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THE CRIME OF FORTIFICATION AND THE DOGMA OF IMPEDIMENT IN THE INVESTOR STATE DISPUTES

Authored By- Yash Patil

Abstract

In order to bring about the jurisdiction of an investment tribunal, it is necessary to fulfil the conditions of the definition of the term "investment." In this context, the word "investment" is defined by the contracting governments in accordance with the bilateral investment treaties that they have in place with one another (BIT). The basic criterion for an investment to be considered legitimate is for it to be in accordance with the laws of the state in which it will be carried out. The investor has the right to be treated fairly and equitably (FET), which is required by the substantive safeguards granted through BITs as well as the minimal standard treatment under customary international law. This right has been bestowed to the investor. In situations when the investment was obtained via unethical business tactics, there is room for ambiguity. Most of the time, state authorities are complicit in the fraudulent dealings that take place. Nevertheless, the investor is the one who is responsible for bearing the repercussions of engaging into such an agreement. This piece of writing has been broken up into three sections, each of which addresses a different aspect of the question of whether or not the concept of estoppel may be used in arbitral proceedings. In the first place, the purpose of this study is to discuss the perspective that arbitral tribunals use while hearing cases that include the corruption defence. In the second part of the study, the author investigates whether or not the legal principle of estoppel may be used in investment arbitration. In conclusion, the purpose of this research is to investigate the proper course of action that may be taken in circumstances like these.

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Introduction

Because of the increased volume of trade and commerce that takes place between countries, liberal economic institutions have contributed to a higher degree of interdependence in the global economy.[1] As a direct consequence of expanding commerce, the need for adequate security of assets made on foreign land becomes a topic of concern for both private persons and national governments.[2] The Bilateral Investment Treaties that nations have signed with one another have helped to direct investments made on other countries territory.[3] In point of fact, the number of investment treaties that have been finalized over the course of the last two decades has seen a significant uptick.[4] The recent increase in the number of bilateral investment treaties is illustrative of the desire on the part of every state to offer investment protection to private investors in order to entice investments.[5]

In the event that a disagreement over the protection standards envisioned by the treaty develops, the BIT that is in place between the contracting nations will serve as the substantive legislation (lex specialis) that would regulate any arbitrations that are initiated.[6] These contracting states consequently define "investment" in line with their own standards, one of the most essential aspects of which is that an "investment" is *"it must be in invested in accordance with the legislation of the host state."*[7]

Because of the nature of the dealings that take place between nations and investors, there are

[1] Oneal, J., Oneal, F., Maoz, Z. and Russett, B., 1996. The Liberal Peace: Interdependence, Democracy, and International Conflict, 1950-85. *Journal of Peace Research*, 33(1), pp.11-28.
[2] Foreign Direct Investment for Development, Maximising benefits, Minimising Costs, OECD, 2002 Oecd.org. 2022. [online] Available at: https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf [Accessed 2nd May 2022].
[3] Helena Sprenger and Bouke Boersma, *The Importance of Bilateral Investment Treaties (BITs) When Investing in Emerging Markets*, Americanbar.org. 2022. [online] Available at: https://www.americanbar.org/groups/business_law/publications/blt/2014/03/01_sprenger/ [Accessed 4th May 2022]. Houthoff.com. 2022. [online] Available at: https://www.houthoff.com/-/media/Houthoff/Publications/bboersma/Investment_treaties.pdf [Accessed 4th May 2022].
[4] Antonio R. Parra, ICSID and the Rise of Bilateral Investment Treaties: Will ICSID be the Leading Arbitration Institution in the Early 21st Century?, PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) Vol. 94 (April 5-8, 2000), pp. 41-43, (May. 08, 2022, 10:16 PM) https://www.jstor.org/stable/25659347?seq=1#page_scan_tab_contents.
[5] Christoph Schreuer, Investments, International Protection, Univie.ac.at. 2022. [online] Available at: https://www.univie.ac.at/intlaw/wordpress/pdf/investments_Int_Protection.pdf [Accessed 9th May 2022].
[6] Douglas, Z., n.d. *The international law of investment claims*. (2012)
[7] Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (April 29, 2004) ¶74. Icsidfiles.worldbank.org. 2022. [online] Available at: http://icsidfiles.worldbank.org/icsid/icsidblobs/OnlineAwards/C220/DC2232_en.pdf [Accessed 16th May 2022].

