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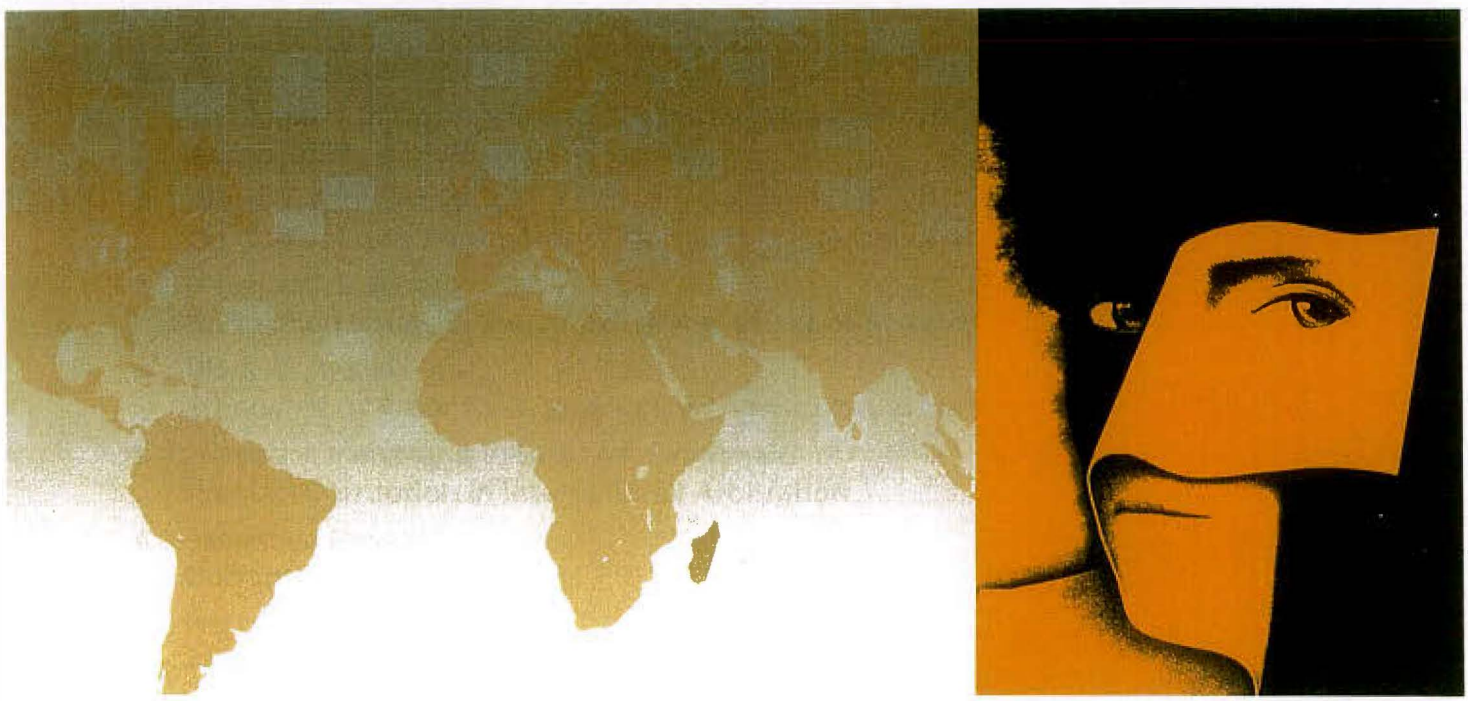
Addressing Issues of Corruption In Commercial and Investment Arbitration



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Chapter 1

The Impact of Corruption on "Gateway Issues" of Arbitrability, Jurisdiction, Admissibility and Procedural Issues

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1. Analyzing the 'impact of corruption on gateway issues of arbitrability, jurisdiction, admissibility and procedural issues' presents one challenge, that of the profusion of concepts whose contours are not well defined.

2. First, there is no universal definition of corruption. As used here, 'corruption' refers to the deliberate abuse of authority or trust to benefit a private interest. It commonly includes methods such as 'bribery' (i.e. giving or offering something to someone as a reward for doing something), 'embezzlement' (i.e. improperly taking control of assets to which one has access) and 'fraud' (i.e. false representations by statements or conduct to gain a material advantage). Corruption may be at issue in situations involving fictitious contracts, services that are not rendered for commercial reasons, hidden interest representation, or commissions paid to companies as means of corrupting officials.[1]

3. The difficulty is even greater if, in light of the recent evolution of investment arbitration, one factors in the hotly debated question of the legality of an investment. An analysis that distinguishes between international commercial arbitration and investment arbitration may therefore be necessary to address the broader question of legality in international arbitration.

