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International Investment Arbitration and the International Fight against Corruption*

El arbitraje internacional de inversiones y la lucha internacional contra la corrupción

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Abstract: Within international investment arbitrations, international protection is usually denied to investments that have been made through acts of corruption as the majority of the investment arbitration tribunals do not assume jurisdiction or the claims are considered inadmissible. These decisions, inevitably and indirectly, lead to the exoneration of international responsibility of the defendant States due to the corruption of their public officials, even when these illicit acts are not configured unilaterally, existing, in most cases, shared responsibility between the investor and the State. By not sanctioning corruption, the current crisis in the investment dispute resolution system is aggravated, which, on the contrary, requires urgent and consensual solutions to guarantee a viable reform.

Faced with this worrying scenario, this article examines mechanisms to achieve the confluence between International Investment Law, International Anti-Corruption Law and the international standards concerning the Responsibility of States for Internationally Wrongful Acts.

We argue that if illicit behavior by public officials is found, depending on the circumstances of each case, the investment arbitration tribunals should rule on the international responsibility of the defendant States for failing to comply with the obligations arising from the International Anti-Corruption and Investment Treaties. Likewise, depending on the case, they must sanction investors and States, since both parties may be responsible for committing the illicit acts of corruption.

Recognizing the limitations inherent to the powers of arbitral tribunals, it is possible to affirm that they cannot remain outside the international fight

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against corruption, as it has been agreed by the international community in the treaties that exist on this matter, being this the situation when the tribunals declare their lack of jurisdiction, avoiding to decide on the acts of corruption identified within the specific case.

Key words: Corruption, international responsibility of States, international investment law, investment treaties, Anticorruption Clause, doctrine of clean hands, abuse of rights, general principle of international law, international investment arbitration

Resumen: En los arbitrajes internacionales de inversión, usualmente se niega la protección internacional a las inversiones efectuadas mediante actos de corrupción al declararse la mayoría de tribunales arbitrales de inversión sin jurisdicción o inadmisibles las demandas. Estas decisiones, inevitablemente, en forma indirecta, conllevan a la exoneración de responsabilidad internacional de los Estados demandados por la corrupción de sus funcionarios públicos, aun cuando estos delitos no se configuran de manera unilateral pues existe, en la mayoría de los casos, responsabilidad compartida entre el inversionista y el Estado. Al no sancionarse la corrupción, se agrava la actual crisis del sistema de solución de controversias de inversión, la misma que, por el contrario, requiere de soluciones consensuadas y urgentes que garanticen una reforma seria y sostenible.

Ante este preocupante escenario, se examinan en este artículo mecanismos para lograr la confluencia entre el derecho internacional de las inversiones, el derecho internacional anticorrupción y las normas internacionales sobre responsabilidad internacional de los Estados por hechos ilícitos.

Sostenemos que si se comprueban comportamientos ilícitos de funcionarios públicos, dependiendo de las circunstancias de cada caso, los tribunales arbitrales de inversión deben pronunciarse sobre la responsabilidad internacional de los Estados demandados por incumplir las obligaciones emanadas de los tratados internacionales anticorrupción y de inversión. Asimismo, dependiendo del caso, deben sancionar a inversionistas y Estados, puesto que ambas partes podrían ser responsables de la comisión de delitos de corrupción.

Reconociendo las limitaciones propias de las facultades de los tribunales arbitrales, es posible afirmar que estos no deben mantenerse al margen de la lucha internacional contra la corrupción, conforme a lo acordado por la comunidad internacional en los tratados existentes sobre la materia, siendo esto lo que ocurre cuando se declaran sin jurisdicción, evitando pronunciarse sobre los actos de corrupción identificados en el caso concreto.

Palabras clave: Corrupción, responsabilidad internacional de los Estados, derecho internacional de las inversiones, tratados de inversión, cláusula anticorrupción, doctrina de *clean hands*, abuso de derechos, principio general del derecho internacional, arbitraje internacional de inversiones.

I. INTRODUCTION

For States and foreign investors to achieve their purposes in a long-term contractual investment relationship and reap its benefits, they need an efficient investment dispute settlement system to support them in cases of breaches of agreements, abuses of State regulatory powers or investor misconduct. The way arbitral tribunals conduct, discuss and resolve these disputes will not only affect the interests of the parties directly involved in international investment arbitration but also—positively or negatively—the objectives and guidelines guiding the international community in the fight against corruption.

Regarding this reasoning, it should be noted that the vast majority of investment treaties in force do not have express and binding anti-corruption obligations. Because of this defect, it could be mistakenly understood that international investment tribunals would not have jurisdiction to discuss the arguments on the corruption of the foreign investor and the host State. For the same reason, it could be understood that these tribunals could not investigate the existence of corruption in the investor-State relationship, nor could they incidentally evaluate the international liability of the State for acts of corruption of its agents or officials, in case there are elements of conviction of the commission of this crime and/or the participation of public officials in it.

In order to develop these assumptions, this article is structured as follows: Section II will develop the fight against corruption in the framework

of international law. In addition, it will explore the express and tacit anti-corruption clauses contained in investment treaties signed by Latin American and Caribbean States, as well as the significant contribution of non-State actors in the fight against corruption. Section III will analyze and evaluate the use of the "clean hands" doctrine and the principle of abuse of rights in the investor-State dispute settlement system, its strengths and limitations. Section IV will examine the possible shared responsibility of the State and the investor, and it will explain under what circumstances the international liability of respondent States should be considered. Finally, a pragmatic approach to the sanctions that arbitral tribunals could determine in order to comply with international law is proposed.

II. THE ANTI-CORRUPTION CLAUSE IN INTERNATIONAL LAW

As we know, investment treaties protect foreign investors if the State receiving the investment (hereinafter, the host State) engages in any arbitrary or discriminatory conduct that harms their investments, in violation of the principles of national treatment, fair and equitable treatment, full protection and security, prohibition of expropriation without compensation, and other investor rights. Currently, there are more than 3,000 investment treaties between bilateral, multilateral and agreements with investment provisions (UNCTAD, 2020, p. 1). Moreover, nine out of ten of these treaties provide for international arbitration as a dispute settlement mechanism (Giorgetti *et al.*, 2020, p. 304). So far, the number of international investment arbitrations exceeds 1,020 cases, involving almost 120 States and one supranational organization: the European Union (UNCTAD, 2020a, p. 1).

Since foreign investments promote and facilitate the economic growth and development of States, it is essential to eliminate the obstacles that disrupt their normal development or put them at risk. It is now accepted that one of the many problems that hinder the free flow of investments, and needs a fast and safe solution by the international community, is corruption. Seen as a transnational phenomenon that deteriorates the values of society and generates great concern due to its negative effect and high costs for States, especially those with developing or emerging economies, it is understood that corruption contravenes international public policy (Low, 2019, p. 341). Thus, the consequences of corruption, such as the destruction of trust, respect for public institutions and the democratic functioning of States, cannot only be attributed to non-state actors or private investors, but also to State agents, if it is the case.

While corruption is perceived as a dishonest, immoral and illegal behavior by the international community of States as a whole, its prohibition for some is not yet a peremptory norm of general international law or

ius cogens (Wood, 2017, p. 3). Indeed, it could be thought that such condemnable conduct has not been explored or discussed in depth in international law, especially in the field of international investment law, where there is still debate on various related issues.