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almost always indications of bribery or corruption present.[8] An investment that is predicated on corruption is considered to be illegal according to the parameters of an investment that are outlined in the majority of contemporary Bilateral Investment Treaties. This is because such unlawful methods are involved.[9] Many times, states are able to get out of their responsibilities under the Bilateral Investment Treaty by alleging that investments are unlawful.[10] If such a claim is shown to be true, it will have the consequence of causing International Centre for Settlement of Investment Dispute's tribunals to reject jurisdiction over the dispute.[11]

It is obvious, and has been pointed out by a number of eminent writers, that any business transaction that is finalized on the basis of bribery and corruption would always be conducted in secret.[12] In contrast to a private transaction, wherein the contract is voidable at the request of any of the parties in the event of a fraudulent transaction, in investor-state disputes, only the investor bears the risk of entering into such an arrangement. In a private transaction, the contract is voidable at the request of any of the parties in the event of a fraudulent transaction. This problem has been seen in a multitude of arbitral awards; in these cases, state actors have initially promoted a corrupt investment, but this enables the state to subsequently claim illegality of investment when questioned on the treatment accorded to the investors. This is a problem because it allows the state to avoid responsibility for its actions.[13] If corruption is so deeply rooted in the system, there may be circumstances in which an investor is left with no other option except to pay bribes to public officials in order to secure the investment.[14] This provides the state with a very handy platform from which to expropriate the investor's assets and then, later, allege that the investment was unlawful on the grounds that it was founded on corrupt practices.

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[8] Yackee, Jason W., *Investment Treaties and Investor Corruption: An Emergent Defense for Host States?* (October 19, 2011). Virginia Journal of International Law, Forthcoming, Univ. of Wisconsin Legal Studies Research Paper No. 1181, Available at SSRN: https://ssrn.com/abstract=1946341

[9] Ferry Ardiyanto, Foreign Direct Investment and Corruption, 2-12 (2012), Mountainscholar.org. 2022. [online] Available at: https://mountainscholar.org/bitstream/handle/10217/71542/Ardiyanto_colostate_0053A_11539.pdf [Accessed 19th May 2022].

[10] Margareta Habazin, *Investor Corruption as a Defence strategy of Host States in International Investment Arbitration: Investors Corrupt acts gives an unfair advantage to Host States in Investment Arbitration*, 18 CARDOZO JOURNAL OF CONFLICT RESOLUTION, 805-828 (2017).

[11] *Metal-Tech Ltd v The Republic of Uzbekistan*, ICSID Case No. ARB/10/, Award (October 4, 2013).

[12] United Nations, Declaration against Corruption and Bribery in International Commercial Transactions, (December 16, 1996), 36 Int'l Legal Materials 1043 (1997); UN General Assembly, United Nation Convention Against Corruption, (October 31, 2003), A/58/422.

[13] *World Duty Free Company Limited v The Republic of Kenya*, ICSID Case No. ARB/00/7, award (October 4, 2006) ¶172., *Yukos Universal Ltd. V. The Russian Federation*, UNCITRAL, PCA Case No. AA 227 (July 18, 2014), ¶1369., *Gustav FW Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case no. ARB/07/24, Award (June 18, 2010), ¶123.

[14] Florian Haugeneder, *Corruption in Investor-State Arbitration*, 10(3) J. WORLD INV. & TRADE 323, 330 (2009).

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Therefore, the question that emerges is why, if the state is profiting off of the investment that it has itself authorized unlawfully, it should not be placed on the same pedestal as the investor. This is because the state itself is engaging in criminal activity. In this paper, we will investigate the methodology utilized by a variety of investment arbitration tribunals and provide an in-depth analysis of that methodology. Based on our findings, we will then propose a methodology that is ideally suited to examine investments in a manner that is congruent with the principles of international law.