4. Second, how to respond to the question — namely, how arbitration law sanctions corruption — with various interrelated concepts, the definition of each is itself a challenge?[2] Is the response to be found in the concept of 'arbitrability', 'jurisdiction', or 'admissibility'? Does the concept of 'gateway issue', which appears to be increasingly popular,[3] even assist?

5. There are at least four difficulties with the notion of 'gateway'. First, it means different things to different people, ranging from any issue that a reluctant respondent might invoke to try to stop an arbitration from proceeding to only those issues affecting party consent that a seized national court will decide at the outset.[4] Second, it may result in standardization, namely consideration of the matter that is always the same in every case, in the same order, and on the same basis. However, a lot will depend on the instrument on the basis of which a claim is brought and on the factual matrix of each case. Third, the 'gateway' debate is beset by a managerial

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mindset in an attempt to reconcile efficacy and legitimacy. It creates a contest between national courts and arbitrators, often by presuming that central matters are for the courts to decide. Yet parties chose arbitration precisely because it is not litigation. Finally, there is no dearth of concepts on offer. If anything, it is their eclectic and at times inconsistent application that can give rise to difficulties in practice. By way of example, Judge Lagergren's famed 1963 ICC award has been said to be based on 'arbitrability' or 'admissibility',[5] while Judge Lagergren himself phrased his conclusion in terms of a lack of 'jurisdiction'.[6] One may add notions such as 'consent', 'severability', 'public policy', '(un)clean hands', 'estoppel' and a treasure trove of Latin aphorisms, and the confusion seems complete.

6. Rather than inventing new ones, it thus seems preferable to retain established concepts of international arbitration, including those that are commonly encompassed by the term 'preliminary objections', whose essence is that, if upheld, they bring proceedings to an end, irrespective of a claimant's ability to prove its case on the merits.

7. Thus simplified, the issue appears as one of threshold: when should corruption be disposed of at the preliminary stage, as opposed to the claim involving corruption being dismissed on its merits? In offering a few considerations in response, the present contribution will therefore focus on the instances where corruption can be sanctioned without the claim ever reaching the merits stage, and will not address the manner in which corruption has been dealt with by arbitral tribunals at the merits stage; nor will it address related issues such as a respondent's acquiescence to corrupt conduct,[7] the doctrine of 'unclean hands' as a merits question,[8] or standard and proof of corruption, which are covered in the next contributions.

I "ARBITRABILITY" OF THE DISPUTE V DISMISSAL AT THE PRELIMINARY STAGE: THE DESIRABILITY OF DECIDING CORRUPTION

8. Can corruption issues be decided by arbitrators? The question, which may have been raised a few decades ago based on the notion of arbitrability, is no longer at issue: it is well understood that arbitrators have the power to decide issues of corruption (A). In reality, the question is not so much posed in terms of the power of the arbitrators, but in terms of the available procedural headings under which arbitrators may dismiss a claim tainted by corruption at the preliminary stage (B).

A A Non-Issue: The Arbitrability of Evidence or Allegations of Corruption

9. When, more than half a century ago, the Swedish judge and jurist Gunnar Lagergren was called to consider a dispute involving bribery and fraudulent inducement of Argentine officials, he famously held that the dispute was incapable of settlement by arbitration. In reaching that decision, he took a principled stance concerning the harm caused by corruption:

> Whether one is taking the point of view of good government or that of commercial ethics it is impossible to close one's eyes... to the destructive effect.. on the business pattern with consequent impairment of industrial

tribunals decide to deal with admissibility objections at the same time as the merits, which can have time and cost implications.[22] The burden and standard of proof can also vary, including because a claimant has to prove consent to arbitration invoked against a respondent with sufficient certainty.[23] Finally, the possibility of reviewing the award will vary depending on whether or not the tribunal decided based on jurisdiction, which will be open to review, or admissibility, which will not be open to review.

21. As will now be seen, the distinction between jurisdiction and admissibility may have a significant effect in cases involving corruption, depending on whether or not the claim is brought in commercial or in investment treaty arbitration.