In this regard, it should be noted that the prohibition of corruption was first included in the Vienna Convention on the Law of Treaties (1969), Article 50 of which mentions the following:

> If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty (p. 24).

Since then, either to achieve a higher purpose such as the common good or for other interests unrelated to the eradication of corruption, States have endeavored to design different binding or non-binding international instruments to fight it (Rose, 2015, pp. 3-4). This has become a trend because States have assumed anti-corruption policies to make their decision-making transparent. Therefore, it is understood that their regulations will lack transparency "si existe corrupción y no es investigada y perseguida por los organismos oficiales" (if corruption exists and it is not investigated and prosecuted by official bodies) (Saco & Torres, 2018, p. 229).

Similarly, non-state actors have participated in the anti-corruption movement through recommendations, guidelines, norms, codes of conduct or standards, many of which are regularly used by States, given the absence of obligations. Nonetheless, not all of them contain a precise meaning of corruption, nor do they mention the specific situations in which corruption is typified. These observations will be developed in the following points of this section from a Latin American perspective.

II.1. The concept of corruption

The term corruption lacks a common definition and constructing one of universal scope is a challenge for the different academic disciplines (Bonell & Meyer, 2015, p. 5). In law, the general interest in finding some important measure to prevent and fight corruption allowed the creation and ratification of international instruments with binding obligations. Almost all of them qualify a variety of conducts as criminal acts of corruption—bribery, abuse of functions or position, embezzlement, illicit enrichment, influence peddling, among others. In addition, these instruments recommend that States introduce an anti-corruption legal framework with the aim to harmonize national legislation.

Among the most relevant treaties are the 1996 Inter-American Convention against Corruption (articles VI, VIII, IX, and XI), the

1997 Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (articles 1.1 and 1.2), the 1999 Council of Europe Criminal Law Convention on Corruption (articles 2 to 15), the 1999 Council of Europe Civil Law Convention on Corruption (article 2), the 2003 African Union Convention on Preventing and Combating Corruption (article 4), and the 2003 United Nations Convention against Corruption (articles 15 to 28).

Although they have international obligations of varying scope and these are not self-executing, all these multilateral instruments fulfill the same objective of promoting the prevention, detection and criminalization of corruption. Of such examples, the Council of Europe's Civil Law Convention on Corruption (1999) expressly defines corruption as:

> requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof (p. 29968).

Likewise, the Inter-American Commission on Human Rights (2018) considers corruption as:

> A complex phenomenon that affects human rights in their entirety [...], as well as the right to development; it weakens governance and democratic institutions, promotes impunity, undermines the rule of law, and exacerbates inequality [... and] is characterized by the abuse or misuse of power, which may be public or private, that displaces the public interest for a private benefit (personal or for a third party), and weakens both administrative and judicial oversight institutions. (Resolution 1/18).

It should be noted that some non-governmental organizations have given a basic meaning to the term corruption (Rose, 2015, p. 7). For example, Transparency International (2009) defines it as "the abuse of power for private gain" (p. 14); and the International Chamber of Commerce (2011), through Article 1 of its Rules for Combating Corruption, concludes that corruption encompasses "bribery, extortion or solicitation, trading in influence, and money laundering." (p. 4).

Regarding international investment law, the definition of corruption has been structured based on the study of how tribunals in international investment arbitration deal with allegations of corruption by the parties, even though they are not set up to decide criminal matters.

Among the most outstanding concepts that the doctrine has developed, there is one that has high academic acceptance. Aloysius P. Llamzon (2014) defines corruption as "knowing application or refusal to apply

laws in a manner that benefits private demands at the expense of public need" (p. 20) and conceives two forms of corruption: bribery and extortion. The former is constituted when the private actor pays some State agent to be benefited by a public decision, and the latter materializes when the State agent is the one who requests some payment from the private actor to facilitate the services of the public administration (Wood, 2018, p. 104).

For its part, the jurisprudence of the foreign investor-State dispute settlement system—headed by the International Centre for Settlement of Disputes (ICSID) and seconded by other institutional or *ad-hoc* arbitral tribunals established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) — often unpredictable and inconsistent (Giorgetti *et al.*, 2019, p. 303), has also developed the concept of corruption. In the absence of binding precedents in that system, tribunals constantly cite previous arbitral awards to support their own decisions.

Most of the final awards reiterate that corruption is a behavior contrary to and in violation of international public policies. Proof of this are the arbitral awards rendered on August 2, 2006, in ICSID Case *Inceysa Vallisoletana, S. L. v. Republic of El Salvador* (§ 249); on October 4, 2006, in the ICSID Case *World Duty Free Co. Ltd. v. Republic of Kenya* (§ 157); on October 8, 2009, in ICSID Case *EDF (Services) Limited v. Romania* (§ 221); on October 4, 2013, in ICSID Case *Metal-Tech Ltd. v. Republic of Uzbekistan* (§ 292); on March 15, 2016, in UNCITRAL Case *Copper Mesa Mining Corporation v. Republic of Ecuador* (§ 563); on December 6, 2016, in ICSID Case *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia* (§ 493); and on August 31, 2018, in ICSID Case *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt* (§ 7.48). Likewise, this definition is taken up in the Decision on Jurisdiction of March 8, 2017, in ICSID Case *Vladislav Kim* et al. *v. Republic of Uzbekistan* (§ 593).

Concerning other sources of international investment law, several investment treaties contain express anti-corruption clauses, in addition to tacit provisions related to corporate social responsibility, which are binding for States and foreign investors. These hard-law and soft-law anti-corruption rules will be explained in the following subsections II.2 and II.3.

II.2. International instruments with express anti-corruption clauses

Based on the idea that States Parties to the United Nations Convention against Corruption can annul corrupt contracts or concessions (Low, 2019, p. 341), a new generation of bilateral investment treaties, as well as international instruments with investment provisions, such as free

trade agreements, which expressly regulate the fight against corruption, began to be signed a few years ago (Kryvoi, 2018, p. 579).

Initially, these types of treaties did not explicitly establish any prohibition on corrupt acts, nor did they provide clear guidance on how to resolve disputes. They merely stated that foreign investments had to be carried out in accordance with the domestic law of the host State if they wished to benefit from the protection offered by investment treaties.

In this context, certain Latin American and Caribbean States have agreed to anti-corruption clauses in such treaties. In addition to adopting or maintaining measures to prevent and combat corruption, they are not required to protect investments: a) whose capital or assets are of illicit origin, b) where illicit and/or corruption acts have been verified in their establishments or operations, and c) belonging to companies sanctioned with the loss of assets.

For a better understanding of what is mentioned in the previous paragraph, we will now mention the international instruments signed by the Latin American and Caribbean States that have express anti-corruption clauses:

1. Bilateral investment treaties: 2008 Japan-Peru (article 10), 2011 Colombia-Japan (article 16), 2011 Japan-Uruguay (article 14), 2015 Brazil-Chile (article 16), 2015 Brazil-Colombia (article 14), 2018 Argentina-Japan (article 9), 2018 Brazil-Ethiopia (article 15), 2018 Brazil-Guyana (article 16), 2018 Brazil-Suriname (article 16), 2019 Brazil-United Arab Emirates (article 16), and 2020 Brazil-India (article 10).
2. Free-trade agreements with investment issues: 2004 Dominican Republic-Central America[1]-United States of America (articles 18.7 to 18.10), 2006 Nicaragua-Taiwan (articles 20.7 to 20.10), 2007 Colombia-El Salvador-Guatemala-Honduras (article 16.9), 2008 Canada-Colombia (articles 1907 to 1910), 2008 Canada-Peru (articles 1907 to 1910), 2010 Canada-Panama (articles 20.7 to 20.10), 2013 Canada-Honduras (articles 20.7 to 20.10), and 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership[2] (articles 26.6 to 26.12).
3. Trade promotion agreements with investment issues: 2006 Colombia-United States of America (articles 19.7 to 19.10), 2006 Peru-United States of America (articles 19.7 to 19.10), and 2007 Panama-United States of America (articles 18.7 and 18.10).