The Strategy Used By Tribunals In Situations Involving The Defence Of Corruption.

The approach used by tribunals in matters involving corruption has often consisted of determining that any investments discovered to be based on corruption are unlawful and, as a result, refusing to exercise jurisdiction over the resulting disputes.[15] The first of these judgements was handed out when the International Chamber of Commerce was presiding over the proceedings. The judge who presided over the court in International Criminal Court Case No. 1110, which was the first prominent case to refuse jurisdiction owing to the prevalence of corruption in the acquisition of investment, was Lagergren.[16] He was of the opinion that such corruption, even if it were completely essential to launch an investment in a certain jurisdiction, is unethical and must cause the transaction to be deemed illegitimate.[17]

The fundamental line of thinking that underpins these kinds of judgements is that corruption violates the fundamental principles of international public policy and is thus prohibited in the majority of legal systems.[18] *"Basic laws of natural law, principles of universal justice, jus cogens in public international law, and the broad standards of morality acknowledged by civilized countries"* are all examples of what are referred to when discussing "transnational public policy."[19]

[15] Florian Haugeneder, *Investment Arbitration - Corruption and Investment Arbitration: Substantive Standards and Proof*, KLUWER ARBITRATION, 1-31, 2012, Law.yale.edu. 2022. [online] Available at: https://law.yale.edu/sites/default/files/documents/pdf/sela/Haugeneder_Liebscher_Corruption.pdf [Accessed 21st May 2022].
[16] ICC Case No. 1110 of 1963.
[17] *Id.*
[18] *World Duty Free Comp. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006) ¶181.
[19] ICC Case No. 7047 (1994); *Wena Hotels Ltd v The Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (December 8, 2000); ICC Case No. 3916(1982).

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The action of the opposite party is made irrelevant for the purpose of the tribunal's adjudication if there has been a breach of an international public policy, since this is a concept that is widely recognized and adhered to.[20] Due to the fact that the investor has engaged in unethical behavior, he or she is simply unable to file a claim in the investment treaty arbitration.[21] To guarantee the promotion of the rule of law, which necessitates that a court or tribunal cannot offer aid to a party that has engaged in corrupt behavior, the goal here is not to penalize one party at the expense of the other. Rather, the intention is to ensure that the rule of law is promoted.[22] Therefore, regardless of whether or not the state was involved in the corruption, the fact that the investor engaged in an unlawful conduct means that his claims cannot be upheld since the investment is no longer protected by the Bilateral Investment Treaty. The state emerges unscathed from the inference of such a rejection of jurisdiction with a clean slate. The state is in the wrong when it has either encouraged corruption or created conditions in which engaging in corrupt behavior was essential in order to make the investment.[23] In both of these scenarios, the state is at fault. Therefore, not punishing the state goes against the concept of *"nemo auditor turpitudinem allegans,"*[24] which essentially implies that no one may be heard to invoke his or her own turpitude. This principle is violated when the state is not punished. As an extension to this maxim is another one, which is called *"in pari causa turpitudinis cessat repetitio."* This maxim states that when both parties are culpable, no one may prevent a court from participating in a dispute that involves an illegal transaction. This maxim is an extension to this maxim. It is not hard to understand that the traditional method of doing things results in a contradiction in the legal system.

State officials and staff are often complicit in engaging in corrupt activities such as making corrupt representations and partaking in various forms of corruption.[25] In addition, the majority of instances of corrupt investments involve the state deliberately looking the other way for a considerable length of time while corrupt actions are carried out.