II CONTRACT V TREATY: VARYING BASES FOR JURISDICTION AND VARYING CONCEPTUAL APPROACHES

22. An analysis of the arbitral case law shows that the notions of admissibility and jurisdiction are not at play in the same way in commercial and investment arbitration. In the former, issues of jurisdiction have readily been resolved through the notion of severability, and arbitrators routinely decide issues of corruption, including at the preliminary stage (A). In the latter, the treaty-based notion of 'legality' of investments has given rise to different treatments of corruption, based on whether or not it affects the tribunal's basis for jurisdiction (B).

A International Commercial Arbitration: Severability of the Arbitration Agreement and Jurisdiction of Arbitral Tribunals to Hear Claims Involving Corruption

23. By and large, declining jurisdiction has not been the traditional way for tribunals and authors to deal with corruption in arbitration, in particular in international commercial arbitration.[24]

24. The underlying approach is that, in the heat of the battle, corruption allegations can fly thick and fast, and a tribunal's function should not be affected by what may simply be party tactics. Any legitimacy concerns can nonetheless be accommodated since an agreement tainted by corruption will be invalid under many, if not most, substantive laws. Here, a distinction is sometimes made in doctrine between contracts *procured by* corruption and contracts that *provide for* corruption, with the former being voidable and the latter being void.[25] Either way, the obvious cause of action, at least in commercial arbitration, will often fail on the merits.

25. From a conceptual standpoint, this is achieved through severability (or separability). [26] In essence, an arbitration agreement forming part of a contract is not affected by the nullity of the main contract as a consequence of corruption. The arbitration agreement remains independent and the arbitral tribunal has jurisdiction to hear the claim (including in its corruption aspects). Consequently, unless the arbitration agreement itself is tainted by corruption or illegality, the unlawfulness of the contract will not vitiate a tribunal's jurisdiction. As put by Lord Hope in *Fiona Trust*:

> **The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts that are specific to the arbitration agreement.**

> progress. Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.[9]

10. Ahead of its time, Judge Lagergren's ruling embodied the modern international consensus that is now reflected in a plethora of legal conventions, national laws and public policy reports that the general interest, both public and private, requires that corruption be defeated. Yet, the award's actual impact on arbitral practice, despite its celebrity, has been rather limited.

11. Opponents of Judge Lagergren's approach point to his award as being extreme, such that arbitrators who decline to hear a claim based on its inarbitrability leave unanswered the question of validity of a contract and whether or not the corruption claim is well founded in the first place.[10] As a matter of policy, there is a fear that respondents might be unduly privileged by this approach and incentivized to torpedo the arbitral process by impugning legal relationships all too readily. There is indeed much to be said for the view that, even in circumstances involving corruption, contractual performance or state compliance with investment guarantees is still capable of being decided by final and binding arbitration.[11] If anything, arbitrability has expanded and gained prominence over the years in many national laws and international legal practice.

12. Arbitrability concerns the question whether national legislation or judicial authority has barred a specific class of disputes from being arbitrated, typically because the legal system in question has arrogated the power to resolve certain disputes and because parties cannot autonomously dispose of certain legal relations (e.g. patents, securities, competition law, criminal law, family law, inheritance rights etc.). But an arbitration concerning rights and obligations in relation to a turnkey project, for instance, does not normally trespass into the domain of criminal law, notwithstanding that the contract may have been procured in corrupt circumstances. Under this approach, the rationale of Lagergren's award lies not so much in the claim's inarbitrability but rather in its inadmissibility, which in turn is founded on general principles of law such as *nemo auditur propriam turpitudinem allegans*.[12]

13. In modern arbitration law, therefore, the arbitrability of a claim involving corruption is a non-issue. Corruption issues are arbitrable, and a dispute involving corruption is arbitrable. On this basis, arbitral tribunals have generally admitted their capability to settle disputes involving such allegations, and corruption is routinely dealt with at the merits stage by holding claims to be groundless due to a void or voidable contract. This is thought to strike a balance between commercial considerations and the ethics of international business.

14. The question, then, is whether allegations of corruption should in all cases be dealt with at the merits stage or if there are situations in which the existence of corruption, once established, should be a bar to the arbitral tribunal's jurisdiction or the admissibility of the claim, *because* the legal relationship in question was tainted by corruption.

B Jurisdiction and Admissibility: An Operative Distinction

15. Simply because an arbitral tribunal has jurisdiction does not mean that it will invariably exercise it at the behest of a claimant. Depending on the circumstances and how it is particularized, corruption may also go to the admissibility of a claim. It is important to note that admissibility is further or alternative to jurisdiction, namely, independent from whether or not the constituent instruments are considered to cover the corrupt practices alleged.

