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Essay

## Investment Treaties & Investor Corruption: An Emerging Defense for Host States

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## Investment Treaties and Investor Corruption: An Emerging Defense for Host States?

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*Bilateral investment treaties (BITs) are famously asymmetric. They grant investors rights but not obligations, while imposing upon states obligations unaccompanied by rights. Recent cases suggest, however, that BIT tribunals are poised to recognize a defense to state BIT liability that, in effect, imposes upon investors the obligation to avoid involvement in public corruption in the course of making a treaty-protected investment. In this Essay, I sketch out the contours of this emerging defense, focusing on the recent investment treaty arbitration between Siemens AG and Argentina. Siemens was awarded over \$200 million for Argentina's expropriation of its investment, but Siemens voluntarily abandoned the award in response to post-award revelations that Siemens had procured the investment through the systematic bribery of Argentine officials. While the Siemens tribunal never had the chance to rule on the legal consequences of the bribery allegations, jurisprudential trends suggest that it would likely have used the fact of corruption to either decline jurisdiction or to otherwise refuse to recognize Siemens's substantive treaty-based rights. I nonetheless argue that the specific contours of this emerging corruption defense are uncertain, and I suggest model investment treaty text for states that wish to secure their reliable access to it.*

### INTRODUCTION: THE SIEMENS AFFAIR

In 2007, Siemens AG, a prominent German multinational electronics and engineering firm, won an impressively large arbitral award against

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Argentina.<sup>1</sup> A tribunal formed under the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) awarded the company over \$200 million for Argentina's unlawful expropriation of the company's investment in the design and construction of an information technology (IT) system commissioned by the government.<sup>2</sup> Argentina's loss in *Siemens* was one of its several recent ICSID defeats. The country has faced an onslaught of investor lawsuits since its financial crisis in the early 2000s and has suffered awards for damages totaling well over half a billion dollars.<sup>3</sup> Although Siemens's claims did not arise from the financial crisis, and while the case, unlike the other Argentine arbitrations, did not involve the sensitive issue of the scope of a "necessity" defense under international law, Argentina was still not eager to honor the award. Five months after the award was rendered, Argentina filed a petition for annulment, the sole mechanism of review available under the ICSID Convention.<sup>4</sup> While occasionally ICSID annulment committees have annulled awards, the grounds available for successful annulment are quite limited.<sup>5</sup> There was little in the *Siemens* award itself to suggest that Argentina had much, if any, chance of convincing the committee to annul the award.<sup>6</sup>

But fortuitously for Argentina, American and German anticorruption agencies had uncovered evidence that Siemens executives had created a corporate culture that had not merely tolerated, but even encouraged the bribing of public officials worldwide on a massive scale. Siemens soon found itself engulfed in a series of embarrassing bribery investigations.<sup>7</sup> For example, the prosecutorial information filed by the U.S. Department of Justice in December 2008 listed nearly \$1 billion in alleged bribes and kickbacks.<sup>8</sup> An information filed against Siemens's Argentine subsidiary detailed a conspiracy through which the company "made or caused to be made" over \$30 million in improper consulting payments in order to

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1. See *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/08, Award (Feb. 6, 2007).

2. Eric David Kasenetz, Note, *Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity and the Current Fight in the ICSID*, 41 GEO. WASH. INT'L L. REV. 709, 709–10 (2010).

3. *Id.*

4. ICSID awards are final unless annulled on the grounds provided for in Article 52(1) of the ICSID Convention.

5. See Dohyun Kim, Note, *The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from An Annulment-Based System*, 86 N.Y.U. L. REV. 242, 243 (2011) (describing the "five limited situations" in which annulment is permitted under the ICSID Convention).

6. Argentina was basing its annulment request on a long-shot claim that the tribunal had been "improperly constituted" because Argentina's challenges to the tribunal's chair had been rejected. Luke Eric Peterson, *Argentina and Siemens Ask Annulment Panel To Suspend Proceedings, So Original Arbitrators Can Look At Bribes Evidence*, INVESTMENT ARB. REP., July 28, 2008, item 6, para. 15, available at [http://www.iareporter.com/downloads/20100107\\_22](http://www.iareporter.com/downloads/20100107_22).

7. Luke Eric Peterson, *Argentina Appeals Award in Light of Siemens Scandal*, FDI INTELLIGENCE, Aug. 1, 2008, <http://tinyurl.com/7tabgd>.

8. Information, *United States v. Siemens Aktiengesellschaft*, No. 1:08-CR-367 (D.D.C. Dec. 12, 2008), available at <http://tinyurl.com/7lxr49o>.

secure Argentine government business, including the IT contract at the heart of the *Siemens* award.<sup>9</sup> Facing massive liability under American and German anticorruption laws, Siemens chose to settle, accepting fines of \$1.3 billion.<sup>10</sup>

The apparently well-supported allegations of Siemens's bribery of Argentine officials (which Siemens eventually admitted<sup>11</sup>) gave Argentina the leverage it needed to force its own settlement with the company. In a procedurally rare move, in July 2008, Argentina formally requested that ICSID commence a "revision" proceeding under ICSID Convention Article 51, which allows an award to be revised "on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered the fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence."<sup>12</sup> Argentina argued that the fact that the IT investment was procured by fraud meant that the tribunal could not uphold the contract as a matter of international *ordre public* (public policy) and that investments procured by fraud did not fall within the scope of protected investments in the Germany-Argentina BIT.<sup>13</sup> A little over one year later (and seven months after Siemens's settlement with U.S. authorities), Argentina and Siemens announced that they were discontinuing their ICSID proceedings, abandoning both the annulment and revision processes. As the price for Argentina's agreement to discontinue proceedings, Siemens agreed to walk away from its \$218 million award.<sup>14</sup>

This surprising outcome may suggest that Argentina's arguments, if the original proceedings had been reopened, may have prevailed. However, the issue of corruptly procured investments has never been expressly addressed by an investor-state tribunal in a BIT arbitration case. The outcome of Argentina's revised argument was uncertain, and Siemens's decision to settle for nothing was most likely driven not only by a narrowly rational estimation of its probability of prevailing on the legal merits, but also on broader considerations of the public relations costs of having the allegations of corruption remain in the public eye.

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9. Information, para. 32(a), *United States v. Siemens S.A. (Argentina)*, No. 1:08-CR-368 (D.D.C. Dec. 12, 2008), available at <http://tinyurl.com/89kuapm>.

10. Jack Ewing, *Siemens Settlement: Relief, But Is It Over?*, BUS. WK., Dec. 15, 2008, available at <http://tinyurl.com/cboqh95>.

11. *Siemens Admits Corruption with Former Argentine Leaders*, ECON. TIMES, Dec. 17, 2008, available at <http://tinyurl.com/cf7saww>.

12. International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 51, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

13. Peterson, *supra* note 6.

14. Luke Eric Peterson, *Siemens Waives Rights Under Arbitral Award Against Argentina, Follows Company's Belated Corruption Confessions*, INVESTMENT ARB. REP., Sept. 2, 2009, available at [http://www.iareporter.com/downloads/20100413\\_3](http://www.iareporter.com/downloads/20100413_3).