[20] Nartnirun Junngam, *Public Policy in International Investment Law: The Confluence of the Three Unruly Horses*, 51 TEXAS INT'L LJ, 67-100 (2016)
[21] Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29(1) ICSID REV., 180, (2014). *World Duty Free Comp. v Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), ¶162 & 179.
[22] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013) ¶389
[23] Mark W Friedman, *Corruption in International Arbitration: Challenges and Consequences*, GLO. ARB. REV. (2017)
[24] Andrew Newcombe, *The Question of Admissibility of Claims in Investment Treaty Arbitration*, KLUWER ARBITRATION BLOG (2010).
[25] Florian Haugeneder, *Investment Arbitration - Corruption and Investment Arbitration: Substantive Standards and Proof*, KLUWER ARB., 1-31, (2012)

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Therefore, it is not righteous in such instances, as recognized by many International Centre for Settlement of Investment Disputes courts, to let the State to deploy the corruption defence only when a claim arises against them for the infringement of investor rights. This is because the State may be accused of violating the rights of investors.[26] When the state deliberately ignored breaches of its own law and gave its blessing to an investment that was not in conformity with its law, the state would be precluded from later using those violations as a jurisdictional defence. This is known as estopped.[27] When the state does not bring any criminal charges against anybody, it cannot allege that an investment was made illegally on the basis of corruption, since this is a well-established principle.[28]

In the case of *Metal-Tech v. Uzbekistan*, the respondent state, Uzbekistan, was successful in using the corruption defence in order to avoid legal responsibility.[29] Metal-tech has collaborated with two different businesses from Uzbekistan to form a joint venture. The disagreement began when the joint venture failed to disburse the owed dividends and an insinuation was made about the possibility of filing for bankruptcy against it. The tribunal declared that it did not have the authority to investigate the charges of bribery made against Metal-tech because it lacked jurisdiction due to the fact that the investment made by Metal-tech in Uzbekistan was founded on corruption.[30] After determining that the Respondents were successful in their claim, the court just requested that they split the expenses of the proceedings with the opposing party since Metal-tech had made an attempt to keep those costs to a minimum.[31] Because of the *Metal-Tech* case, the amount of due diligence that international investors do before making investments in a foreign area has significantly risen.

Another important precedent was set in this area by the judgement in the case of *Wena Hotels vs. Egypt*.

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[26] *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award (February 6, 2008) ¶120; *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, IIC 299, Award (August 16, 2007) ¶346. *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine*, ICSID Case No ARB/08/0, IIC 431, Decision on Jurisdiction (March 8, 2010), ¶140; *H & H Enterprises Investments Inc v Arab republic of Egypt*, ICSID Case No ARB/09/15, IIC 542, Decision on Jurisdiction (June 5, 2012), ¶52-54; *Railroad Development Corp v Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012), ¶144-7.

[27] *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25.

[28] Greenwald, B. and Greenwald, B., 2022. *The Viability of Corruption Defenses in Investment Arbitration When the State Does Not Prosecute*. [online] EJIL: Talk!. Available at: https://www.ejiltalk.org/the-viability-of-corruption-defenses-in-investment-arbitration-when-the-state-does-not-prosecute/ [Accessed 23rd May 2022].

[29] *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (October 4, 2013) ¶110.

[30] Investment Treaty News. 2022. *Metal-Tech v. Uzbekistan - Investment Treaty News*. [online] Available at: https://www.iisd.org/itn/en/2018/10/18/metal-tech-v-uzbekistan/ [Accessed 26 May 2022].

[31] *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (October 4, 2013) ¶421.

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After putting all of the facts and evidence into the record, the tribunal came to the conclusion that it could not absolve Egypt of its responsibility because the country had failed to bring charges of corruption against the consultants involved, despite having adequate knowledge of the relevant circumstances.[32] In addition, the Paris Court of Appeal has decided that it is not sufficient to find in favor of the State based on mere claims without indicting or prosecuting the individuals who are said to have benefited from the corruption.[33] This decision was made. As a result, investment tribunals have taken a conflicted stance when dealing with the anti-corruption defence put out by Respondent States. In the next part, we will investigate whether or not the doctrine of estoppel may be applied, as well as whether or not it is the best course of action.

The Extent To Which The Doctrine Of Estoppel May Be Applied.

