal looked on Who Does What instead of What Is Done, as it was in this particular case, the Tribunal provided appropriate investigation regarding the actual presence of act of corruption made by the investor rather than to look on actual circumstances and details of the crime. There still was a possibility for proof of indirect expropriation if Tribunal had been decided to continue further proceedings due to the host-state breach of Resolution No. 15 which by annulling exclusive rights of the investor and de facto ownership overtaking by the government could have indirect expropriation effect. However, this assumption cannot be supported by evidence. However, the possibility of the host-state numerous violations proof creates an inevitable necessity for additional mechanism invention which will allow the investor to protect its rights even in case of corruption in order to exclude one beneficiary effect even despite investment law violations by the host-state.

It is clear, that if the investor in such a sloppy way pays bribes with the host-state governmental officials in order to decrease the investment prolongation due to the bureaucratic obstacles the investment protection seems impossible due to its legal obligations stated in relevant BIT as well as difficulties in the host state responsibility proof regarding corruption act.

Ultimately, the author agrees with Tribunal's decision because even in the case of a detailed investigation of bribery there is no guarantee that the fault of the government would be proven due to the characteristic of bribery beneficiaries. The Consultants had no authority to make requirements before the investor to pay a bribe, while the participation of other

governmental officials still has to be proven, thus, the malicious initiative of the investor is prominent.

That is to say, that the Tribunal decided that each party of the dispute has to pay its costs and ICSID proceeding costs have to be shared by the parties. Such a conclusion has outlined since Uzbekistan also participated in the corruption crime. Such an outcome gives hope that Tribunal's recognition of responsibility for corruption crime by both parties on the costs can in the future transform into a burden for the host state on other legal aspects.

3.3. Other Relevant Awards

In order to show the actual effectiveness of Corruption Defence Strategy, two more cases need to be shortly analysed.

3.3.1. Siemens A.G. v. The Argentine Republic

Legal substance included the governance of ICSID Convention, Bilateral Investment Treaty between the Federal Republic of Germany and Argentina (hereinafter the "BIT") as well as international laws.[117] After an appropriate investigation by the ICSID Tribunal, the breaches of investor protection, as well as expropriation, were documented.[118] As a result, the Tribunal obliged the host state to pay compensation for 217 838 439 US dollars.[119]

The core uniqueness of this case is that arbitral proceedings consist of no evidence concerning the corruption appearance. Corruption related issues raised from a long-term annulment petition initiated by the host state that had low ability to succeed.[120] However, it appeared that investor's executives had been systematically committing bribery crimes worldwide on a massive scale.[121] Subsequently, the investor became an object of unpleasant bribery investigations.[122] As a result, Siemens was found guilty in several settlement agreements concluded with anti-corruption authorities of USA and Germany.[123] Not surprisingly, that in the light of such international scandals the host state took the procedurally rare step by asking ICSID Arbitration to "revise" the award.[124]

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[117] *"Siemens A.G. v. The Argentine Republic",* ICSID Case No. ARB/02/8, Award, February 6, 2007, par. 78, p. 22.
Available at: https://www.italaw.com/sites/default/files/case-documents/ita0790.pdf
Accessed on 26 April, 2020.
[118] *Ibid,* par. 403, pp. 128-130.
[119] *Ibid.*
[120] Jason W. Yackee, *"Investment Treaties and Investor Corruption: An Emergent Defense for Host States?"*, Investment Treaty News, Oct. 19, 2012.
Available at: https://www.iisd.org/itn/2012/10/19/investment-treaties-and-investor-corruption-an-emerging-defense-for-host-states/
Accessed on 26 April, 2020.
[121] *Ibid.*
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid*

Ultimately, Siemens abandoned ICSID award in exchange for host state consent to discontinue the revision initiatives.[125]

Even though in reality, the host state did not implement Corruption Defence Strategy during arbitral proceedings, it evidently would have been implemented in case of the ICSID award revision. Such an outcome was a result of a combination of the apparent desire of Siemens to escape additional image destruction and its disadvantageous situation awareness. Taking into consideration the date of the end of Siemens arbitral proceedings, the investor was aware of existing conclusions documented by the Tribunal in the Duty-Free case. Therefore, even though *stare decisis* is not applicable under the ICSID structure, the line of Tribunal's legal behaviour still can be predicted. Hence, Siemens understood that in case of corruption proof by Argentina, the Tribunal would not be able to provide investment protection due to Article 1 (1) of the relevant BIT[126] and appropriate international law. As a result, due to the obvious lack of ability to win a case, Siemens decided to not lose additional expenses on paying expensive law companies.