Had it been fully litigated, how would the *Siemens* tribunal have addressed Argentina's corruption argument? What issues would have arisen, and how would they have been resolved? Is there an emerging defense of corruption in investment treaty arbitration? Those are the essential questions that I address in the remainder of this short Essay. The possible emergence of a corruption defense in investment treaty arbitration is especially important given the reinvigoration of anticorruption investigations and prosecutions at the municipal level, particularly in developed countries. For example, in 2010, the U.S. Department of Justice filed over thirty enforcement actions under the U.S. Foreign Corrupt Practices Act (FCPA); in 2000, it filed none.<sup>15</sup> The United Kingdom seems poised to follow suit. It recently passed into law its own anticorruption statute, modeled on the American FCPA, but potentially more far-reaching.<sup>16</sup> Even China has recently strengthened its long-standing anticorruption law by adding a provision to its criminal code prohibiting the bribery of foreign public officials (and not just PRC functionaries).<sup>17</sup> As municipal anticorruption investigations develop high-quality evidence (or outright investor admissions) of foreign corruption,<sup>18</sup> we can expect respondent states in investment treaty arbitrations to increasingly raise those facts or admissions as a defense to liability.

In fact, we have remarkably little direct guidance as to how investment tribunals might rule on claims of corruption like Argentina's. But we do have some important indirect guidance. We can turn, in particular, to a relatively long and consistent line of private arbitral jurisprudence addressing the relevance of public corruption to private contract disputes. In the private context, corruption most typically arises where an arbitral tribunal is asked to enforce a contract between a foreign investor and a local intermediary who has been engaged to facilitate the investor's bids or applications for state business, ostensibly as a "consultant" or by offering "technical assistance."<sup>19</sup> The foundational question raised in such disputes

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15. See *FCPA and Related Enforcement Actions*, U.S. DEP'T OF JUST., <http://tinyurl.com/cfsvoj7> (last visited Nov. 15, 2011) (listing FCPA enforcement statistics).

16. See, e.g., Julius Melnitzer, *U.K. Enacts "Far-reaching" Anti-bribery Act*, LAW TIMES, Feb. 13, 2011, at 9.

17. Zhōnghuá rénmin gònghéguó xíngfǎ (中华人民共和国刑法) [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 14, 1997, effective Oct. 10, 1997), available at <http://tinyurl.com/cpgmrq8>. For a discussion of the new U.K. Bribery Act, see Zach Torres-Fowler & Kenneth Anderson, *The Bribery Act's New Approach to Corporate Hospitality*, 52 VA. J. INT'L L. DIGEST 39 (2011).

18. See Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act – 1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 115 (2010) (noting that the FCPA practice creates strong incentives for corporations to self-investigate possible instances of bribery and to report those findings to the government, in exchange for more lenient treatment).

19. See Yves Derains, Jean-Jacques Arnaldez & Dominique Hascher, *Cour Internationale D'Arbitrage de la Chambre de Commerce Internationale*, 127 J. DROIT INT'L [Clunet] 1059, 1083 (2000) (describing the "schéma classique" case of corruption as it arises in international commercial arbitration).

is whether the arbitrator should enforce the contract despite his conviction, developed either *sua sponte* or upon the urgings and proofs of one of the parties, that the underlying aim of the contract was to facilitate bribery of state officials, illegal either under the relevant municipal law or unlawful as a matter of what might be called universal “good morals” or international public policy.

THE ORIGINS OF THE CORRUPTION DEFENSE: THE LAGERGREN  
AWARD

The starting point to answering that question is Judge Lagergren’s 1963 award.<sup>20</sup> Lagergren, a distinguished Swedish lawyer and judge (and eventual president of the Iran-U.S. Claims Tribunal) was sitting as sole arbitrator in a contract dispute. The claimant, a politically well-connected Argentine, was demanding payment from a foreign investor in the Argentine power sector on a commission contract under which the claimant was allegedly guaranteed a large percentage of the value of any state contracts eventually awarded to the investor. The respondent investor admitted that the claimant had been engaged to “use . . . his admittedly considerable influence with the political appointees of the Peron regime for promoting the respondent’s interests in relation to specific matters,” but argued that that engagement had not extended to the specific state contract for which the claimant was seeking a commission.<sup>21</sup>

While neither party sought to challenge Judge Lagergren’s authority to decide the merits of the dispute on the basis of the nature of the commission contract,<sup>22</sup> Lagergren took it upon himself to “examin[e] the question of [his] jurisdiction on [his] own motion,” as the contract was, in his view, one that was “condemned by public decency and morality.”<sup>23</sup> He found that both Argentine and French law condemned obligations that were against “good morals,” and asserted that it could not “be contested that there exists a general principle of law recognised by civilised nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators.”<sup>24</sup> In his view, and on the basis of the testimony of several witnesses and the parties’ own admissions, the

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20. See J. Gillis Wetter, *Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case No. 1110*, 10 ARB. INT’L 277, 282 (1994) (reproducing the award in full).

21. *Id.* at 286.

22. *Id.* at 291 (noting that both parties insisted that Judge Lagergren could not refuse jurisdiction to decide the dispute on the merits under either Argentine law (the *lex contractus*, or “the law of the place where an agreement is made”) or French law (the *lex arbitri*, or “the law of the place where arbitration is to take place”)).

23. *Id.*

24. *Id.* at 293.

commission contract was clearly one whose central aim was the encouragement of public bribery,<sup>25</sup> and “[s]uch corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.”<sup>26</sup> Whether from the perspective of “good government or that of commercial ethics,” it was “impossible” for Judge Lagergren to “close [his] eyes . . . to the destructive effect[s]” of such corruption on “industrial progress.”<sup>27</sup> That meant that he was obligated to decline jurisdiction.<sup>28</sup> As he explained, “[p]arties who ally themselves in an enterprise” involving “gross violations of good morals and international public policy” “must realise that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.”<sup>29</sup>

Judge Lagergren’s award has elicited much commentary and criticism over the years, primarily centering on his alleged misapplication of the principle of the separability (or autonomy) of arbitration clauses.<sup>30</sup> In short, commentators suggest that he erred in appearing to dispose of the case on jurisdictional grounds, as the separability principle holds that in most cases a defect in the underlying contract should not be held to nullify an arbitration clause contained therein.<sup>31</sup> Put somewhat differently, the basic issue is whether the fact of a corrupt contract is properly addressed by a tribunal as an issue of “jurisdiction” or of “admissibility,”<sup>32</sup> with most modern commentators now appearing to accept the view that it should be addressed as the latter, not the former.<sup>33</sup>

In subsequent years, numerous awards settling private international commercial disputes have adopted Lagergren’s basic position that international arbitral tribunals should generally not involve themselves in

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25. *Id.*

26. *Id.* at 294.