It is a common concept of state accountability in international law that nations may be held accountable for the actions of its officials when such officials are exercising components of their governmental power.[34] As a consequence, the activities of state officials bind the state, and the state itself may be held responsible for such actions. The viability of the theory of estoppel as an instrument of application in international law may be traced back to this fundamental precept. The concept of estoppel, which is found in international law, makes it impossible for a state to retract some assertions that it has already stated.[35] The idea known as *"nullus commodum capere de sua injuria propria,"* which translates to "no one may be permitted to take advantage of his own wrong," served as the inspiration for the development of this theory.[36] Since the corruption might be ascribed to the State as well, it would be against the international norm of logic and proportionality to offer entire immunity to the State.

[32] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (Decembers 8, 2000) ¶116.
[33] Saleh, S., Dehaudt-Delville, Y., Mittal, A. and Scherer, M., 2022. *Protection of States' Diplomatic Assets in France - Kluwer Arbitration Blog*. [online] Kluwer Arbitration Blog. Available at: http://arbitrationblog.kluwerarbitration.com/2018/02/21/protection-states-diplomatic-assets-france/ [Accessed 31st May 2022].
[34] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 7, (2001).
[35] L.C. MacGibbon, *Estoppel in International Law*, 7, INT'L & CO. L.Q., 512 (1958).
[36] Charles T. Kotuby, *General Principles of Law, International Due Process and the Modern Role of Private International Law*, 23 DUKE J. OF COMP. AND INT.L.423-428 (2013).

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In international investment law, there is not a lot of backing for the practice of applying the theory of estoppel to conflicts between investors and states.[37] Under normal circumstances, the law of estoppel does not prevent a state from bringing up a corruption defence. When applying the theory of estoppel, there must be a clear declaration of truth that is voluntary, unconditional, and permitted, and that is also relied on to the opposing party's disadvantage for the doctrine to be applicable.[38]

The taking of bribes is virtually never made public, and the practice of corrupting public officials is almost always prosecuted.[39] Where a state has made positive affirmations that have triggered the acts of investors, the theory of estoppel may be used as a rule of international law. However, this is only the case when the doctrine is relevant.[40]

On the other hand, given the covert nature of the dealings, it is highly unlikely that any investor would be able to prove that they had placed undue reliance on a precise, unqualified, and officially sanctioned statement made by the state indicating that it would be acceptable to pay a bribe. This is because it is highly unlikely that the state would make such a statement. It is feasible for a state to make the argument in this instance that it cannot be held accountable for the criminal activities of its officials if those persons are not "cloaked with governmental authority." This is one of the defences that a state may use. This is one of the several defences that a state may utilize in this situation. It follows that the State may not be held accountable for the private activities of the officials *"when the behavior is so far from the scope of their official responsibilities that it should be equated to that of private people, not traceable to the State."*[41] In the majority of instances, officials who engage in corrupt behavior do so in order to further their own personal interests, which are unrelated to their official responsibilities.[42]

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[37] Andreas Kulick, *About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, 27 EURO. J. OF INT. L, 108-115 (2016).
[38] Derek Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, 33 BYIL. 176,202 (1958); *Pan American Energy LLC v. Argentina*, ICSID Case no. ARB/03/13, Award (July 27, 2006) ¶151.
[39] Maziar Jamnejad, *World Duty Free v The Republic of Kenya: a Unique Precedent?* Chathamhouse.org. 2022. [online] Available at: https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il280307.pdf [Accessed 3rd June 2022].
[40] *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal et* al., ICSID Case No. ARB/07/3, Award (Dec. 28, 2009), ¶211.
[41] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Nov. 2001, Supplement No. 10 (A/56/10), chap. IV.E.1.
[42] Divina Law. 2022., Camille I. Aromas, *The Corruption Defence: An Asymmetrical Treatment Between the Investor and the Host State | DivinaLaw*. [online] Available at: https://www.divinalaw.com/news-and-updates/the-corruption-defence-an-asymmetrical-treatment-between-the-investor-and-the-host-state/ [Accessed 3rd June 2022].