1 Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.
2 Chile, Mexico and Peru.

4. 2015 Brazil-Peru Economic and Trade Deepening Agreement (article 2.14).

II.3. International instruments with tacit anti-corruption clauses

Considering the Guiding Principles on Business and Human Rights: Implementing the UN Framework to Protect, Respect, and Remedy —applicable to all States and all forms of business (Guiding Principles, 2011, p. 7)—adopted by UN Human Rights Council Resolution A/HRC/RES/17/4 of 2011, some States chose to include tacit anti-corruption clauses in investment treaties and agreements with investment provisions. These relate to the mandatory or voluntary use of international corporate social responsibility initiatives by foreign investors.

In such cases, in addition to those Guiding Principles, certain treaties contain provisions suggesting that during the sourcing and implementation of foreign investments, as well as in the internal policies of the investing companies, the following non-binding instruments, for example, should be applied: OECD Guidelines for Multinational Enterprises (revised 2011), the 2000 United Nations Global Compact, the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (amended 2017), the 2015 OECD/G20 Project on Combating Base Erosion and Profit Shifting, among others.

Likewise, arbitral tribunals could use the provisions by which States encourage the incorporation of such non-binding instruments into business practices to eradicate corporate misconduct through corruption. This is because initiatives by non-state actors are seen as relevant —soft law—standards for international investment arbitration (Kaufmann-Kohler, 2010, p. 3). On certain occasions, arbitral tribunals have used them discretionally to clarify ambiguous rules and to fill legal gaps in treaties (Bjorklund & Reinisch, 2012, p. 31).

As in the previous point, we will now mention the international investment instruments signed by the Latin American and Caribbean States which, in their corporate social responsibility clause, indicate the incorporation of guiding principles referring to the fight against corruption in general:

1. Bilateral investment treaties: 2014 Colombia-France (Article 11), 2015 Angola-Brazil (article 10, annex II.x), 2015 Brazil-Colombia (article 13.e), 2015 Brazil-Chile (article 15.2.e), 2015 Brazil-Malawi (article 9.2v), 2015 Brazil-Mexico (article 13.2e), 2015 Brazil-Mozambique (article 10, Annex II.v), 2016 Argentina-Qatar (article 12), 2016 Chile-Hong Kong (article

16), 2018 Brazil-Ethiopia (article 14.2.e), 2018 Brazil-Guyana (article 15.2.e), 2018 Brazil-Suriname (article 15.2.e), 2019 Brazil-United Arab Emirates (article 15.2.e), 2019 Brazil-Morocco (article 13.2.g), 2019 Brazil-Ecuador (article 14.2.e), and 2020 Brazil-India (article 12.2.e).

2. Free trade agreements with investment issues: 2008 Canada-Colombia (article 816), 2008 Canada-Peru (article 810), 2010 Canada-Panama (article 9.17), 2013 Canada-Honduras (article 10.16), 2013 Colombia-Costa Rica (article 12.9), 2013 Colombia-Panama (article 14.15), and 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (article 9.16).
3. 2015 Brazil-Peru Economic and Trade Deepening Agreement (article 2.13).

II.4. Non-binding international initiatives in the fight against corruption

Another important non-governmental anti-corruption effort is the International Chamber of Commerce Anti-Corruption Clause (2012), an exhortative and non-binding instrument that "is drafted with the purpose of striking a balance between the parties' interest in avoiding corruption and their need to ensure the achievement of the contract's objectives" (p. 9). Such an initiative is aimed at the international corporate sector, as corruption can also be carried out by non-state actors (Nadakavukaren Schefer, 2020, p. 4). Moreover, their illicit acts have the same negative impact on public policy and international public order as those produced by state actors.

Through this clause, the contractual parties undertake to apply the International Chamber of Commerce Rules on Combating CorruptBon, thus ensuring the ethical integrity of the parties involved during the negotiations and the term of the contract. Even after the termination of the obligations between the parties, this clause allows the continuation of the agreed anti-corruptive behavior. Given the flexibility of soft law instruments in anti-corruption matters, we consider that they are the most effective and practical to prevent corporate corrupt actions as they are designed with more precise, restrictive, and reviewable contents to adapt them to new requirements. Hence, they have a greater degree of influence within States than the anti-corruption treaties themselves when it comes to taking measures to prevent, repress and punish corruption (Rose, 2015, p. 219).

From what has been explained so far, it is understandable that the fight against corruption is discussed in international investment arbitration

as a matter of international public policy. Nonetheless, it is not easy to analyze or solve it, since arbitral tribunals are generally hesitant to rule on corruption arguments. In many cases, they avoid pronouncing on the matter and, rather, focus on identifying whether the investment is tainted by corruption in order to justify their incompetence or not admit the investor's claim.

Few tribunals in the investor-State dispute settlement system have adopted a different approach, such as prioritizing the public interest issue to investigate suspicions or clear indications of corruption in the allegations, defenses and evidence presented by the parties. If they were to opt for the path followed by the tribunal in the ICSID Case *Metal-Tech v. Uzbekistan*, whose award will be analyzed below, we believe that arbitral tribunals would not only have to recognize that the investors violated the legal system of the respondent State, but also assess the international responsibility of the latter for failure to fulfil its obligations under the respective investment treaty and anti-corruption treaties due to the corrupt actions of its agents or officials.

Although the investor-State dispute settlement system has legal and doctrinal arguments for holding respondent States internationally responsible, tribunals have not so far concluded to that effect. The closest that has been obtained is to split the costs of the arbitral proceedings. However, by the award rendered on December 27, 2016, in the ICSID Case *Spentex Netherlands v. Uzbekistan*, in addition to ordering the payment of costs, the arbitral tribunal recommended the respondent State to donate USD 8 million to an anti-corruption fund of the United Nations Development Program under the sanction of adding an extra amount to the costs (Alekhim & Shmatenko, 2018, p. 178).

It should be pointed out that, in the investor-State dispute settlement system, there is no other arbitral award containing a pronouncement similar to the one made in the ICSID Case *Spentex Netherlands v. Uzbekistan*. Foreign investment corruption arguments continue, in most cases, to be considered as issues relating to the jurisdiction of tribunals and the admissibility of the claims. We believe that such legal solutions do not help in the fight against corruption in accordance with the international instruments already mentioned.

This lack of compliance will continue each time the arbitral tribunals of such system dismiss the claims without ruling on the corruption acts of the parties, this by applying one or all of the following criteria used to assess the legitimacy of foreign investments: a) compliance with the legal system of the host State, b) compliance with international or transnational public policies, and c) the clean hands doctrine. This last criterion, which is not free of debate, will be explained in the following section.

III. THE CLEAN HANDS DOCTRINE IN INTERNATIONAL INVESTMENT LAW

Like the concept of corruption, the clean hands doctrine lacks a universally accepted definition. Developed in the field of equity and good faith of common law (Kreindler, 2010, p. 317), it is often explained with the core idea "he who comes into equity must come with clean hands" (Le Moullec, 2018, p. 14). That is, justice cannot be demanded if any illegal conduct was committed (Crawford, 2012, p. 717).