27. *Id.*

28. *Id.*

29. *Id.* For an earlier and equally morally tinged condemnation of public corruption, see *Oscanyan v. Arms Co.*, 103 U.S. 261, 277–78 (1880) (reflecting Judge Lagergren’s clear moral distaste — indeed, repugnance — for the parties’ corrupt actions much earlier, where the U.S. Supreme Court refused to enforce a corrupt commission contract between a U.S. firearms manufacturer and an intermediary to the Turkish government. The Court viewed such contracts, which it characterized as “obnoxious” and “repugnan[t],” as violating “Christian morality” and “natural justice”).

30. Wetter, *supra* note 20, at 277–79.

31. *Id.* at 277–81.

32. See generally Jan Paulsson, *Jurisdiction and Admissibility*, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE, AND DISPUTE RESOLUTION: *LIBER AMICORUM* IN HONOUR OF ROBERT BRINER 601 (Gerald Aksen et al. eds., 2005).

33. For example, Gary Born notes that modern commentators and tribunals “have correctly rejected Lagergren J.’s analysis and acknowledged the competence of arbitrators to resolve claims of illegality, including bribery and corruption.” 1 GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 804 (2009). Wetter argues, however, that Lagergren’s critics misunderstand his actual approach to the case, and that the award’s “true meaning” is that corruption raises an issue of admissibility (or “arbitrability”) rather than “jurisdiction.” Wetter, *supra* note 20, at 281.

settling disputes over the performance of obligations involving contracts the object of which is public corruption. Indeed, a recent treatise on corruption and international commercial arbitration distills a number of basic lessons from this jurisprudence, including, most importantly, that the generally recognized sanction is “absolute nullity,” by which is meant that tribunals will not (or should not) recognize causes of action founded upon contracts obtained through the corruption of public officials.<sup>34</sup> The municipal law analogy is the doctrine of “unclean hands,” as, for example, recently applied by the U.S. Court of Appeals for the Ninth Circuit.<sup>35</sup>

But that case, and most reported arbitral awards, involve litigants — typically private — disputing the enforceability of contracts *for* the bribery of public officials. As an analogy, most of these disputes are the international commercial equivalent of a contract for murder, where the performance that the “buyer” seeks from the “seller” is itself an illegal, immoral, or otherwise disapproved act. However, in the investor-state context, the investor will rarely, if ever, be litigating a dispute over a contract *for* corruption with the host state whose government the investor has sought to corrupt. Rather, the issue of corruption tends to arise where an investor has a relatively formal investment relationship with the state (for example, a concession contract), where the core contractual object is facially unobjectionable, yet the state alleges that this relationship was attained through the investor’s involvement in a secondary, corrupt scheme.

#### THE CORRUPTION DEFENSE TODAY: *WORLD DUTY FREE*

Despite the frequency of public corruption and, increasingly, of investor-state arbitrations, it is surprising that this particular situation has meaningfully arisen only once in a published investor-state award, and relatively recently.<sup>36</sup> In *World Duty Free Co. Ltd. v. Republic of Kenya*,<sup>37</sup> an

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34. ABDULHAY SAYED, CORRUPTION IN INTERNATIONAL TRADE AND COMMERCIAL ARBITRATION 388 (2004).

35. *Adler v. Federal Republic of Nigeria*, 219 F.3d 869 (9th Cir. 2000) (applying the doctrine of “unclean hands” to declare a partially performed contract to bribe and defraud Nigerian government officials unenforceable, barring the plaintiff from recovering funds he had advanced to his Nigerian counterparties). The *Adler* court defines the unclean hands doctrine as “clos[ing] the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.” *Id.* at 876–77.

36. For example, while Sayed’s treatise identifies a relatively large number of international arbitrations involving allegations of public corruption, SAYED, *supra* note 34, at 483 (Index of Arbitration Cases Dealing with Corruption, listing twenty-eight arbitrations), almost all of his examples include purely private disputes. One main exception is *Hub Power Company Limited (HUBCO) v. Pakistan WADPA & the Federation of Pakistan*, 15 MEALEY’S INT’L ARB. REP. 7, sec. A.1, where the main dispute involved a private investor and WADPA, a Pakistani governmental agency. The Pakistani Supreme Court held that where there was “*prima facie*” evidence that state contracts were obtained through fraud, it would violate public policy to allow the dispute to be

ICSID case, an investor from Dubai had won the right to operate duty-free stores in Kenya's two international airports.<sup>38</sup> The ICSID tribunal's jurisdiction was based on an arbitration clause in the concession agreement. Unlike most ICSID cases, there was no applicable underlying BIT. Furthermore, the concession agreement contained a choice-of-law clause that directed the tribunal to apply domestic (Kenyan and English) law, not international law as such.<sup>39</sup>

The investor alleged that the Kenyan government had expropriated its investment by fraudulently seizing ownership of the concession company and placing it into receivership, with the state-appointed receiver "mismanag[ing]" the company and "run[ning] down" its assets.<sup>40</sup> The government's alleged motivation was to destroy evidence related to a sensational corruption scandal, the "Goldenberg Scandal," in which the Kenyan government had manufactured false documents relating to the export of gold and diamonds in a scheme to raise funds for President Daniel Arap Moi's reelection. As part of that scheme, the government had allegedly listed World Duty Free, without its knowledge, as the consignee on export documents related to the fraudulent transactions.<sup>41</sup>

Somewhat amazingly, in the course of explaining this complicated background to the tribunal, the claimant openly described at length how it had acquired the concession by making a "personal donation" to President Moi of \$2 million.<sup>42</sup> While the donation was funneled through an intermediary, the investor was present when a suitcase containing the funds was personally delivered to the President at a meeting in which the investor presented his proposal. The investor viewed the donation as the cost of doing business in Kenya, fully documenting the expense and considering it part of the consideration offered in exchange for winning the concession. Upon retrieving the suitcase after his meeting, the investor found that the money had been replaced with fresh corn, a "good sign," he

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settled according to the contract's arbitration clause. SAYED, *supra* note 34, at 72–74. Another exception is *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, a contract-based arbitration. However, in that case, the corruption allegation was raised late in litigation, and its evidentiary basis was never fully developed. The tribunal held that even if it accepted the evidence presented, the evidence was "insufficient to establish the plea" of contract invalidity, as the evidence — which was in any case "vigorously denied" — suggested that only \$200 might have changed hands. *Id.* at Appendix C, ¶¶ 52–57.

37. ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), available at <http://italaw.com/documents/WDFv.KenyaAward.pdf>.

38. *Id.*

39. *Id.* ¶¶ 106, 158.

40. *Id.* ¶ 71.

41. *Id.* ¶ 68–69. For a general description of the Goldenberg Scandal, see James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law As An Anti-Corruption Strategy in Kenya*, 14 CONN. J. INT'L L. 407, 427–35 (1999).

42. *World Duty Free* ¶ 66.

was told, that the President “likes your proposal.”<sup>43</sup> The proposal was subsequently approved.