Siemens v. Argentina ICSID precedent clearly illustrates the vulnerability of international investment law towards Corruption Defence Strategy forcing the investor to give up even in the scenario when violations by the host state are proven, and the Tribunal has already drafted investment award.

3.3.2. MOL v. Republic of Croatia

Firstly, that is the only pending case which can have a significant impact on Corruption Defense Strategy future implementation. Therefore, final legal conclusions documented by the Tribunal will be available only after award publication.

Facts consider ICSID Arbitration initiated in 2013 by the MOL Hungarian Oil and Gas Company Plc (hereinafter the "claimant") against the Republic of Croatia (hereinafter the "defendant") in accordance with the Energy Charter Treaty ("ECT").[127] The claimant identifies certain breaches of the defendant's contractual obligations stated in ECT Article 10 (1) that is concerning the fair and equitable treatment and the breach of the "Umbrella Clause" resulting in an expropriation thus breaching Article 13 of the ECT.[128]

The core issue arises around shareholder's agreement concluded between the claimant and defendant in July of 17, 2003 regarding the ownership of Croatia's largest gas and oil

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[125] *Ibid*
[126] *"Treaty between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments",* United Nations – Treaty Series, vol. 1910, Article 1.
Available at: https://www.investorstatelawguide.com/documents/documents/BIT-0006%20-%20Argentina-Germany%20BIT%20(1991)%20%5Benglish%20translation%5D%20UNTS.pdf
Accessed on 26 April, 2020.
[127] *"MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*", ICSID Case No. ARB/13/32, Decision on Respondent's Application Under ICSID Arbitration Rule 41(5), 2 December, 2014.
Available at: https://www.italaw.com/sites/default/files/case-documents/italaw4073.pdf
Accessed on 27 April, 2020.
[128] *Ibid,* paras. 20-21, pp. 6-7.

company Industrija Nafte dd (hereinafter the "INA") that was an object of claimant's investment.[129] On January 30, 2009, the shareholder's agreement (hereinafter the "shareholders agreement") was negotiated and amended, resulting in the prevalence of claimant's shares of INA.[130]

In 2014 the Republic of Croatia initiated parallel proceedings under UNCITRAL Arbitration against the MOL in order to annul the Shareholder's Agreement concluded in 2009.[131] One of the main arguments of the host-state was that Shareholders Agreement was concluded through the bribery, thus making it illegal relying on the articles 293 and 294 of the Croatia Criminal Code ("CCC").[132] Nevertheless, the Tribunal concluded that host-states claims based on bribery, concerning the Shareholders Agreement are all dismissed.[133]

The next step of Corruption Defence Strategy implementation by the host state became the ICSID Rule 41(5) Application request arguing that a) UNCITRAL has to have jurisdiction over the Shareholders Agreement b) The criminal investigation against Mr Hernádi who is the CEO and Chairman of the MOL [falls outside the scope of the ECT, which extends only to the protection of investments].[134]

An important note is that then time Prime Minister of Croatia Ivo Sanader who allegedly received a 5 million euros bribe was criminally prosecuted on November 2012.[135] Nevertheless, in July 2015, the claim was annulled by the Supreme Court of Croatia due to the procedural errors.[136] Subsequently, in September 2015, the host state started a retrial of a bribery claim.[137] Moreover, The Croatian criminal authorities also raised claims against Mr Hernádi regarding paying bribes in exchange for the investor receiving a significant stake in INA.[138]

Therefore, even though UNCITRAL Tribunal denied bribery claims due to the lack of appropriate evidence, the ICSID Arbitration still can classify burden of proof presented by Croatia as sufficient enough in order to lack its jurisdiction.