Furthermore, issues on the legal status of this doctrine in international law have been reviewed by the United Nations International Law Commission. In the context of the codification of diplomatic protection, through its Report of the 57th session, this Commission supported the conclusions of the Special Rapporteur John Dugard (2005) on the doctrine in the following terms: a) "it was an important principle of international law to be taken into account whenever it was shown that a claimant State had not acted in good faith and had come before the tribunal with unclean hands" (§ 236), and b) "it clearly did not fall within the scope of diplomatic protection and should therefore not be included in the draft articles" (§ 226). Moreover, "it had primarily arisen in the context of claims for detriment directly caused to the State, which exceeded the scope of diplomatic protection" (§ 231).

The use of the clean hands doctrine in national jurisdictions as a mechanism to protect legal systems (Le Moullec, 2018, p. 15) served as a strategy for respondent States to face international investment arbitration by arguing the corruption of the claimant investor. If the investors' illegal or improper behavior was proven, their hands would be dirty and they would not enjoy the right to file any claim (Llamzon, 2015, p. 316). Consequently, in addition to obtaining the denial of jurisdiction by the arbitral tribunals, the respondent States would not be compelled to pay any economic compensation for the damages eventually produced. Likewise, they would also reduce legal, arbitration and other arbitral procedural costs. The respondent States would thus be relieved of any responsibility, even in cases where they have been involved in acts of corruption.

Although the first ICSID case in which an investment arbitral tribunal declined jurisdiction (Kreindler, 2010, p. 314) because it considered that the foreign investment was contrary to international public policy was *Inceysa Vallisoletana, S. L. v. Republic of El Salvador*, we argue, without expressly mentioning it, that in the arbitral award adopted on August 2, 2006, this tribunal also discussed and developed the clean hands doctrine under the following terms:

> Allowing Inceysa to benefit from the realization of an investment that clearly violates the fundamentals of the bidding process from which it

> originated would be a serious breach of the justice that this Tribunal is obliged to impart. No legal system based on rational grounds allows a person who has carried out a chain of clearly illegal acts to benefit. (2006, § 244).

However, the ICSID Case *World Duty Free Co. Ltd. v. Republic of Kenya* is described as the first international investment arbitral dispute in which an arbitral tribunal—under the ICSID arbitration rules—used corruption arguments to reject the investor's claim (Devendra, 2019, p. 251). The arbitral award rendered on October 4, 2006, in that case describes how the claimant investor presented evidence of the payment of the bribe—as a personal donation—to the president of Kenya to close an investment contract at the Nairobi and Mombasa international airports in 1989 (*World Duty Free Co. Ltd. v. Republic of Kenya*, 2006, §§ 68-74). Based on this information, Kenya objected to the petitioner's pleadings and requested the dismissal of the claim arguing both the illegal origin of the contract (§ 105-107) and the application of the clean hands doctrine (§ 108). The arbitral tribunal accepted the respondent State's defense and decided that the claimant investor was not entitled to maintain its claims because its wrongful acts contravened international public policy and order, as well as Kenyan domestic law (§§ 157, 179, and 188).

Since then, the clean hands doctrine has been invoked and considered by respondent States as an essential defense for dealing with international investment disputes (Kreindler, 2010, p. 317). With its use, in many cases, they have sought to avoid international State responsibility for failure to fulfil the obligations arising from investment treaties. At the same time, arbitral tribunals have also been asked to apply this doctrine as a general principle of public international law, even though there is no consensus in the doctrine in this regard (Devendra, 2019, p. 282).

Consequently, as of 2006, the vast majority of tribunals in the investor-State dispute settlement system does not assume jurisdiction when it is proven that the claimant investor acquired its investment through corruption. The most relevant exceptions to this practice are justified by the scope of the allegations of corruption, the lack of substantiation or clarity of the claims, and the identification of the actual State agents. On this point, we have as an example the Decision on Jurisdiction of August 19, 2013, in the ICSID Case *Niko Resources Bangladesh vs. People's Republic of Bangladesh—Bangladesh Petroleum Exploration & Production Company Limited (Bapex), and Bangladesh Oil Gas and Mineral Corporation (PetroBangla)—*.In this dispute, the respondent State knew about the claimant investor's corrupt activities prior to entering into the 2006 Gas Purchase Agreement between PetroBangla and Joint Venture BAPEX partners and Niko (§§ 484-485).

This does not mean that the claimant investors are disqualified from arguing the clean hands doctrine. There are arbitral proceedings in which the corrupt behavior of the agents of the respondent State, and therefore the failure to fulfil its international obligations under anti-corruption and investment treaties, has been alleged and demonstrated. In fact, the ICSID dispute *World Duty Free Co. Ltd. v. Republic of Kenya* is one of them. Due to the action of the claimants in the investor-State dispute settlement system, we could classify the invocation of corruption as an act of accusation and defense of the parties (Alekhim & Shmatenko, 2018, p. 165), which will be developed below.

III.1. Corruption as an accusation and as an objection in international investment arbitrations

As mentioned above, in international investment arbitrations, there were disputes where foreign investors accused the host States of attempting or committing corruption acts during the negotiation, signing, and execution of investment contracts. On their initiative, and without being directly involved in the consummation of the wrongdoing, they presented evidence of such facts. There is examples of such allegations, although unsuccessful for the claimants' interests (Alekhim & Shmatenko, 2018, pp. 167-168), in the arbitral awards rendered on August 3, 2005, in the UNCITRAL Case Methanex *v. United States of America* (part I, § 7); on March 3, 2006, in the ICSID Case *F-W Oil Interests, Inc. v. Republic of Trinidad and Tobago* (§§ 49-53 and 210-212); on October 4, 2006, in the ICSID Case *World Duty Free Co. Ltd. v. Republic of Kenya* (§ 66); on July 29, 2008, in the ICSID Case *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (§§ 355-366); on March 13, 2009, in the ICSID Case *RSM Production Corporation v. Grenada* (§ 5.2); on September 8, 2009, in ICSID Case *Azpetrol International Holdings B.V., Azpetrol Group B.V., and Azpetrol Oil Services Group B.V. v. Republic of Azerbaijan* (§ 6); and on October 8, 2009, in the ICSID Case *EDF (Services) Limited v. Romania* (§ 221).

As for the invocation of corruption as a defense, the respondent States used it in various ways, either by discussing it during the first stages of the arbitral proceedings—jurisdiction and admissibility—or during the merits stage, in order to obtain the denial of the claimant investor's petitions. With such defense strategies, the arbitral tribunals assessed whether the investments were negotiated, agreed upon or executed under the domestic legal system of the respondent States.

After finding that the investments were illegal, these tribunals held that they were not protected by the relevant investment treaties. Thus, without investments or state consents required for the continuation of

the respective investment arbitral proceedings, the tribunals declined jurisdiction or declared the claims inadmissible.