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The "scope of employment" of state officials cannot be expanded to include activities that are carried out privately and for the purpose of gaining personal advantage.[43]

The concept of public policy known as *"ex dolo malo non oritur actio,"* which asserts that no court will assist a man who founded his cause of action upon an immoral or unlawful act, is the rationale that underpins the belief that the claimant should be held accountable for the damages.[44] The public, or in this instance, the vast majority of people who pay taxes and other citizens of the nation, is who the law is intended to protect, not the parties involved in the legal dispute.[45] Therefore, in light of the fact that the investor is unable to substantiate his claims without depending on an unlawful conduct, the theory of clean hands rules that his claims cannot be upheld.[46] The defence of a complicit state, on the other hand, is likewise founded on an unlawful conduct for the same reasons. Therefore, as a result of extending immunity to the state, both parties to the agreement are being treated differently despite the fact that they share the same factual matrix.

Appropriate Method Of Handling The Situation

There is a significant problem that is hurting the fairness of investment treaty arbitration, and that problem is the habit of invoking corruption as a defence in order to avoid responsibility resulting from a violation of treaty responsibilities towards investors.[47] It is vital for the tribunals to strike a balance between the risks posed by both parties and to treat them in an equitable manner.[48] In the event that the State is permitted to employ the corruption defence to its benefit, the responsibility of entering into an agreement based on fraudulent acts lies solely on the investor who entered into the agreement.[49] Despite the fact that investors must not be exonerated of the wrongdoings they have committed, they should not be the sole party to carry the whole weight of the consequences

[43] Howard Whitton, *Implementing effective ethics standards in Government and the Civil Service*, Oecd.org. 2022. [online] Available at: https://www.oecd.org/mena/governance/35521740.pdf [Accessed 3rd June 2022].
[44] Public Policy - General Principles: As to the first, in 1 CHITTY ON CONTRACTS at ¶17-007 (7 ed.).
[45] *World Duty Free Comp. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006) ¶181.
[46] *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008), ¶141.
[47] ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION (2014).
[48] Carolyn B. Lamm, *Fundamental Rules of Procedure: Who's Due Process, is it?* (2014), 2022. [online] Available at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/lamm_fundamental_rules_of_procedure_whose_due_process_is_it.pdf [Accessed 5th June 2022].
[49] Michael Hwang S.C, Corruption in Arbitration- Law and Reality, 2022. [online] Available at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media013261720320840corruption_in_arbitration_paper_draft_248.pdf [Accessed 5th June 2022].

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of the fraudulent transaction.[50] In spite of the fact that it did not decide to alter the practice, the Metal-Tech tribunal did admit that granting blanket immunity to the defendant party in instances involving corruption might lead to an undesirable conclusion.[51] In these kinds of circumstances, the standard procedure entitles the state to immunity from additional culpability while also allowing it to share in the expense of any legal actions that are necessary.[52]

The corruption defence enables the state to engage in corrupt activities during the acquisition of the investment, to handle the investment in an unjust and arbitrary way by expropriating it, and to subsequently use the corruption defence as a legal justification for these acts.[53] Therefore, in order to discourage such a mindset, it is necessary for the state to be held to the same level of liability as private parties and to be prevented from asserting that it is entitled to immunity in situations in which it was the primary cause of the corruption. In such a circumstance, even when the investment becomes illegal as a result of the rules of the Bilateral Investment Treaty, the tribunal shall not rule out its jurisdiction notwithstanding the fact that the provisions have rendered the investment unlawful. Instead, one should investigate several other possibilities in order to guarantee that all parties are subjected to the same risks and are handled in an equal manner.