A crucial factor in Tribunals investigation could be the notion documented in *"Plama Consortium Limited v. Bulgaria"* case stating that there is a requirement of *"Clean Hands"* in order to raise a claim under the ECT.[139] Hence, principles of international law, as well as the burden of proof presented by the criminal authorities of the host state, will be significant

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[129] *Ibid,* par. 14, p. 4.
[130] *Ibid,* par. 16, pp. 4-5.
[131] *"Republic of Croatia v. MOL Hungarian Oil and Gas Company Plc"*, PCA CASE No. 2014-15, Final Award, 23 December, 2016.
Available at: https://www.italaw.com/sites/default/files/case-documents/italaw94016.pdf
Accessed on 28 April, 2020.
[132] *Ibid,* par. 96, p. 33.
[133] *Ibid,* par. 490, p. 162.
[134] MOL v. Croatia case, *supra* note 127, par. 39, p. 14.
[135] *Ibid*, par. 17, p. 5.
[136] Croatia v. MOL case, *supra* note 131, par. 16, p. 10.
[137] *Ibid*, par. 189, p. 59
[138] *Ibid*, par. 487, p. 159
[139] Plama case, *supra* note 34.

factors. Moreover, the Tribunal could state that providing investment protection to the MOL could be against international public policy.[140] Ultimately, there are more than enough legal possibilities to accept the Corruption Defence Strategy and deny ICSID jurisdiction relying on the illegality of the Shareholders Agreement.

4. Political and Economic Issues

In order to develop an appropriate legal mechanism that will allow to decreasing the unfairness effect of *Clean Hands Doctrine* defence strategy implementation in Investor-State arbitration, it is necessary to cover relevant economic and political issues in this regard. The analysis is provided from a practical point of view and in order to exclude additional fact descriptions, the paper covers legal cases discussed in Chapter Three.

The "Duty-Free" case clearly illustrates how the highest political authority is being paid in order to receive favourable investment conditions. The primary evidence of international norms manipulation is the fact that the former president continued his political career and received no legal consequences from Kenya.[141] Moreover, the host state in 2003 had found [$1 billion in stolen funds in overseas accounts].[142] As a result, the governmental officials from his administration had been pursued while Mr Moi received no consequences.[143] Thus, the host-state used relevant facts discovery in order to become de facto beneficiary rather than satisfy the demands of national criminal law.

There is a necessity to take a more detailed look at the *"Metal Tech"* case due to its complexity as well as transparent economic and political interconnection. First of all, the Israeli company realized that the government of Uzbekistan felt a sufficient decrease in the molybdenum industry after the collapse of the Soviet Union and needed appropriate know-how technology as well as world market connections in order to start a successful exporting company.[144]

It is not a secret that every investment is a high-risk procedure even despite investment protection mechanisms, and there are two ways how to start an investment promotion: a) honestly - by communication with government authorities and act in accordance with all beurocratic procedures b) unfair - by finding patrons who are able to use political connections in order to avoid bureaucratic obstacles as well as possible political pressure and competition. As it was constituted during arbitral hearings, Mr Rosenberg, the CEO of the Metal Tech, has chosen way of less resistance by stepping into collusion with three individuals. The political influence of these individuals was evident due to the fact that Mr Sultanov was the brother of

[140] Croatia v. MOL case, *supra* note 131, par. 93, p. 32.
[141] Robert. D. McFadden, *"Daniel Arap Moi, Autocratic and Durable Kenyan Leader, Dies at 95.",* The New York Times, February 4, 2020.
Available at: https://www.nytimes.com/2020/02/03/obituaries/daniel-arap-moi-dead.html
Accessed on 29 April, 2020.
[142] *Ibid.*
[143] *Ibid.*
[144] Metal Tech case, *supra* note 86, paras. 6-7, pp. 8-9.