Such reasoning, referring to the requirement of investment legality demanded by treaties, has been applied, for example, in the Decisions on Jurisdiction rendered on July 31, 2001, in the ICSID Case *Salini Costruttori S.p.A. and Italstrade S.p.A. (I) v. Kingdom of Morocco* (§ 46); and on April 29, 2004, in the ICSID Case *Tokios Tokelés v. Ukraine* (§ 84). Similarly, this requirement has been described in the arbitral awards rendered on October 4, 2006, in the ICSID Case *World Duty Free Co. Ltd. v. Republic of Kenya* (§ 187); on April 15, 2009, in the ICSID Case *Phoenix Action, Ltd. v. Czech Republic* (§§ 101-102); on August 16, 2007, in the ICSID Case *Fraport AG Frankfurt Airport Services Worldwide (I) v. Republic of the Philippines* (§§ 397, 401 and 402); on September 8, 2009, in the ICSID Case *Azpetrol International Holdings B.V., Azpetrol Group B.V., and Azpetrol Oil Services Group B.V. v. Republic of Azerbaijan* (§ 7); on May 19, 2010, in the ICSID Case *Alasdair Ross Anderson et al. v. Republic of Costa Rica* (§§ 58-59); on April 14, 2010, in the ICSID Case *Saba Fakes v. Republic of Turkey* (§ 119); on February 7, 2011, in the ICSID Case *Malicorp Limited v. Arab Republic of Egypt* (§ 119); on December 15, 2014, in the UNCITRAL Case *Hesham Talaat M. Al-Warraq v. Republic of Indonesia* (§§ 645-647); on 4 October 2013, in the ICSID Case *Metal-Tech Ltd. v. Republic of Uzbekistan* (§§ 165 and 374); and on March 30, 2015, in the ICSID Case *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania* (§ 716).

It follows from the above that both the requirement of investment legality, as well as any denial of petitions, after proving the corruption of investments, are manifestations of the clean hands doctrine (Dumberry, 2016, pp. 234-235). Furthermore, in the absence of that binding requirement, arbitral tribunals likewise declared their incompetence or the inadmissibility of the claims in safeguard of international public policy. Proof of the tacit applications of this doctrine is the arbitral awards rendered on December 8 in the ICSID Case *Wena Hotels Ltd. v. Arab Republic of Egypt* (§ 111); on August 2, 2006, in the ICSID Case *Inceysa Vallisoletana, S. L. v. Republic of El Salvador* (§§ 248-250); on October 4, 2006, in the ICSID Case *World Duty Free Co. Ltd. v. Republic of Kenya* (§ 157); on August 27, 2008, in the ICSID Case *Plama Consortium Limited v. Republic of Bulgaria* (§ 143); on April 15, 2009, in the ICSID Case *Phoenix Action, Ltd. v. Czech Republic* (§ 78); on December 10, 2014, in the ICSID Case *Fraport AG Frankfurt Airport Services Worldwide (II) v. Republic of the Philippines* (§ 332); on May 16, 2014, in the ICSID Case *David Minnotte & Robert Lewis v. Republic of Poland* (§ 131); and on December 27, 2016, in the ICSID Case Blusun *S.A., Jean-Pierre Lecorcier & Michael Stein v. Italian Republic* (§ 264).

This verification of the investment legality required by treaties for their international protection ends up incorporating the clean hands doctrine in investment arbitration (De Alba, 2015, p. 324). Even in the absence of the requirement the doctrine has continued to be applied, as certain arbitral tribunals have argued that the legality requirement is inherent or implicit in investment treaties. For example, such an approach can be seen in the Decision on Jurisdiction and Liability rendered on June 6, 2012, in the ICSID Case *SAUR International v. Republic of Argentina* (§ 306). Similarly, such approach is reflected in the awards rendered on March 31, 2003, in the ANSA Case *Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar* (§ 58); on April 15, 2009, in the ICSID Case *Phoenix Action, Ltd. v. Czech Republic* (§ 101); on June 18, 2010, in the ICSID Case *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (§§ 123-110); on December 10, 2014, in the ICSID Case *Fraport AG Frankfurt Airport Services Worldwide (II) v. Republic of the Philippines* (§ 328); and on March 30, 2015, in the ICSID Case *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania* (§ 293).

In addition to the manifestations described above, there have been disputes in which the clean hands doctrine has had a use other than those mentioned, and these refer to the procurement of foreign investments in violation of the principle of good faith. Frequently, this principle is also invoked as a defense by the respondent States to question the investment legality or to make evident the bad faith of the investor. This new State strategy to challenge the investor's claims, which transforms the verification of the international legality of investments into a matter of abuse of law, will be analyzed below as a general principle.

III.2. Principle of Abuse of Rights and the Clean Hands Doctrine

At the beginning of this section, it was pointed out that the origins of the clean hands doctrine are closely linked to good faith, one of the fundamental principles of public international law, supported by the principles of legality and *pacta sunt servanda*. This supreme principle has been recognized in the investor-State dispute settlement system. Examples of this are the Decisions on Jurisdiction rendered on August 4, 2011, in the ICSID Case *Abaclat et al. v. Republic of Argentina* (§ 646); and on August 19, 2013, in the ICSID Case *Niko Resources Bangladesh v. People's Republic of Bangladesh—Bangladesh Petroleum Exploration & Production Company Limited (Bapex) and Bangladesh Oil Gas and Mineral Corporation (PetroBangla)*—(§ 476). In addition, the arbitral awards rendered on May 29, 2003, in the ICSID Case *Técnicas Medioambientales Tecmed v. United States of America* (§ 153); on August 2, 2006, in the ICSID Case *Inceysa Vallisoletana, S. L. v. Republic of El Salvador* (§§ 226 and 230); on August 27, 2008, in the ICSID Case *Plama Consortium*

Limited v. Republic of Bulgaria (§§ 135 and 230); on April 15, 2009, in the ICSID Case *Phoenix Action, Ltd. v. Czech Republic* (§§ 106 and 109); on June 18, 2010, in the ICSID *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (§§ 123-124); and on February 7, 2011, in the ICSID Malicorp *Limited v. Arab Republic of Egypt* (§ 116).

It is necessary to underline that behaving in good faith implies acting within the law, complying with the basic provisions of the host State and international rules without taking advantage of their vagueness or ambiguities. As good faith is a principle common to all legal systems, an action in bad faith not only leads to non-compliance with the principle of legality and the principle of *pacta sunt servanda*, but also the violation of any national legislation (Cremades, 2012, p. 769).

Consequently, a foreign investment project carried out in accordance with the host State's legislation, but executed in bad faith taking advantage of the lack of national regulations or the legality requirement of investment treaties, could not claim or benefit from the protection granted by the latter (Llamzon, 2015, p. 317). In other words, the relationship between the contracting parties to the foreign investment must be conducted within the framework of good faith, and within the limits of the legality of the host State's legal system and, essentially, of general international law.

The principle of abuse of rights, one of the broadest expressions of the principle of good faith—in addition to the clean hands doctrine—is used to avoid concealment or simulation of corrupt behavior in foreign investments (Sipiorski, 2019, p. 11). Being part of international law, respondent States likewise use this principle as a defense to limit the application of investment treaties in international investment arbitration.

Through the principle of abuse of rights, the aim is not to limit the rights of foreign investors, but to restrict the improper or malicious exercise of their rights and deny them direct access to the investor-State dispute settlement system. In our opinion, this search for international protection without legitimacy on the part of these investors, as well as the intention of evading international responsibility on the part of the respondent States—alleging the bad faith of the foreign investors even in cases in which the States have had participation or prior knowledge of the corrupt acts—, constitutes an abuse of the investor-State dispute settlement system, since both act without rectitude or loyalty.