16. Generally speaking, admissibility concerns the question whether, in light of all the circumstances, a tribunal ought to examine a claim. An issue is admissible if there are no reasons why the arbitrators should not proceed to render a binding decision on the merits. On the other hand, an issue is inadmissible if compelling reasons exist for a tribunal to refrain from entering into its merits. The classic exposition of the International Court of Justice (the "ICJ") in the *Oil Platforms* dispute applies *mutatis mutandis* in international arbitration:

> Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits.[13]

17. Admissibility is thus decided after a tribunal has affirmed its jurisdiction,[14] whereas objections to jurisdiction strike at the logically prior ability of a tribunal to give rulings as to the admissibility or merits of a claim.

18. The distinction between jurisdiction and admissibility is sometimes blurred in practice, not least since the same circumstances can give rise to both types of objections. International courts and tribunals eschew too schematic an approach,[15] and often consider that preliminary objections, if upheld, will bring the proceedings to a close. Investment tribunals, in turn, are said to have not always adopted a clear and consistent distinction between jurisdiction and admissibility.[16]

19. Conceptually, the distinction between jurisdiction and admissibility is very much alive — and effective — in investment treaty arbitration in particular.[17] One way to determine whether objections relate to jurisdiction or admissibility is to consider whether they relate to the title under which a tribunal's jurisdiction is said to exist, namely an arbitration clause in a contract or a dispute resolution provision contained in an investment treaty. In such a case, the objections are jurisdictional.[18] If the objections are founded on considerations lying beyond the application or interpretation of the basis of jurisdiction and are directed at the claim itself rather than the tribunal, they concern admissibility.[19] For instance, admissibility objections may concern the ripeness of a claim, waiver, the capacity of a claimant, exclusive forum selection, *lis pendens*, or *res judicata*.

20. The distinction has important practical consequences, even if the short-term result may be the same, namely the dismissal of proceedings at the preliminary stage. Thus, it might be possible to cure admissibility defects, although the practical value of resubmitting a claim will vary from case to case, not least since a new tribunal will likely hear the claim.[20] Moreover, admissibility will not be raised by a tribunal *proprio motu*, whereas a tribunal must affirm its jurisdiction by virtue of its position.[21] Further, depending on the nature of the objection and the applicable procedural framework, some

> Allegations that are parasitical to a challenge to the validity to the main agreement will not do.[27]

26. Severability is said to ensure a speedy resolution of disputes that are not subject to obstruction by the courts. One might even argue that the parties' procedural rights are better respected by dismissing the claim at the merits stage than rejecting it at the preliminary phase. This also sends a clear signal that arbitral tribunals *will* pass a substantive (and negative) judgment on corruption.

27. The upshot is that an arbitral tribunal's ability to entertain a case is often not considered to be at the crux of cases involving corruption. Severability also explains why other corruption-related topics, including the standard and burden of proof and *sua sponte* tribunal investigations, have become such focal topics in arbitration. Be that as it may, one would need to bear in mind at least two caveats that highlight the importance of issues of jurisdiction.

28. First, the parties (typically, the respondent) may not have asked the tribunal to consider the invalidity of the underlying contract. Given that the potential issue is not characterized as jurisdictional, the arbitrators have an unenviable choice. It can (i) rule *ultra petita*, (ii) turn a blind eye to invalidity and effectively condone a breach of international public policy, possibly in ignorance of the applicable law, or (iii) resign at an advanced stage of the proceedings if they wish to avoid being implicated in a breach of international public policy, which is costly and somewhat embarrassing in light of the alternatives that were relinquished.

29. Second, severability should not be taken too far. Because it focuses on the arbitration agreement and requires that consent to arbitrate be examined independently from the substantive issues in dispute, its effect is negative: consent is not automatically negated in cases of corruption. However, it is one thing to say the arbitration agreement is separate, and another to say that jurisdiction is established. The autonomy doctrine should therefore not be elevated to a presumption of jurisdiction.

30. In certain circumstances, invalidating the substantive legal relationship may result in an unenforceable arbitration agreement. An arbitration agreement has for example been considered to be ineffective in cases of threats or duress,[28] forgery or impersonation,[29] *non est factum* (i.e. mistaken signature without knowledge).[30] In practice, however, findings of corruption contaminating the arbitration agreement seem to be rare. Bribery is traditionally not considered to be a factor vitiating an agreement to arbitrate and thus ousting jurisdiction, at least in a commercial context. The reason for this is that the traditional exceptions listed above revolve around a lack of consent, and that engaging in corruption or taking bribes will normally not wipe out consent. There is thus a tension between severability and legality.