Prime Minister and Mr Chijenok was working in the Office of the President of Uzbekistan.[145] Mr Rosenberg confirmed that Mr. Chijenok was able to accelerate investment procedure, namely by closing red tapes during the [joint venture of Uzmetal] establishment.[146]

As a result, the joint venture was established on extremely favourable terms for the investor making it 50% of not only company shares but also sufficient income, and there is no proof that it would be possible to conclude the agreement on the same terms without a bribe. As it was documented by the Tribunal, the production of molybdenum by Uzmetal was supposed to be 600 tons per year.[147]

After taking a look at a market of molybdenum production, the price varies from 15 till even 30 000 US dollars per kilogram.[148] If to take a price of 50 dollars per kilogram, after simple calculations it becomes clear that the average income per year could be 600 dollars from 1 kilogram, hence, if Uzmetal sells 600 tons per year a total annual income is approximately 360 000 000 dollars. From an economic point of view, the investment concluded by Metal Tech is hugely lucrative, and in the light of hundreds of millions of annual incomes, the investment sum of 20 million is a good deal. Moreover, it is affordable to allocate 20% of the investment sum on a bribe in order to initiate such a profitable joint venture.[149] Thus, 4 million for a bribe comparing with potential 100 million annual income seems nothing, and it fully paid off, especially taking into consideration that Metal-Tech operated in Uzbekistan for nine years.[150]

From a political point of view, the investor had to realize that the risk of losing the company in the case of Utkir Sultanov's leave from his Prime Minister post is high. Logically, that if Mr Chijenok was to accelerate the investment procedure, the duty of Mr Uygur Sultanov was to use its brother's power to provide political security of the investment and that was proven by the Tribunal by identifying the fact that last payment to the consultants was made in the same month when Prime Minister lost his position.[151] Thus, if Mr Chijenok was to accelerate the investment procedure, the duty of Mr Uygur Sultanov was to use its brother's power to provide political security of the investment. Subsequently, all procedures regarding

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[145] Brody Greenwald, Jennifer Ivers, *"Addressing Corruption Allegations in International Arbitration*", Leiden: Brill, 2019, p. 41.
[146] *Ibid.*
[147] Metal Tech case, *supra* note 86, par. 14, p. 11.
[148] *"Molybdenum Prices",* Molybdenum Prices - Molybdenum Prices Manufacturers, Suppliers and Exporters on Alibaba.com.
Available at:
https://www.alibaba.com/premium/molybdenum_prices.html?src=sem_ggl&cmpgn=9767931325&adgrp=103363837361&fditm=&tgt=kwd-308643258387&locintrst=&locphyscl=9062308&mtchtyp=b&ntwrk=g&device=c&dvcmdl=&creative=428856668604&plcmnt=&plcmntcat=&p1=&p2=&aceid=&position=&gclid=Cj0KCQjwm9D0BRCMARIsAIfvfIYHbiB64oY-TtdV7ZaBj_ymnby49TEulDarRXVA0soCN0xS3lPjzaEaAuPREALw_wcB
Accessed on 13 April, 2020.
[149] Metal Tech case, *supra* note 86, par. 199, p. 64.
[150] *Ibid,* paras. 13;53;299, p. 10;18;103.
Uzmetal was established on 18 January 2000 and on 30 December 2009, it was [delisted from the state registry of legal entities].
[151] *Ibid*, par. 351, p. 121.

government involvement in Uzmetal bankruptcy started immediately after the leave of Utkir Sultanov that happened in 2006.[152]

Metal Tech had certain political expectations and risk acknowledgement; however, the income of the investment was high enough to cover all expenses in the early stages. Molybdenum production can be recognized as a strategically important industry due to the massive scale of its use, starting from different metal production and ending with use in the atom industry.[153] It had to be predictable that day when a government will decide to take control of such plants which can gain sufficient income will come. Moreover, when technology is already implemented, and world market connections are discovered, investor is not needed anymore, and the government can operate molybdenum, plants by itself. The investor should be aware of these facts. However, it still decided to start investment integration by illegal means and more importantly, without any additional security measures regarding bribery secrecy. Metal Tech did not even draft any written consultation agreements, they did nothing, leaving obvious governmental connections of the consultants. Such a tangible number of mistakes illustrates the haste in the light of the desire to conclude the investment as fast as possible.