If the investment of the investor has been actively promoted by the Host State for a significant period of time despite being fraudulent at the time of inception, then the Host State should not be granted the privilege of using the corruption defence simply because certain claims of unfair and unjust treatment lie against them. This is because using the corruption defence would give the Host State an unfair advantage.[54] To acknowledge claims stemming from an investment that are founded on fraudulent behavior is a violation of the fundamental norms of international law. Permitting a state to profit from its own violations of international law is another violation of the fundamental principles underlying this body of law.[55] Therefore, in order to create a balance, if it can be established that obtaining the investment without indulging in corrupt acts was impossible

[50] Jason Summerfield, *The Corruption Defence in Investment Disputes: A Discussion of the Imbalance Between International Discourse and Arbitral Decisions*, 7 TDM 1 (2009).
[51] *Metal-Tech Ltd v The Republic of Uzbekistan* (ICSID Case No. ARB/10/3)
[52] Norton Rose Fulbright - Ruth Cowley, *Investor corruption: Bribery at centre of failed investor claim*, Lexology. 2022. [online] Available at: https://www.lexology.com/library/detail.aspx?g=7b77aafd-36bb-4092-8b02-bd0a4f31b8de [Accessed 6th June 2022].
[53] Jason Yackee, Investment Treaty News. 2022. *Investment Treaties and Investor Corruption: An Emerging Defense for Host States? - Investment Treaty News*. [online] Available at: https://www.iisd.org/itn/en/2012/10/19/investment-treaties-and-investor-corruption-an-emerging-defense-for-host-states/ [Accessed 6th June 2022].
[54] Michaela Halpern, *Corruption as a complete Defence in Investment Arbitration or part of a balance?* 23 WILL. J. OF INT. L. & DIS. RES., 297-318 (2016)
[55] Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29 ICSID REV.,180, (2014). *World Duty Free Comp. v Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), ¶162 & 179.

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or that such indulgence was induced by the state itself, then the state shall be estopped from raising the plea of illegality on the grounds that bribery or corruption was involved. This is because it is impossible to obtain the investment without indulging in corrupt acts. Consequently, in order to create a balance, if it can be established that obtaining the level of financial reward that is bestowed upon investors ought to be proportional to the amount of profit generated by the investment.[56]

Conclusion

When a conflict emerges between an investor and a state in another country, there is sometimes an element of mistrust present. The Host State is constantly on the lookout for defences under the BIT that would allow it to escape the jurisdiction of the tribunal so that it may avoid having to pay the compensation that is being sought. The corruption defence is a popular strategy used by the Host State. In this strategy, the Host State asserts that the investors engaged in fraudulent conduct at the beginning of the transaction, which the Host State considers to be their fault for engaging in such behavior. If a matter is brought before an international tribunal with the intention of violating the norm of good faith, then it is generally understood that the case will be dismissed. Because of the charges of corruption, the investment is now unlawful under the terms of the Bilateral Investment Treaty, and the tribunal can no longer exercise its jurisdiction over the matter. This gives a simple platform for the state to engage in corrupt agreements with the investors and, later, to immunize itself from any responsibility by creating a corruption defence. Consequently, this makes it possible for the state to immunize itself from any culpability. When a defence like this is used, the investors are often coerced into paying bribes to state authorities at the time of entering into an agreement by those officials. After then, the state is able to simply treat the investors in an unfair way by expropriating their money with the freedom of later alleging that the investment was made in an unlawful manner.

[56] Cisarbitration.com. 2022. *Metal-Tech v Uzbekistan: No Jurisdiction Because of Corruption: CIS Arbitration Forum – Online Journal about Dispute Resolution in Russia, Ukraine, Kazakhstan, Belarus and the Region*. [online] Available at: http://www.cisarbitration.com/2013/12/16/metal-tech-v-uzbekistan-no-jurisdiction-because-of-corruption/ [Accessed 6th June 2022].

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The arbitral tribunals are obligated to make an effort toward striking a balance between the risks that are borne by both parties to a contract. Because the state is the only entity that may legitimately use the corruption defence, this practice is harmful to the interests of investors. As a result, the State ought to be judged just as culpable, and the tribunal ought to maintain its authority to continue hearing the conflict. The parties involved need to jointly take responsibility for entering into a tainted agreement, and the state can't be allowed to enjoy total immunity from blame. When a state has previously given its approval for an investment, the legal doctrine of estoppel makes it impossible for that state to later allege that the investment was made in violation of the law. The claims of the investor must be acceptable before the tribunal if the Host State deliberately overlooks any illegality in the initiation or execution of the investment.