Initially, respondent States invoked abuse of rights to reject claims (Ascencio, 2014, p. 767) when they considered that: a) the claims lacked sufficient grounds (for example, in the arbitral award rendered on September 3, 2001, in the UNCITRAL Case *Ronald S. Lauder v. Czech*

Republic [§ 179]); b) these had no legal validity (as in the arbitral award rendered on December 10, 2010, in the ICSID Case *RSM Production Corporation and Others v. Grenada* [§ 6.1.1]); and c) international investment arbitrations were initiated with a malicious purpose (see the arbitral award rendered on March 17, 2006, in the UNCITRAL Case *Saluka Investments BV v. Czech Republic* [§ 236]). Those State objections were dismissed by the relevant arbitral tribunals.

However, since the arbitral award adopted on April 15, 2009, in the ICSID Case *Phoenix Action, Ltd. v. Czech Republic*, where good faith was recognized as an autonomous standard and an additional requirement of the Salini test to validate the existence of a legitimate investment under ICSID rules (2009, §§ 114 and 142-144), claims have been repeatedly rejected when it is proven, for example, that the corporate restructuring, carried out after the establishment of the investment, was made in bad faith with the sole purpose of accessing the investor-State dispute system.

The jurisprudential development of the aforementioned concepts can be found in the Decision on Jurisdiction rendered on June 1, 2012, in the ICSID Case *Pac Rim Cayman LLC v. Republic of El Salvador* (§§ 2.1-2.110 and 2.41); and in the arbitral awards on Jurisdiction rendered on July 18, 2013, in the UNCITRAL Case *ST-AD GmbH (Germany) v. Republic of Bulgaria* (§§ 421-423), and on December 17, 2015, in the UNCITRAL Case *Philip Morris Asia Limited v. The Confederation of Australia* (§§ 584-588). Likewise, this development is reflected in the arbitral awards rendered on August 13, 2009, in the ICSID Case *Europe Cement Investment & Trade S.A. v. Republic of Turkey* (§§ 167 and 174-175); on April 14, 2010, in the ICSID Case Saba *Fakes v. Republic of Turkey* (§ 44); and on June 2, 2016, in the ICSID Case *Transglobal Green Energy, LLC and Transglobal Green Panama, S. A. v. Republic of Panama* (§§ 116-118).

Furthermore, some arbitral tribunals have dismissed claims for violation of the principle of good faith, since it is a matter of international public policy which, in turn, includes principles of morality accepted by the international community. Some examples are the arbitral awards rendered on August 2, 2006, in the ICSID Case *Inceysa Vallisoletana, S. L. v. Republic of El Salvador* (§ 249); on October 4, 2006, in the ICSID Case *World Duty Free Co. Ltd. v. Republic of Kenya* (§§ 139 and 179); and on August 27, 2008, in the ICSID Case *Plama Consortium Limited v. Republic of Bulgaria* (§§ 141-143).

To conclude with the analysis of this point, it can be pointed out that, depending on the characteristics of the case, by declaring claims incompetent or inadmissible, arbitral tribunals provide respondent States with the opportunity to evade compliance with investment treaties

without realizing that such decisions indirectly reinforce corruption. It is worth mentioning that it is not necessary to wait for the universal recognition of the clean hands doctrine as a norm of international law —a topic that will be analyzed below—for it to allow the assessment of the respondent States' behavior, since the duty of international arbitrators prevents matters concerning the international fight against corruption from being ignored.

III.3. The general principles of international Law and the clean hands doctrine

Due to the lack of a universal consensus for the recognition of the clean hands doctrine, there is a great academic and jurisprudential debate on the qualification of this doctrine as a source of international law, as stated in Article 38.1.c of the Statute of the International Court of Justice (Le Moullec, 2018, p. 16). Even if this doctrine is not described by any treaty or international custom (Crawford, 1999, p. 336), it does constitute a general principle of law in several national legislations. However, as a national legal principle, it does not produce the same legal effects as the general principles of international law, since the latter is exclusive to international law (Dumberry, 2020, p. 200).

The clean hands doctrine has not been rejected or discredited as a general principle of international law by the International Court of Justice (Kreindler, 2010, p. 318); rather, the Court has not ruled on it. Recently, in the ruling of February 13, 2019, on the preliminary objections in the case concerning certain Iranian assets (*the Islamic Republic of Iran v. the United States of America*), the Court held that such a doctrine did not constitute sufficient grounds for objecting to the admissibility of the claim (§ 122). This debate also exists in international investment arbitration, where different types of arguments are generated for and against it, or some tribunals simply avoid ruling on the matter.

Arbitral tribunals have used the clean hands doctrine in a discretionary manner to decide on their jurisdiction, the admissibility of the claim, and the legality of the investment. Due to this repeated application, it could be said that in the investor-State dispute settlement system there is a tendency to recognize the clean hands doctrine as a general principle of international law (Llamzon, 2015, p. 317). Nonetheless, with the arbitral award rendered on July 18, 2014, in the UNCITRAL Case *Yukos v. Russia*, in which it was affirmed that the doctrine is not a general principle of international law (§ 1363), that tendency had a setback, as arbitral awards with similar decisions were produced. Proof of this is the arbitral award rendered on November 22, 2018, in the UNCITRAL Case *South American Silver v. Bolivia*, which also did not recognize said doctrine as a rule of international law (§§ 448 and 453).

As seen, there is no consensus as to the recognition of the clean hands doctrine as a general principle of international law. In this sense, its application has not been constant because arbitral tribunals have associated it more with the requirement of investment legality, international public policy, and good faith.

On the contrary, anti-corruption treaties do have international legal effects and, despite this, they are not fully applied by arbitral tribunals to determine the international responsibility of States. Beyond the fact that the conformation of arbitral tribunals originates from the will of the parties, we consider that, as administrators of justice, investment arbitral tribunals must ensure and promote both the respect and the correct application of international law, including anti-corruption treaties. Furthermore, these tribunals should take into consideration the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter ARSIWA), elaborated by the United Nations International Law Commission, in order to avoid inconsistent decisions that could potentially and indirectly encourage corruption, weakening the efforts of the international fight against corruption.

IV. THE INTERNATIONAL RESPONSIBILITY OF STATES

Except for the most recent generation of investment treaties mentioned in section II, the vast majority of these international instruments were not designed with express provisions prohibiting any act of corruption in the investor-State relationship. This lack of regulation, however, is no excuse for investment tribunals to accept corruption defenses without further analysis and absolve respondent States of any international responsibility.

In most cases, the recognition of the existence of corruption in foreign investments means the participation of both parties, investor and State, in the commission of such illicit activities, with greater or lesser responsibility each, depending on the circumstances of each case. Therefore, in many of them, there is a shared responsibility.

For proven situations of illegal foreign investments, the ARSIWA provide unquestionable grounds that should be used to assess whether the corruption of such investments also entails the international responsibility of the respondent States. Let us recall, that these ARSIWA follow—in part—the objective or strict theory, which states that only the breach of international obligations by States is relevant, regardless of whether the unlawful behaviors of their agents or organs were carried out with willful misconduct or negligence (Novak & García-Corrochano, 2016, pp. 394 and 396).

Since the ARSIWA elaborate on the attribution of such responsibility and the situations of non compliance with international obligations, the following may be noted regarding the international responsibility of States: a) it arises from the violation of international obligations; b) the actions or omissions that trigger such violation are directly attributable to States, in accordance with international law; and c) the violation must not occur under exceptional situations.