Additionally, if the investor is aware that it is breaching local laws it has to be aware that the government is a powerful machine that has all levers in order to not only expropriate the investment but also find every illegal deed of the investor in order to justify this expropriation. Subsequently, from the one hand investor is denied of its rights in international arbitration, on the other hand, it is aware of breaching local laws by buying favourable investment terms as well as political protection which most-likely could not be achieved in a legal way.

Another important aspect is the publication of the investment award, and in case of corruption discovery, domestic media can have a sufficiently adverse effect on the government, which in this case is president Karimov. As a result, the state can decide to not choose such a defence strategy due to the desire not to suffer any harm for the political influence. An investor could bet on that scenario, however, in the case of Metal Tech, the income of the Uzmetal was too tangible, and media effect was not harmful due to the political structure of Uzbekistan. Many states have sufficient control over media and news agencies; hence, this is not a necessarily victorious strategy for the investor. As it is seen in the case of Metal Tech, a number of publications can be found with exclusively positive memories of Mr Sultanov as well as Karimov.[154]

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[152] *Ibid.*
[153] *"5 Major Molybdenum Uses: INN.",* Investing News Network, June 15, 2017.
Available at: https://www.citationmachine.net/bibliographies/599515310?new=true
Accessed on 11 April, 2020.
[154] An appropriate search of these individuals shows a number of local news articles, moreover, in 2018 the monument was built in the honour of President Karimov.
See ex. "Архивы Ислам Каримов." Коммерсант.Уз *("The archives of Islam Karimov",* Kommersant.uz)
Available at: https://kommersant.uz/tag/islam-karimov/
Accessed on 11 April, 2020.
See ex. Boris Babev, "На каналах Национальной телерадиокомпании был показан новый документальный фильм Уткир Султанов. Жизнь и судьба", культура.уз *("On the channels of National broadcasting company, was shown the new documentary Utkir Sultanov. Life and fate.",* kultura.uz), 16.07.2019.

Ultimately, the devil is in details, and Metal Tech made many mistakes precisely in detail, hence, such a careless attitude to the investment cause sufficient difficulties regarding appropriate mechanism development which could fight back the *Corruption Defence Strategy.*

Siemens case does not include any investigations and facts relating to the corruption crime. Therefore, it is impossible to provide an appropriate political and economic analysis. Nevertheless, the fact that bribe was sufficient and at the highest level is evident due to the reaction of the investor.

The corruption acts in MOL case similarly to Metal Tech appeared in contract negotiations regarding shares division between the investor and government that most likely would not be achieved without a bribe. However, the main difference is that the government seems serious concerning the prosecution of all liable individuals. Such a scenario illustrates the seriousness of political authority change resulting in prosecution of all illegal deeds no matter of the level of previous governmental authority. Nevertheless, this could be a strategy showing such an attitude during arbitral proceedings that can completely change after favourable award publication.

In conclusion, several problematic aspects of finding a solution can be drafted. First of all, it is difficult to find appropriate evidence in order to prove that the state required to pay a bribe in order to start an investment, hence, in most cases responsible are those individuals who stepped in such an economic crime but not the whole state. Secondly, not only the existence of investment legality provision in relevant BIT or investment contract matters but also it is essential how corruption is committed. If domestic anti-corruption mechanisms can prove committed corruption acts by the investor and conclude the breach of local criminal law, there is no way how to escape from unfavourable consequences. Thirdly, the political structure is not permanent forever in any of the government. Therefore, all benefits which are bought from the current political regime can be annulled by the upcoming regime. Thus, the Corruption Defence Strategy becomes the only instrument for the government how-to correct malicious abuse of the power in personal needs by unfair officials.