In its counter-memorial, and in response to the claimant’s apparently unprompted acknowledgement that it had obtained the concession through the bribery of Kenya’s highest political figure, Kenya purported to “avoid” the underlying contract. Kenya went on to argue that the Tribunal should dismiss the claimant’s case because, under Kenyan and English law and as a matter of “international public policy,” the Tribunal was required to leave the parties as it found them (the *in pari delicto potior est conditio defenditis* principle, or “where the guilt is shared, the defendant’s position is the strongest”).<sup>44</sup>

The tribunal had little trouble finding, as a factual matter, that the claimant had bribed President Moi in the course of obtaining the concession.<sup>45</sup> The key question was legal: As a matter of either international or domestic law, what were the consequences of the (admitted) bribe? Citing Sayed’s treatise, various international antibribery treaties (including one signed by Kenya), domestic anticorruption laws (including Kenya’s, dating from the 1960s), domestic court judgments, and Judge Lagergren’s award (among others), the tribunal found itself “convinced that bribery is contrary to the international public policy of most, if not all, States, or to use another formula, to transnational public policy.”<sup>46</sup> The Tribunal also agreed with its reading of prior awards that the hypothetical fact (alleged by the claimant) that public corruption was culturally tolerated in Kenya, or even expected as part of its traditional “Harambee” system, was legally irrelevant to the question of whether corruption violated international public policy.<sup>47</sup> Under international public policy, investor “claims based upon contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.”<sup>48</sup>

After offering what would seem to be an independently sufficient justification for dismissing the case on grounds of *ordre public international*, the tribunal went on to offer a detailed analysis of the “applicable laws chosen by the Parties” — English and Kenyan law, between which it conveniently found no “material” difference.<sup>49</sup> The tribunal thought it

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43. *Id.* ¶ 131.

44. *Id.* ¶ 161 n.21.

45. *Id.* ¶ 136.

46. *Id.* ¶ 157.

47. *Id.* ¶ 156. The tribunal demonstrated little sympathy for the “damned if you do, damned if you don’t” aspect of modern anti-corruption law, the compliance with which may cause an investor to lose out on major investment opportunities. See Christopher F. Corr & Judd Lawler, *Damned If You Do, Damned If You Don’t? The OECD Convention And The Globalization of Anti-Bribery Measures*, 32 VAND. J. TRANS’L.L. 1249 (1999).

48. *World Duty Free* ¶ 157.

49. *Id.* ¶ 158–59.

particularly “significant that in England, historically, the common law has traditionally abhorred the corruption by bribery of officers of state,” and that English courts applied a strict rule of refusing to entertain actions based upon corruptly obtained contracts.<sup>50</sup> Thus, under either English or Kenyan law, the claimant was “not legally entitled to maintain any of its pleaded claims . . . on the ground of *ex turpi non oritur action*” (“from a dishonorable cause an action does not arise”), as all of the pleaded claims “sound[ed] or depend[ed] upon” the tainted concession agreement.<sup>51</sup> Of some theoretical importance — and implicitly responding to the debate that has circulated around Judge Lagergren’s award — the tribunal noted that it was not treating the fact of corruption as a jurisdictional issue. Asserting the “well-established legal principle[]” of separability, it noted that it was “operat[ing] on the assumption that the . . . arbitration agreement remains . . . valid and effective,” allowing the tribunal to issue a binding award on the issues decided. In contrast, and as Paulsson has argued, treating an allegation of corruption as jurisdictional rather than as an issue of “admissibility” going to the substance of the dispute raises the possibility that the claimant could freely relitigate the underlying claim in other fora.<sup>52</sup>

*World Duty Free* is interesting for a number of reasons, though as a contract-based case its lessons for the more typical investment-treaty based dispute are perhaps less certain than might appear at first glance. The award is interesting, first, because it affirms the (probably unsurprising) willingness of international investment arbitrators to affirm Judge Lagergren’s much earlier and much less well-supported assertion that there is something about public corruption in international commerce that is widely viewed as especially odious. In Lagergren’s time, the concept of “international public policy” was much less theoretically developed than it is today. But more importantly, the legal sources that one might cite in support of finding such a policy were few and far between. In contrast, as the *World Duty Free* tribunal persuasively notes, today we may find a plethora of international conventions and municipal laws forthrightly condemning public corruption as a scourge upon society.<sup>53</sup> *World Duty Free*’s most important contribution was not that it recognizes this widespread condemnation; it was, rather, to apply the consequences of condemnation to a deal between a sovereign and an investor whose core contractual object — the operation of a duty-free concession — is hardly

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50. *Id.* ¶ 173.

51. *Id.* ¶ 179.

52. Paulsson, *supra* note 32, at 604.

53. For a law review summary of those developments, see Alejandro Posadas, *Combating Corruption under International Law*, 10 DUKE J. INT’L & COMP. L. 345 (2000). An updated discussion can be found in Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 VA. J. INT’L L. 413, 425–27 (2007).

objectionable itself. In other words, the international public policy against enforcing contracts *for* public corruption also works to preclude the enforcement of public contracts *obtained* through contracts for public corruption.<sup>54</sup>

The second reason that *World Duty Free* is of both scholarly and practical interest is the willingness of the tribunal to overlook the host state's own substantial involvement in the corrupt scheme. The tribunal was not faced with a contract won through the investor's bribing of a corrupt subaltern Kenyan official. Rather, the bribe directly involved the sitting head of state, acting in the official capacity of awarding a public concession. Under traditional international law concepts governing the attribution of international responsibility, there is little doubt that President Moi's actions — if a violation of public international law — would be attributed to the Kenyan state, even if his actions violated Kenyan law or were otherwise outside the scope of his presidential duties.<sup>55</sup> And indeed, in *World Duty Free*, the investor made a last-ditch attempt to argue that it was inequitable to allow Kenya to benefit from its own corrupt actions.<sup>56</sup> That argument paralleled Judge Lagergren's own suggestion that

before invoking good morals and public policy as barring parties from recourse to judicial or arbitral instances in settling disputes care must be taken to see that one party is not thereby enabled to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other.<sup>57</sup>

But in *World Duty Free*, one party that benefitted from the underlying corrupt action — President Moi, who received, and kept, a suitcase full of money — was not a “party” to the lawsuit. Indeed, the tribunal held that

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54. In the tribunal's view, the bribery agreement and the concession agreement were in fact not severable; they were parts of “one overall transaction and not two unrelated bargains.” *World Duty Free* ¶ 174. That said, the main aim of the overall transaction was clearly the (otherwise unobjectionable) awarding and operation of a concession agreement.

55. The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts [hereinafter ILC Draft Articles] was not applicable to the corruption issue. However, they do illustrate the modern tendency under international law to aggressively attribute official acts by the executive to the state itself, even where the executive's actions were ultra vires or illegal under domestic law. ILC art. 3 (2001) (establishing attributability to the state as an element of internationally wrongful act); art. 4 (establishing that the conduct of any “State organ,” including the “executive,” shall be attributed to the state); art. 7 (establishing that the “conduct of an organ of a State or of a person . . . empowered to exercise elements of the governmental authority shall be considered an act of the State . . . even if it exceeds its authority or contravenes instructions”). The official commentary to Article 7 says that its rule is now “firmly established . . . by international jurisprudence, State practice and the writings of jurists.” The ILC Draft Articles was not relevant in *World Duty Free* because the investor was not claiming to have suffered an international wrong by virtue of the state's involvement in a corrupt scheme. Even if he were making such a claim, it is not clear that an investor who has corruptly won a concession agreement could plausibly claim to have been “harmed” by the corruption, rather than to have benefited from it.