Concerning the investor-State dispute settlement system, specifically within the ICSID mechanism, it seems that there could be two ways to generate international responsibility of States: for the violation of its Convention and the breach of investment treaties (Douglas, 2010, p. 816). Due to these circumstances, authors such as Llamzon (2014) describe international investment law as a subsystem or specialized system of international responsibility (p. 245). However, based on the ICSID Case *World Duty Free Co. Ltd. v. Republic of Kenya*, where the arbitral tribunal qualified Kenyan corrupt acts based on national legislation, there is not much arbitral discussion on the international responsibility of respondent States for corruption of public officials.

The lack of an appropriate analysis on the points of connection between international investment law, international anti-corruption law, and the international responsibility of States has been reflected in various investment awards. Therefore, we believe that future international investment arbitrations should make a better application of the rules of interpretation of the Vienna Convention on the Law of Treaties in the analysis of the compliance of States with their international obligations, and in cases of corruption of public officials.

IV.1. International responsibility for the corruption of public officials

As mentioned above, the provisions of the ARSIWA are essential in the analysis to be conducted by investment tribunals on the responsibility of respondent States for the corruption of their public officials. We consider that these provisions can be applied to analyze whether corrupt conduct by agents or authorized organs of such States, including when it exceeds their authority or contravenes the instructions of their functions, constitutes a breach of international obligations and whether or not it is directly imputable to the respondent States.

Furthermore, the ARSIWA admit the nexus between the acts or omissions of public officials and the respondent States, without regard to any distinction of State hierarchies or classifications. Therefore, the ARSIWA do not exempt States from international responsibility for the *ultra vires* acts of their public officials as long as they have acted as such, even if their motives were improper to their positions.

According to article 12 of the ARSIWA, a State is in breach of an international obligation when, by its acts, it contradicts that obligation. The latter may originate from a rule, custom, general international principle, or any other source of international law regulating the conduct of States. In claims for corruption during the execution of foreign investments, the respondent States would have international responsibility for failing to comply with their duties to prevent, criminalize and eradicate corruption, provided that such failures are verifiable.

Likewise, we consider that the respondent States would be under international responsibility for the corrupt conduct of their agents, public officials, or representatives—if they solicit and accept bribes to secure and maintain foreign investments or extort foreign investors for their benefit—for breaching the protection standards of investment treaties. This is because these principles are closely linked to transparency, good faith, compliance with national laws and due diligence, without any coercion or restriction, that govern investor-State relations.

It should not be forgotten that arbitral tribunals precisely must know, interpret and properly apply international law to cases of corruption in foreign investments. Since corruption is considered a complex issue in international investment arbitration, any omission of this duty on the part of arbitral tribunals can have counterproductive effects in the fight against corruption.

To remedy this situation, one of the many solutions discussed in the doctrine on how arbitral tribunals should address such wrongdoing is the general principle of international law *nullus commodum capere de sua injuria propia* or "no one can take advantage of their own mistake". With its application, these tribunals would prevent respondent States that in some way have had participation in the acts of corruption from invoking and obtaining some benefit from the defense of corruption —i.e., through the clean hands doctrine—, since this form of exercise of their right to defense would be equivalent to the recognition of their international responsibility for the corruption of their public officials (Devendra, 2019, pp. 276-277).

Due to the particularities of the jurisdiction and powers of investment tribunals, they would not be able to hold criminally liable those identified in the commission of corruption crimes. However, we do not believe that the absence of this power prevents them from performing their functions within their respective competencies on investment. Their powers as investment tribunals allow them to clarify the corrupt acts of the parties, to assess them incidentally, as well as to issue final, binding, and enforceable awards, specifically concerning the investor-State relationship.

IV. 2. Analysis of iInvestment arbitral awards in which corruption in the Investor-State relationship has been addressed

When investment tribunals reject jurisdiction or declare investment corruption claims inadmissible, they exonerate the respondent States from international responsibility. These decisions cause instability in the International Rule of Law and infringement on the exercise and enjoyment of human rights (Resolution 1/18, 2018).

Although there is a significant number of arbitral awards granted in this direction, certain arbitral tribunals have ruled sporadically on the international responsibility of the respondent States. These cases allow the doctrinal debate on the international responsibility of States for the corruption of their public officials to be more objective, which is why we analyze them below.

IV.2.1. ICSID Case *World Duty Free Co. Ltd. v. Republic of Kenya*

Through the award rendered on October 4, 2006, in the ICSID Case *World Duty Free Co. Ltd. v. Republic of Kenya* case, the arbitral tribunal decided the inadmissibility of the claim on the grounds of investment corruption, illegality in contravention of international public policy (§ 157). It further held that the traditional *Harambee* donation given to President Moi of Kenya (§ 110) was a disguised bribe (§ 167). Under Kenyan law, this crime could not be imputed to the respondent State, even if the receipt of the bribe was proven (§§ 169-170). The claimant itself accused the respondent State of corruption and argued that it did not consider the illegality of the donation, as it described it as a routine operational practice to obtain such a contract (§ 130).

This ICSID dispute was brought pursuant to an arbitral clause contained in a ten-year renewable lease agreement entered into by World Duty Free Co. Ltd. and Kenya for the construction, maintenance and operation of duty-free stores at the Nairobi and Mombasa airports as of July 1, 1990. In that year, World Duty Free Co. Ltd. began operations with an investment of more than USD 27 million (2006, §§ 62-67). In 1992, President Moi asked the investor to support him in raising external funds for his election campaign through a massive fraud linked to the export of gold and diamonds (§ 68).

World Duty Free Co. Ltd. faced retaliation from Kenya to eliminate certain evidence of such fraud: they seized the properties, the administration and imprisoned its representative (2006, §§ 70-73). Therefore, in 2000, the company filed a request for arbitration against Kenya, with both UK and Kenyan law as the applicable law (§ 158). The respondent State rejected the claim on the grounds that the investments were illegal

(§ 158), since, prior to the signing of the contract, the aforementioned traditional donation had been given to President Moi.

Even though the bribery occurred prior to the closing of the lease, the ICSID arbitral tribunal merely expressed its concern about the lack of investigation and prosecution in domestic fora against Moi (2006, § 180). Moreover, it declared that the corrupt behavior of the highest authority and representative of Kenya was not attributable to the respondent State, a position that allowed the latter to free itself from any international responsibility.

IV.2.2. ICSID Case *Metal-Tech Ltd. v. Republic of Uzbekistan*

In the October 4, 2013 award of this ICSID case, the arbitral tribunal dismissed the claim on the grounds of its refusal to exercise jurisdiction after verifying the contamination of the investment with corruption. In order to safeguard the Rule of Law, this arbitral tribunal preferred not to grant international protection to the claimant investor for being involved in corrupt practices (§ 389).

In 2000, the investor Metal-Tech Ltd. created the joint venture JV Uzmetal Technology together with Uzbekistan's State-owned companies—AGMK and UzKTJM—to develop and operate a modern molybdenum production plant (2013, § 7). Their investment was in the range of USD 17.5 million (§ 12). In 2006, Uzbekistan initiated criminal proceedings against the joint venture on charges of abuse of authority and damages against the State. In parallel, it abrogated all of the joint venture's exclusivity rights on the export of refined molybdenum oxide (§§ 37-38). The following year, UzKTJM initiated legal proceedings against JV Uzmetal Technology for the collection of dividends and bankruptcy proceedings, which were declared founded in 2009 (§ 52).