In the light of the unfairness element concerning de facto beneficiary in the face of the host state after the Clean Hands Doctrine implementation, certain doubts regarding the effectiveness of international investment law as well as arbitration, in general, can be witnessed. Taking into consideration the legal obligations of the investor, global criminalization of the corruption and moral distaste towards bribery the anti-mechanism towards Corruption Defence Strategy seems impossible to be developed in compliance with international principles as well as arbitration structure. Thus, the solution can be set in the relevant BIT or relevant investment contract. Even though most of the BITs have investment

Available at: https://www.kultura.uz/view_5_r_13647.html
Accessed on 11 April, 2020.

legality or other anti-corruption provisions, there still is a possibility to make amendments. However, it has to be done proportionately in order not to breach any of the international law.

The lack of equity in the Corruption Defence Strategy can be seen regarding the responsibility of entities involved in corruption crime. As it could be seen in cases described in Chapter three, all individuals who participated in the bribery are not prosecuted, and some of them even continued political careers.

Following the same logic laying behind the ELR rule, there could be a similar rule invented and included in BIT or investment contract which states that before providing the evidence of corruption by the host state it is necessary to show appropriate consequences of criminal law for the individuals committed the corruption act. Hence, the Corruption Defence Strategy can be implemented only in case when responsible entities are being judged following domestic criminal law. Such an invention can at least abolish the manipulation with international norms by the host state and make sure that the corruption act de facto is being judged as an economic crime. Such prosecution of corrupted officials will harm the current political regime; however, as it was stated by the court in Duty-Free case: there is no evidence that state shall be responsible over certain public officials.

Conclusions and Recommendations

The thesis hypothesised that there is a particular vulnerability of international investment law towards Corruption Defence Strategy due to the de facto beneficiary in the face of the host state. The hypothesis confirmed during the research.

The thesis concluded de facto beneficiary in the face of the host state even despite breaches of its legal obligations. Subsequently, the answer to the research question indicates the low level of equity towards the Corruption Defence Strategy.

It was concluded, that such an economic crime as corruption achieved global criminalisation in most of the legal frameworks due to the UNCAC ratification, however, its effectiveness regarding the actual fight against corruption is low in the light of its recommendation character.

After analysing the legal grounds of the Corruption Defence Strategy, several sources of Corruption Defence Strategy legality were identified. The first legal source which gives no chance for the investor to access its protection rights is when appropriate investment legality provision is stated in relevant BIT. Such or a similar anti-corruption provision makes the investment illegal and denies Tribunal's jurisdiction. The second source was found in international norm system, more precisely the Clean Hands Doctrine. The author concluded that the Clean Hands Doctrine is a reasonable instrument in order to achieve equity and secure the prestige image of the Tribunal.

On the other hand, a more detailed investigation of the principle of equity that is a core goal of the Clean Hands Doctrine evidenced that interaction of various international norms with

the law does not necessarily always achieve justice. Subsequently, gaps in structuralising international norms hierarchy create specific space for manipulation with these norms by particular actors. As a result, the host state can use a shield of violated international norms in ICSID Arbitration while de facto profit from such an outcome even despite its violations. Such a conclusion results in a lack of equity by the Tribunal in some cases when Corruption Defence Strategy is implemented.

Analysis of jurisdiction and claim admissibility borderline has constituted that Tribunals have different strategies; however, usually in case of economic crime appearance, it is decided on the merits rather than the jurisdictional stage. This is a positive attitude showing the intention of the Tribunal to stand up for its jurisdiction. However, the competence of the Tribunal to make a decision regarding the particular case is still limited, which creates a lack of proper investigation abilities.

ICSID precedents showed that in the case of Corruption Defence Strategy implementation, more detailed analysis has to be made on case by case basis due to the significant differences in crucial aspects.

The Duty-Free award evidenced the difficulties of proving the responsibility of the host state over-committed corruption crime. For the Tribunal the deed of President of the country cannot be classified as appropriate evidence in order to constitute the breach of the whole country. Corruption act discovery by the investor also is left without attention showing that in case of corruption appearance, there is no chance for the investor to receive protection of the investment. As a result, Tribunal set specific standards for the investor, and according to the author, there seems to be a manipulation of international norms by the host state as well as unequal treatment of the Tribunal. Another critical aspect outlined by the author was regarding the failure of Kenya to comply with corruption criminalization legal obligations concerning the UNCAC due to the bribery precedents at the highest level of governmental authorities.