56. *World Duty Free* ¶¶ 176–77.

57. Wetter, *supra* note 20, at 294.

because the payment to President Moi was “covert,” “its receipt is not legally to be imputed to Kenya itself.”<sup>58</sup>

Even if it were imputable, English law followed a “strict” rule under which the tribunal had no authority or discretion to engage in a “balancing operation reflecting the relative misconduct of the [c]laimant and the Kenyan President so as to relieve the [c]laimant from the one-sided burden of public policy in this case.”<sup>59</sup>

And, finally, even if the tribunal were permitted to exercise its discretion to balance, it would not do so in this case, which did not “remotely fall within the class of cases” where the balance of the equities would support a measure of compassion for the claimant’s plight of having partially performed to his detriment a corrupt contract.<sup>60</sup> That was because the claimant was neither an “innocent party . . . unwittingly caught up in an incidental or peripheral illegality” nor someone who had been coerced or otherwise forced into paying a bribe.<sup>61</sup> Before paying the bribe, the claimant “retained a free choice whether or not to invest in Kenya and whether or not to conclude the Agreement.”<sup>62</sup> The claimant freely chose to pay the bribe and therefore should not benefit from a discretionary balancing of the equities.<sup>63</sup>

#### WORLD DUTY FREE APPLIED TO SIEMENS

How might the lessons of *World Duty Free* have been translated by the *Siemens* tribunal if the company had not been so willing to abandon its millions? What doctrinal roadblocks might have lain in Argentina’s path? How might Argentina have imported a “policy” against public corruption into the investment treaty framework, when most BITs, including the Germany-Argentina BIT, make no reference to corruption?

There are essentially three ways in which the fact of Siemens’s involvement in corruption might have legally relevant consequences.

First, and as Argentina apparently claimed, corruption may be relevant to BIT tribunals by virtue of the very same international public policy identified by Judge Lagergren and the *World Duty Free* tribunal. In that view, the public policy — and the consequences that flow from it — exists independently of investment treaties, perhaps as a sort of free-floating, transnational “common law” rule that applies to international investment tribunals by virtue of the fact that they are either “international” in

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58. *World Duty Free* ¶ 169; see also *id.* ¶ 178 (noting that the tribunal “does not identify the Kenyan President with Kenya”).

59. *Id.* ¶¶ 176–77.

60. *Id.* ¶ 178.

61. *Id.*

62. *Id.*

63. *Id.*

composition or function or because they are charged specifically with applying “international law” as such. ICSID tribunals *are* in fact charged, at least in some cases, with applying international law existing outside of the international legal rules expressly embodied in BITs. Article 42(1) of the ICSID Convention requires ICSID tribunals to apply “such rules of law as may be agreed by the parties,” but “[i]n the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) *and such rules of international law as may be applicable.*”<sup>64</sup> An ICSID tribunal that recognizes a freestanding “rule of international law” that condemns corruption and that is “applicable” would, then, be able to apply that “rule” to a BIT-based dispute. Of course, neither Judge Lagergren nor the *World Duty Free* tribunal enjoyed an express charge to apply international law. Judge Lagergren’s dispute was not an ICSID dispute — so Article 42 did not apply — and *World Duty Free* was governed by the parties’ contractual choice of domestic law. The willingness of both Judge Lagergren and the *World Duty Free* tribunal to nonetheless invoke an international legal rule condemning corruption suggests that Article 42(1)’s last clause (“in the absence of such agreement”) is hardly necessary for a tribunal to adequately justify its application of international anticorruption principles. In other words, international arbitral tribunals may have the *inherent* authority to apply relevant international legal rules, regardless of whether the parties have ever expressly authorized them to do so.

Second, the relevant domestic law (either selected by the parties or applicable in the absence of party choice) may steer the tribunal toward anticorruption principles. We see this, for example, in *World Duty Free*, which relied extensively on English law rules of *in pari delicto* to justify its decision to dismiss the claim.<sup>65</sup>

Third, an ICSID tribunal in a BIT dispute might look to the BIT’s language to locate an express or implicit anticorruption rule. The BIT at issue in *Siemens* contained no express mention of corruption (or of its legal consequences), but Argentina might have attempted to claim that the treaty implicitly incorporated anticorruption principles.

In the following subsection I discuss the possible application of international public policy, focusing on recent investment treaty jurisprudence that enunciates an investor’s duty to act in good faith and to avoid serious misconduct. In the second subsection I discuss the Germany-Argentina BIT’s “in accordance” provision, which establishes a

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64. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 42, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 160 (emphasis added).

65. A party-selected domestic law may itself incorporate international legal rules, such that a domestic choice of law clause has the effect of also leading to the application of international rules.

link to Argentina's domestic anticorruption law, as a possible source of legal consequences for Siemens' bribery.

#### THE DUTY TO ACT IN GOOD FAITH

There is little doubt that Argentina would have stood an excellent chance of convincing its tribunal to follow *World Duty Free* in affirming the existence of an international legal rule (or public policy) condemning public corruption. A somewhat more difficult question is whether the *Siemens* tribunal would have been comfortable extending that rule's scope of application even further from its original domain of sanctioning contracts for corruption. In other words, where a tribunal is asked to resolve a contract dispute whose very object concerns corruption, it is relatively natural for the tribunal to view the corruption as directly relevant to its ultimate decision. The core of the tribunal's mandate is tainted, so to speak. But in the *Siemens* case, the tribunal's mandate arises most directly from the BIT, which is, of course, hardly itself tainted by corruption. The investor is seeking to vindicate rights that it enjoys under a valid international treaty; it is not trying to enforce an otherwise legitimate contract that was procured by corruption (as in *World Duty Free*), and it is certainly not trying to enforce a contract *for* corruption, *itself* illegitimate, as in Judge Lagergren's case. As the link between the corrupt act and the source of the substantive legal rights at issue becomes more distant, it becomes less morally or logically obvious that the misdeed of corruption in one context should significantly impact the parties' chances of success on the merits in another context.

