
Fraud and Corruption in Investment Arbitration

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Two illustrative cases in 2006

- *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006.
- *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006.

Inceysa v. El Salvador

“[...] the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, ‘nobody can benefit from his own fraud’.”

- *Inceysa v. El Salvador*, para. 242.



World Duty Free v. Kenya

“In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.”

- *World Duty Free v. Kenya*, para. 157.



Legal approaches

- **Express legality clause**
- **Implied legality clause**
- **International public order**



Express legality clauses

- “Each State Party shall protect within its territory the investments made in accordance with its legal provisions by investors of the other State Party and shall not impede the administration, use, usufruct, extension, sale and liquidation of said investments through unjustified or discriminatory measures.”
- Article 2(2) Germany-El Salvador BIT, 11 December 1997

No jurisdiction

“Uzbekistan’s consent to ICSID arbitration, as expressed in Article 8(1) of the BIT, is restricted to disputes ‘concerning an investment.’ Article 1(1) of the BIT defines investments to mean only investments implemented in compliance with local law. Accordingly, the present dispute does not come within the reach of Article 8(1) and is not covered by Uzbekistan’s consent. This means that this dispute does not meet the consent requirement set in Article 25(1) of the ICSID Convention. Accordingly, failing consent by the host state under the BIT and the ICSID Convention, this Tribunal lacks jurisdiction over this dispute.”

- *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 373

Implied legality clauses

- “1 – a contribution in money or other assets; 2 – a certain duration; 3 – an element of risk; 4 – an operation made in order to develop an economic activity in the host State; 5 – assets invested in accordance with the laws of the host State; 6 – assets invested *bona fide*.”
- *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 114



Implied legality clauses

- “[T]his condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT,” and “States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws.”
- *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 101.



International public order

- “[...] it is now generally accepted that investments made on the basis of fraudulent conduct cannot benefit from BIT protection; and this is a principle that is independent of the effect of any express requirement in a BIT that the investment be made in accordance with the host State’s law.”
- *Minnotte and Lewis v. Poland*, ICSID Case No. ARB/10/1, Award, 16 May 2014, para. 131

International public order

- “Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations. [...] Thus, jurisdiction must be declined in this case. It follows from the foregoing, that in concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature rather than from any national rules on arbitrability. Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.”
- *ICC Case No. 1110*, Award, 1963, paras. 20 and 23.



Policy Considerations

- **Fraud:**
- “Unilateral” dishonesty committed by an investor against the interests of the host state
- appears to justify the harsh consequence of depriving investors of access to ISDS



Policy Considerations

- **Corruption:**
- “bilateral” dishonesty committed by an investor and host state officials against the interests of the host state and its population
- Denial of jurisdiction or admissibility, depriving investors of access to ISDS, has been criticized as punishing only one party.

Lagergren award

- “[C]are must be taken to see that one party is not thereby enabled to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other.”
- *ICC Case No. 1110*, Award, 1963, Yearbook Comm. Arb. XXI (1996) 47

Calls for more nuanced solutions

- “With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.”
- Article 34 UNCAC Consequences of acts of corruption