Metal Tech award illustrated the scenario in which state is the initiator of bribery-related facts reveal and thereof, showed compliance with its international legal obligations concerning such mechanisms as UNCAC. However, the author concluded the lack of equity under ICSID Arbitration due to the possible indirect expropriation effect by the host state, which most likely would be proven. Such a conclusion was stated due to the de facto beneficiary in the face of the host state. Nevertheless, the lack of equity, in this case, cannot be improved. Thus, in the light of all facts such as investment legality requirement in the relevant BIT as well as the investor decision to sloppy promote the investment through the bribery author documented that the Tribunal was not able to hold another decision.

Siemens award showed the true power of Corruption Defence Strategy due to the fact that investor abended its 200$ million compensation in exchange for the host state consent to discontinue the revision initiatives.

The MOL case is still pending and it can have a significant impact on future Corruption Defence Strategy implementation. If the Tribunal will decide to act in the same behaviour as it was in previous precedents the need of Corruption Defence Strategy anti-mechanism will become more crucial.

The political and economic analysis concluded the profitability of investments as well as certain political expectations in the case when bribery takes place. As a result, investors are aware of breaching national law of the host state. Thus, the whole protection caused by corruption usually starts to ruin after the change of governmental authorities. This means that in the light of political cycles change on the global arena due to the time, more and more Corruption Defence Strategy implementations will appear. However, despite investor awareness of breach of the law author still believes that the appropriate mechanism has to be developed due to the de facto injustice as a consequence of the whole investment process.

Both theoretical, as well as practical parts of the research, documented the lack of equity thus stressing out the necessity of appropriate mechanism development in order to improve that weak point. Moreover, in light of the harmful effect on the whole international trade development, the demand for an appropriate solution is more tangible. The analysis documented that it is impossible to create the instrument against Corruption Defence Strategy within the framework of international law and arbitration structure. Such a conclusion is made due to the possible anti-corruption provision in the relevant BIT as well as global moral distaste that can harm prestige of the ICSID Tribunal.

On the other hand, the solution could be set in the relevant BIT or relevant investment contract. Even though most of the BITs have investment legality or other anti-corruption provisions, there still is a possibility to make amendments.[155] It has to be done proportionately in order not to breach any of the international law.

The lack of equity in the Corruption Defence Strategy can be seen regarding the responsibility of entities involved in corruption crime. As it could be seen in cases described in Chapter three, all individuals who participated in the bribery are not prosecuted, and some of them even continued political careers. It could be different in the MOL case; however, it will be witnessed only after award publication.

Following the same logic laying behind the ELR rule, there could be a similar rule invented and included in BIT or investment contract which states that before providing the evidence of corruption by the host state it is necessary to show appropriate consequences of criminal law for the individuals committed the corruption act. Hence, the Corruption Defence Strategy can be implemented only in case when responsible entities are being judged by domestic criminal law. Such an invention can at least abolish the manipulation with international norms by the host state and make sure that the corruption act is being judged as an economic crime. Such

[155] Gordon, K. and J. Pohl (2015), *"Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World",* OECD Working Papers on International Investment, 2015/02, OECD Publishing. Available at: http://dx.doi.org/10.1787/5js7rhd8sq7h-en
Accessed on 21 April, 2020.

prosecution of corrupted officials could harm the public support of current political regime; however, as the court stated it in Duty-Free case: there is no evidence that state shall be responsible over certain public officials.
The wording included in BIT or investment contract could be the “unclean hands clauses”. These clauses can indicate evidence regarding the criminal prosecution of governmental authorities participated in investment-related economic crime by the host state.

Ultimately, the author believes that based on conclusions and recommendations above it will be possible to attract more legal attention towards this issue as well as find an effective solution in order to fix these weak points and make international investment law more effective.

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