Domestic law is unlikely to provide much in the way of an answer here, although, as discussed below, the text of a particular BIT might. But even in the absence of expressly corruption-relevant BIT language, there is some indication that an ICSID tribunal might be willing to at least consider extending an international public policy against arbitral involvement in enforcing contracts for corruption to an international public policy against arbitral involvement in enforcing treaty rights that arise from an investment procured through corruption. The main support for this assertion is a short series of recent investment treaty awards dealing with what Andrew Newcombe calls "investor misconduct" and of which investor involvement in public corruption might be considered a subcategory.<sup>66</sup> These cases typically include allegations that the investor defrauded the host state in the process of winning a public concession. A

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66. Andrew Newcombe, *Investor Misconduct: Jurisdiction, Admissibility or Merits?*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 187 (Chester Brown & Kate Miles eds., 2011).

leading example is the case of *Inceysa Vallisoletana S.L. v. Republic of El Salvador*.<sup>67</sup>

In *Inceysa*, an ICSID case brought under the Spain-El Salvador BIT, the respondent state asserted and proved to the tribunal's satisfaction that the investor had committed fraud in the bidding process for a state contract to construct vehicle-testing stations through numerous false representations in the bid documents. In holding that the investor was precluded from benefitting from the BIT's protections, the tribunal cited (without much in the way of support) a general principle of "good faith" that foreign investors are expected to respect when making investments.<sup>68</sup> It provided a list of allegedly applicable Latin maxims that were "based on justice," including the maxim of *ex dolo malo non oritur actio* ("an action does not arise from fraud").<sup>69</sup> The tribunal also identified — again without much support — an international public policy that excludes fraudulently obtained investments from international legal protections.<sup>70</sup> Treating the fraud as going to its jurisdiction over the dispute, the tribunal dismissed the claim on jurisdictional grounds, taking the somewhat unusual step of awarding costs in the state respondent's favor.<sup>71</sup>

*Inceysa* is notable because of the tribunal's willingness to articulate an expanded concept of "international public policy," allowing or even requiring the tribunal to punish investors for misconduct. While the tribunal was also able to locate its mandate to dismiss the case in the BIT's language — particularly its Article 3 ("Protection"), which requires each Contracting Party to protect in its territory the investments made, *in accordance with its legislation* — that conventional hook is hardly necessary to support the award's outcome.<sup>72</sup> The free-floating principle of "good faith" that the tribunal also identifies would, it seems from the award, be more than enough to justify a dismissal of the investor's case.<sup>73</sup>

The award in *Plama Consortium Ltd. v. Republic of Bulgaria* confirms this possibility.<sup>74</sup> The dispute arose under the Energy Charter Treaty (ECT), which does not contain an equivalent provision to the *Inceysa* BIT's Article 3. *Plama*, the foreign investor, had purchased a formerly state-owned

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67. ICSID Case No. ARB/03/26, Award (Aug. 2, 2006), available at <http://tinyurl.com/d3ojfge>.

68. *Id.* ¶¶ 230–44.

69. *Id.* ¶¶ 241, 240(a).

70. *Id.* ¶ 252.

71. *Id.* ¶ 338–39.

72. *Id.* ¶¶ 230–44.

73. *Azinian v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (Nov. 1, 1999), a NAFTA Chapter 11 case, hints at *Inceysa's* good faith principle. In that earlier case, the U.S. investor won a waste-disposal concession on the basis of extravagantly false claims about its industry experience and financial and technological resources. *Id.* ¶ 29. The tribunal characterized the investor's behavior as "unconscionable," but its lies and exaggerations were legally irrelevant to the tribunal's decision in Mexico's favor, which rested entirely on denial of justice principles. *Id.* ¶ 110.

74. ICSID Case No. ARB/03/24, Award (Aug. 27, 2008), available at <http://italaw.com/documents/PlamaBulgariaAward.pdf>.

refinery. In the course of gaining approval from the Bulgarian Privatization Agency to make the purchase, the investor falsely claimed to be making his bid in consortium with two large commercial entities.<sup>75</sup> The investor was able to bring the refinery online for only a short period of time, and the investment was eventually liquidated in bankruptcy proceedings.<sup>76</sup> The investor charged various Bulgarian government agencies and authorities with violating the ECT by creating “numerous, grave problems” that ruined its investment.<sup>77</sup> Bulgaria raised the investor’s misrepresentations at the jurisdictional stage, but the tribunal held that “allegations on [sic] misrepresentation did not deprive it of jurisdiction . . . and, in light of the serious charges raised . . . decided to examine these allegations during the merits stage.”<sup>78</sup>

The tribunal found that the investment had been obtained “by deceitful conduct . . . in violation of Bulgarian law.”<sup>79</sup> Granting ECT protections to such an investment “would be contrary to the basic notion of international public policy — that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal.”<sup>80</sup> It would also be “contrary to the principle of *nemo auditur propriam turpitudinem allegans*”<sup>81</sup> (“no one can be heard to invoke his own turpitude” or “no one shall be heard who invokes his own guilt”). Further, the tribunal viewed the claimant’s conduct as violating the principle of “good faith” found in Bulgarian and international law (citing *Inceysa*).<sup>82</sup> That obligation “encompasses, *inter alia*, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment.”<sup>83</sup> Where the investor has violated that obligation, the substantive protections of the ECT cannot apply.<sup>84</sup> The tribunal did not discuss how grave or serious those violations must be; it accepted (or assumed) that the violation here was sufficiently serious to merit full denial of ECT protections, even though it also held that the investor’s claims would fail on the merits anyway. In that sense, *Plama* was a less difficult case than it might have been. The tribunal did not find itself in the tricky position of having to consider balancing state mistreatment of the investor against the investor’s violation of fundamental good-faith-like principles.

Awards like those in *Inceysa* and *Plama* thus illustrate the willingness of tribunals to locate within international public policy rules that allow them

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75. *Id.* ¶ 100.

76. *Id.* ¶ 66–72.

77. *Id.* ¶ 72.

78. *Id.* ¶ 96–97.

79. *Id.* ¶ 143.

80. *Id.*

81. *Id.*

82. *Id.* ¶ 144.

83. *Id.*

84. *Id.* ¶ 325.

to sanction investors for undesirable conduct related to their acquisition of their BIT-protected investments. Those awards are clearly expansionary. To see how, simply note that the *Plama* tribunal's articulation of a rule against enforcing contracts obtained by wrongful means is actually not, by its own terms, relevant to the *Plama* investor's claim, which was the enforcement of its treaty-based rights, which exist independently of its contract rights. That point aside, it is quite likely that the *Siemens* tribunal, had it been given the chance, would have similarly located and applied an international public policy to sanction Siemens for its corrupt conduct, especially given the much richer precedent establishing corruption, as opposed to fraud, as an international evil.

#### TREATY-BASED "IN ACCORDANCE" PROVISIONS

Even if the *Siemens* tribunal were not willing to identify and apply a stand-alone international public policy against corruption in Argentina's favor, drawing perhaps on good-faith jurisprudence for guidance, the Germany-Argentina BIT, like the BIT in *Inceysa*, contained a provision that might be read to implicitly incorporate an anticorruption rule. Article 1(1) of the Germany-Argentina BIT, in the course of defining the things ("investments") covered by the treaty, says that "[t]he concept of 'investment' refers to all types of assets *defined in accord with the laws and regulations of the Contracting Party*" in which the investment is made.<sup>85</sup> A number of recent awards have addressed the meaning and application of similar "legality" requirements. Among the more important discussions is *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*.<sup>86</sup>

In *Fraport*, the Germany-Philippines BIT defined covered investments as "any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State."<sup>87</sup> The tribunal interpreted this provision as establishing a jurisdictional limitation *ratione materiae* (subject-matter jurisdiction) that required it to examine whether Fraport's investment in an airport construction project was made in accordance with Philippine laws.<sup>88</sup> The majority found that Fraport had "consciously, intentionally and covertly structur[ed] its investment in a way which it knew to be a violation" of the Philippine Anti-Dummy Law, which aimed

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85. Treaty on the Mutual Protection and Promotion of Investments between the Federal Republic of Germany and the Argentine Republic, Arg.-F.R.G., Jul. 9, 1991, *available at* <http://tinyurl.com/cwvn3gz> (emphasis added).