Metal-Tech Ltd. filed its request for arbitration in 2010, seeking a declaration of non-compliance by Uzbekistan with the principles of fair and equitable treatment, full security and protection, guarantees and protective measures, among other standards (2013, § 55). Uzbekistan rejected all the claims in the lawsuit alleging that Metal-Tech Ltd. promised payment for the approval of the plant project (§ 195). The latter denied this version, although it later acknowledged that it spent about USD 4 million on consultancies between 2001 and 2007. It also acknowledged that it gave a loan in 1998 (§ 197), one of the beneficiaries being a public official: the brother of the Prime Minister of Uzbekistan.

With this statement by the claimant investor, the ICSID arbitral tribunal demanded explanations (2013, § 239) and requested additional documents on the amounts disbursed between the parties. In the light of that, Metal-Tech Ltd. did not comply with the order and sought to

amend its version (§§ 256 and 265). Taking into account the procedural conduct of the claimant, as well as the overpayment of the consultancy fees, the tribunal declared the investment illegal (§§ 372-373). However, although Uzbekistan was not found directly responsible for corruption, the arbitral tribunal—in this ICSID case—recognized that the State had a role in the illegality of the investment. For that reason, it decided to divide the costs of the arbitral proceedings between the parties (§ 422).

IV.2.3. ICSID Case *Spentex Netherlands v. Uzbekistan*

In this ICSID case, whose award rendered on December 27, 2016 is not yet public, the arbitral tribunal apparently did not consider the presence of international responsibility of Uzbekistan for the corruption of its public officials. However, it stated that both parties were involved in corruption and admonished the Uzbek State for not disclosing the names of the public officials involved in corruption.

As in the ICSID Case *Metal-Tech Ltd. v. Uzbekistan*, the claim was dismissed and a division of the costs of the dispute was established in a rather original way: the arbitral tribunal recommended the respondent State to donate USD 8 million to an anti-corruption fund of the United Nations Development Program. In case of non-compliance, the arbitral tribunal would issue a decision on additional payment to the initial amount of the costs of the arbitral proceedings (Alekhim & Shmatenko, 2018, p. 178).

IV.2.4. ICSID Case *F-W Oil Interests, Inc. v. Republic of Trinidad and Tobago*

The March 3, 2006 award describes how F-W Oil Interests, Inc. accused Trinidad and Tobago of corruption and retaliation after refusing to pay a bribe request for USD 1.5 million in exchange for acquiring a bid to refurbish the Southwest and West Soldado offshore oil and gas fields. The request was made during negotiations for the refurbishment project. Since F-W Oil Interests, Inc. failed to prove the corruption of Trinidad and Tobago public officials, the ICSID arbitral tribunal rejected the claim, arguing that the expenditures made by the claimant during the pre-contractual stage did not constitute an investment (2006, § 213).

In early 2000, Trinmar, a subsidiary of the State-owned Petrotrin, invited F-W Oil Interests, Inc. to participate in the bidding process for the refurbishment, which it won, despite being threatened with the withdrawal of its bid if it did not deliver the requested bribe. Even though F-W Oil Interests, Inc. committed to investing more than USD 60 million in Trinidad and Tobago, the coercion continued until Trinmar withdrew from the bidding process.

Due to the facts described above, including the request for bribery, F-W Oil Interests, Inc. filed a request for arbitration against Trinidad and Tobago for violating its rights under the bidding contract and the

applicable bilateral investment treaty, in addition to causing it substantial damages and losses due to the investments made during the bidding process (2006, § 106). Trinidad and Tobago responded by pointing out that such investment did not occur (§ 107), and alleged the misconduct and dishonesty of F-W Oil Interests, Inc. (§ 210).

The arbitral tribunal in this ICSID case concluded that, because of the lack of investment, Trinidad and Tobago was not liable for the acts or omissions of its public officials (2006, § 207). Furthermore, in light of the withdrawal of F-W Oil Interests, Inc. from all allegations of corruption (§ 210), the arbitral tribunal considered that it had no grounds to rule on such allegations (§ 211).

IV.2.5. ICSID Case *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Republic of Perú*

The Lucchetti companies owned a pasta manufacturing and sales plant located in Los Pantanos de Villa, a protected natural area. In 1997, the Municipality of Lima ordered the companies to stop construction of the plant for violating environmental regulations. The following year, the Municipality declared the construction license and other authorizations for the plant invalid. In response, Lucchetti companies filed amparo action and precautionary measures against the Provincial Council, the mayor of the Municipality of Lima and the Council of the District Municipality of Chorrillos. In the corruption context of the late 1990s in Peru, all of these proceedings ended in favor of the Lucchetti companies, which allowed them to complete construction of the plant and operate unimpeded until 2001.

That year, the Municipality of Lima revoked the operating license of the Lucchetti companies and ordered their definitive closure, alleging non-compliance with zoning and environmental regulations necessary for the operation of the plant. The Municipality's decision also referred to the judicial decisions in favor of these companies, considering that they were issued in a corruption context.

In 2002, the Lucchetti companies filed a request for arbitration against Peru for failures to fulfil three provisions of the applicable bilateral investment treaty, specifically the standards of fair and equitable treatment, national treatment, and most favored nation treatment, in addition to illegal, discriminatory, and uncompensated expropriation (Saco, 2016, p. 657).

The Peruvian State objected to the jurisdiction of the ICSID arbitral tribunal on the grounds that the dispute predated the entry into force of the aforementioned Convention. In the arbitral award rendered on February 7, 2005, the arbitral tribunal declared itself incompetent to hear the merits of the dispute on the basis of the objection of lack of

jurisdiction *ratione temporis*—pre-Convention dispute—(2005, § 59), choosing not to rule on the allegations of corruption and its impact on the investment.

V. FINAL THOUGHTS

In a vast number of international investment arbitrations, corruption in investments is an issue not examined with due diligence and depth. Arbitral tribunals avoid pronouncing themselves and decide, for the most part, to declare the absence of jurisdiction or the inadmissibility of the claim, a position that we consider erroneous since corruption does not occur unilaterally, but, rather, with shared responsibility between investors and States.

Therefore, it is worrying that arbitral decisions, taken within the scope of the investor-State dispute settlement system, may indirectly interfere with the international fight against corruption by exempting the respondent States from any international responsibility for the corruption of their public officials, as a consequence of the almost automatic application of doctrines such as the clean hands or the illegality of the investment.

We consider that the duty to ensure and promote respect for and the correct application of international law as a whole is the primary tool that investment arbitral tribunals have when facing allegations and defenses of corruption between the parties. Furthermore, to avoid potential inconsistencies in the application of investment treaties and anti-corruption treaties, arbitral tribunals should consider the provisions of the Vienna Convention on the Law of Treaties and be very cautious and rigorous in the analysis of the Articles on Responsibility of States for Internationally Wrongful Acts of the United Nations International Law Commission of 2001.

If the corrupt behavior of public officials is proven, investment arbitral tribunals should assess the international responsibility of the respondent States for failure to fulfil the applicable investment treaties and their international obligations on the fight against corruption, without prejudice to the responsibility of the claimant investors in the commission of the corruption crimes.

This way, the defenses related to the existence of corruption—the clean hands doctrine or illegality of the investment—usually invoked by the respondent States, would cease to be used with the main purpose of evading their international responsibilities and would become a legitimate defense for cases in which the corruption is actually due to an act of exclusive responsibility of the investor and not shared or exclusive responsibility of the State.

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