86. ICSID Case No. ARB/03/25, Award (Aug. 16, 2007), *available at* <http://italaw.com/documents/FraportAward.pdf>; *see also* Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/05, ¶ 100, Award (Apr. 15, 2009) (investments must be "bona fide" to enjoy treaty protections).

87. *Fraport* ¶ 281 (emphasis omitted).

88. *Id.* ¶¶ 339, 404.

to prevent foreigners from exercising control over certain kinds of investments.<sup>89</sup> The violation was “egregious,” and as such, the tribunal had no jurisdiction over the dispute.<sup>90</sup>

The *Fraport* award is primarily of interest because of its elaboration of the requirement that investments be made in accordance with the host state’s laws. While the majority was able to locate that requirement in express treaty language, it also (interestingly) suggested that such an obligation exists independently as a matter of international public policy, which imposes upon investors obligations that are “reciprocal” to the BIT-based obligations on governments to “conduct their relations with foreign investors in a transparent fashion.”<sup>91</sup> That “reciprocal obligation,” rooted in “policy,” may also be thought of as an obligation that the investor show “[r]espect for the integrity of the law of the host state.”<sup>92</sup>

For our purposes, the main point is simply that Argentina would have had a plausible and perhaps strong argument that Siemens’s investment in the IT project was made in violation of Argentine anticorruption laws, and as such, under Article 3 of the Germany-Argentina BIT, the investment was not made “in accordance with its legislation” and did not deserve treaty protection.

While this might have proven to be a winning argument, it should be clear that relying on “in accordance” provisions in BITs to provide tribunals with authority to take account of corruption poses a number of interpretative and applicative uncertainties. For one, such provisions typically do not mention *which* laws and regulations must be complied with for an investment to enjoy BIT protections. As the dissenting arbitrator in *Fraport* suggested, interpreting “in accordance” provisions such that a lack of investor compliance with *any* law, no matter how trivial the law or the violation, would risk creating an “Achilles Heel of investment arbitration” by making “jurisdiction depend[] on the [c]laimant passing a full legal compliance audit.”<sup>93</sup> Thus, even if we accept that a violation of an anticorruption law might typically be serious, it is certainly also possible that an investor might violate anticorruption laws in a relatively minor way, by, for example, making an illegal “grease payment” to speed up the otherwise routine granting of a permit, or by providing a government employee with a small token of appreciation upon the closing of contract negotiations.

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89. *Id.* ¶ 323; *see also id.* ¶ 401.

90. *Id.* ¶¶ 397, 401. The majority also suggests that *Fraport*’s misconduct had extended to the arbitral proceedings, with the company allegedly concealing documents relating to the illegal scheme from the tribunal. *Id.* ¶ 400.

91. *Id.* ¶ 402.

92. *Id.*

93. *Id.* § 37 (Cremades, dissenting).

A second difficulty lies in determining the legal consequences of an “in accordance” violation. While the *Fraport* tribunal was comfortable with denying the investor any recovery at all (as was the tribunal in *World Duty Free*), “in accordance” provisions themselves typically contain no mention of consequences. In fact, we can imagine that the consequences of an “in accordance” violation might depend on the severity of the legal violation (or the gravity of the investor’s misconduct), just as it might also depend on the state’s own complicity or responsibility. The debate over whether “in accordance” violations should be treated as going to jurisdiction or admissibility is, in a sense, a proxy for a debate over consequences. If “in accordance” violations are treated as going to admissibility — and thus, as having substantive consequences — tribunals will be much more likely to consider weighing the investor’s misconduct against the state’s.<sup>94</sup>

A third difficulty is determining whether “in accordance” provisions (or related “international public policies”) establish a continuous duty upon the investor to ensure the legality of his actions. The majority in *Fraport* rejected in dicta this possibility, emphasizing instead that the relevant BIT language was aimed only at the “initiation” of investments.<sup>95</sup> It also suggested that, as a policy matter, “the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment,” such that the only jurisdictionally relevant question was whether the investment was in compliance with national laws at the time that it was made.<sup>96</sup> Post-establishment noncompliance with national laws “might be a defense to claimed *substantive* violations of the BIT, but could not deprive a tribunal of its jurisdiction.”<sup>97</sup>

A final difficulty entails the identification of potential mitigating factors that might help to excuse an investor’s violation of the host state’s laws. The *Fraport* tribunal suggests several potential factors: a good-faith mistake by the investor, for example, where the host state law was “unclear” at the time, or where the investor relies on mistaken legal advice, or where the illegality “was not central to the profitability of the investment, such that the investor might have made the investment in ways that accorded with local law without any loss of projected profitability.”<sup>98</sup> The majority also

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94. Indeed, dissenting arbitrator Cremades suggests that illegality be dealt with at the merits stage as a question of “excuse” or limitation of state liability, “depending on the circumstances.” *Id.* § 14 (Cremades, dissenting). Under this approach, where illegality is considered a merits issue, the tribunal would have the opportunity to balance the investor’s misbehavior against the state’s. According to Cremades, treating investor illegality instead as jurisdictional, while treating state illegality as merits-based, places host states in a “powerful position” because the tribunal “must first examine the speck in the eye of the investor and defer, and maybe never address, a beam in the eye of the Host State.” *Id.* § 37.

95. *Id.* ¶ 345.

96. *Id.*

97. *Id.* (emphasis in original).

98. *Id.* ¶ 396.

recognized “estoppel” as defense, such as where the host state “knowingly overlooked” the illegality and “endorsed an investment which was not in compliance with its laws.”<sup>99</sup> It is interesting to compare this hypothetically successful estoppel defense with the tribunal’s award in *World Duty Free*, which, as noted above, was quite unwilling to impute to the state-respondent knowledge of or responsibility for the corruption of its own president.<sup>100</sup>

#### CONCLUSION: INCORPORATING THE CORRUPTION DEFENSE INTO INVESTMENT TREATIES

In summary, Argentina had both plausible and perhaps strong arguments that Siemens’s admitted involvement in public corruption violated both international public policy and Argentine law, and that the violation should have had legal consequences for Siemens’s BIT claim. Investor corruption has indeed emerged as a potentially viable state defense in investment-treaty arbitration. Or, to look at things a bit differently, it seems reasonably clear that ICSID tribunals are willing to creatively impose obligations on investors — for example, to avoid corruption when making investments, or to act in good faith toward the state — that go some small way toward correcting the famous asymmetry of investment treaties, which are, traditionally, virtually entirely concerned with granting rights to investors while imposing obligations on states, and not vice versa.

At the same time, states interested in securing their right to a corruption defense of reasonably certain content would do well to consider adapting the texts of their investment treaties rather than to continue to rely on the vagaries of international public policy or cryptic “in accordance” provisions. While there are obviously any number of drafting approaches that might be taken, I provide here one possible model. Imagine a provision (we can call it “Article X”) that reads as such:

##### Article X: Investments Must Be Made and Operated in Good Faith

(1) In order to enjoy the protections granted by this treaty, an otherwise covered investment must be made and operated in accord with the international principle of good faith, without fraud

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99. *Id.* ¶ 346.

100. *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 138–157 (Oct. 4, 2006), available at <http://italaw.com/documents/WDFv.KenyaAward.pdf>. Perhaps one way of reconciling these different sensitivities to the state’s involvement in knowingly permitting (or even encouraging) illegal investments is to recognize that in *World Duty Free*, Kenya had recently experienced a surprisingly peaceful presidential transition after twenty-four years of Moi’s rule. The tribunal may have felt the need to grant Kenya, as respondent, something of a “blank slate” as to actions of Moi’s notoriously corrupt regime.

or deceit, and in accord with the material laws and regulations of the State party in whose territory the investment is made. In addition, any investment procured or operated, in whole or in part, through the corruption of public officials shall not be covered by the provisions of this treaty.

(2) Any question of whether an investment is precluded under this Article from enjoying the protections of this treaty shall be treated as a preliminary issue; where a tribunal finds that an investment is not entitled to enjoy the protections of this treaty under this Article, the tribunal shall decline jurisdiction over the merits of the dispute. Where a tribunal has so declined jurisdiction, the investor shall be precluded from raising substantially similar claims before any other international tribunal.

I make no claim that this model clause is necessarily the best that could be drafted. This version is, for example, strongly pro-state, and the “best” clause might err on the side of imposing somewhat less strict obligations on investors. It might also be objected that tribunals are doing a perfectly acceptable job using the tools they have available to them already. Without arguing those points, I will briefly point out a few features of my proposal.

First, note that this clause resolves the issue of whether the relevant investor obligations are continuous, or whether they exist only at the time an investment is made, by choosing the former. While the *Fraport* tribunal may be correct in its argument that the best interpretation of the specific treaty language in front of *it* was that the duty of illegality went only to the decision to invest, and was not continuous,<sup>101</sup> there is no particular reason to believe that states would not prefer — if they had thought about it — to hold investors to a continuous duty to behave in internationally acceptable ways.

Note also that I have addressed not just issues of corruption, but also the more general issue of the investor’s obligation to act in good faith. This joint treatment is appropriate given the overlapping issues and approaches that tend to arise in cases of corruption, fraud, and other examples of bad faith behavior. While good faith is obviously a legal term of uncertain content, my use of it implicitly directs tribunals to a relatively well-developed literature and jurisprudence describing “good faith” as part of a transnational *lex mercatoria* (“merchant law”).<sup>102</sup> By referring explicitly

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101. *Fraport* ¶ 344–45.

102. See, e.g., Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT’L L. 79, 127–28 (2000) (“International arbitral tribunals are very willing to apply the good faith requirements of national laws and to find that a contracting party has not acted in good faith. Moreover, international arbitrators frequently state that parties to international contracts must act in good faith regardless of whether national law imposes such a requirement. Indeed, a number of commentators have identified a duty of good faith as one of

to a duty of good faith, I grant tribunals some discretion in the Model Article's application, and I tie that application to predominant international commercial norms.

My use of the qualifier "material" is an attempt to respond to the dissenting arbitrator's concerns in *Fraport*. Recall that the dissenter was concerned that under the majority's approach in that case, states might be able to use minor violations of important laws, or violations of minor laws, to fully and improperly escape their BIT obligations.<sup>103</sup>

And finally, note that I have resolved the debate over whether to treat investor misconduct as a jurisdictional or substantive legal consequence in favor of the jurisdictional approach. My solution goes against Paulsson's preferred approach<sup>104</sup> and at least some arbitral jurisprudence. But if treating corruption as a substantively important fact of admissibility offers the benefit of allowing the tribunal to decisively resolve the dispute — by, for example, declaring the entire relationship legally "null" in a binding, enforceable award<sup>105</sup> — it also poses certain disadvantages for state-respondents. Most importantly, if a tribunal is allowed to treat investor misconduct at the merits stage, it will be significantly more likely to engage in an equitable balancing exercise that will put the state at risk of having its own blameworthiness used to offset or moderate the legal consequences of the investor's misbehavior.

While some readers may view such a balancing exercise as inherently positive, the traditional approach, "strict" (as the *World Duty Free* tribunal characterized English law<sup>106</sup>), or even "paradoxical" (as claimed by Sayed<sup>107</sup>), is to leave the parties where the tribunal finds them. The fact that such a policy will, in the BIT context, consistently favor states rather than investors is itself an artifact of the pro-investor asymmetry of investment treaties, which permit investors to sue states, but not vice versa. I thus define the legal consequence of investor misbehavior as one of "jurisdiction" to be treated as a "preliminary issue," but I also attempt to address Paulsson's concern with arbitral finality by precluding the

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the general principles of international trade law developed in international arbitration proceedings.").

103. *Fraport* § 36 (Cremades, dissenting).

104. Paulsson, *supra* note 32, at 616–17.

105. Cf. S.J., *Sentence rendue dans l'affaire 3916 en 1982*, 1984 J. DROIT INT'L 930, 934 (1984) (noting that it is satisfying that the arbitrators accept their jurisdiction in such [bribery] cases in order to avoid the risk of "leaving the parties unable to obtain a judgment" due to an arbitral declination of jurisdiction, and noting further that "one can consider whether international arbitrators are better placed than national judges to recognize the practices and norms of international business and are, in consequence, in a position to contribute to the creation of a true international public order") (author's translation).

106. *World Duty Free* ¶¶ 176–78.

107. SAYED, *supra* note 34, at 367. For Sayed, the "paradox" of the traditional absolute-nullity solution to contracts for corruption lies in the fact that it tends to punish only one of the parties, or to punish the parties differentially, even when both are equally culpable as to the violation of public policy.

investor from responding to a declination of jurisdiction by refileing a substantially similar lawsuit before other fora that might be listed in the BIT's dispute settlement article.

In short, investor corruption seems to be an emerging state defense in investment treaty arbitration. But it is also a defense whose contours and consequences could and should be better specified. States wishing to ensure access to a robust and reliable corruption defense should incorporate it expressly into their investment treaties. Model Article X provides one possibility, albeit from a state-centric perspective. In the absence of a conventional solution to the defense's current uncertainties, we can expect investment treaty tribunals to continue to recognize investor corruption as legally sanctionable, even if they diverge on the question of what, precisely, those sanctions should be, or how or when they should be applied.