31. Against this background, corruption has generally been viewed, in international commercial arbitration, from the angle of international public policy, namely principles that reflect an international consensus as to universal standards and accepted norms of conduct.[31] It is indeed increasingly difficult to imagine that the applicable laws would not condemn corruption, given the public policies that form part of the legal bloodstream of a governing national law, as well as the widespread international consensus on these issues.[32] As recognized by the Paris Court of Appeal:

> A contract having as its aim and object a traffic in influence through the payment of bribes is, consequently, contrary to French international public policy as well as to the ethics of international commerce as understood by the large majority of States in the international community.[33]

32. Thus, there is a clear trend in commercial arbitral case law towards ensuring that the arbitral process is not abused to further corrupt ends. As a matter of protecting the general interest, arbitral tribunals dealing with illegal contracts will not recognize them as enforceable.[34] Generally speaking, in addition to considering the underlying substantive rights and obligations void(able) under the applicable law (i.e. rejecting a case on the merits in the narrow sense, such as a breach of contract being impossible without a valid contract), tribunals have frequently affirmed that corruption is contrary to international public policy and that they will *per se* not assist claimants that seek to rely on corruption, bribery or other forms of serious illegality (i.e. rejecting a claim as inadmissible independent of the merits of the claim in the narrow sense, such as whether or not there was a breach of contract).

33. A long line of ICC awards thus affirms that corruption and bribery infringe international public policy. Besides Judge Lagergren's well-known award in ICC Case No. 1110, this includes for example ICC Cases No. 2730, 3913, 3916, 5622, 7047, 7664 and 8891.[35] In these cases, whenever corruption was established on the evidence, the tribunals declined to assist the claimants in pursuing their contractual claims, because the contracts were null as a matter of the applicable domestic law and/or because international public policy rendered a contract induced by corruption unenforceable. Evidently, arbitrators are not oblivious to reality and the deleterious effects of corruption. The logic of *fraus omnia corrumpit* was captured as follows by the tribunal in *Himpurna v PLN*, an UNCITRAL case in which corruption was ultimately not proven:

> The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption.[36]

34. Similarly, agency or commission agreements used to corruptly obtain a concession or public procurement contract — sometimes dubbed 'consultancy' arrangements — have at times been declared null or voidable,[37] although the tension with the basic principle of freedom of contract is sometimes felt more acutely in such cases involving third-party intermediaries.[38] Those disputes usually concern the refusal of a principal to pay a local facilitator's fees. Here, too, tribunals have been known to deny legally enforceable rights stemming from contracts tainted by corruption on account of a violation of the applicable law and as a matter of international public policy. This does not rule out more permissive approaches towards lobbying and influence peddling.[39]

35. In such and similar instances, in light of the fact that jurisdiction as such is not at issue and there is no preliminary phase in the proceedings, it can be difficult to distinguish between (substantive) admissibility and a ruling on the merits, given their close connection and identical outcome. Indeed, although a conceptual distinction is possible, commercial arbitral practice sometimes inclines to consider anything that does not bear on jurisdiction to be a matter relating to the merits, which can be another source of

confusion. The distinction may thus lie in whether a tribunal is invited not to enter into the merits (despite having jurisdiction to do so) and, for example, whether a tribunal is invited to reject a party's alleged failure to perform its obligations. In the former case, the tribunal is concerned with the viability of the claim and does not proceed to examine any of the obligations alleged to be owed and infringed; in the latter case, the tribunal is concerned with the merits of the dispute. In short, 'can a breach of contract, if any, be validly asserted?', as opposed to 'was there a breach of contract?'.

36. The position, as will be seen, is radically different in investment treaty arbitration.

B Investment Treaty Arbitration: The Impact of International Treaty Law Mechanisms on the Sanction of Corruption at the Preliminary Stage

1. Subject Matter Jurisdiction as a Bar to Claims Involving Corruption

37. Because consent to arbitration is based on a treaty[40] and the survival of the arbitration agreement is not at issue, investment treaty arbitration is not concerned with severability. Nor is there a logical problem of an arbitral tribunal 'deciding in a vacuum' that would need to be redressed by the doctrine of severability.

38. Consent, however, is the core requirement for jurisdiction to exist in investment treaty arbitration. It cannot be presumed, and must be established with certainty based on the respective terms of each treaty.[41] The question then is to what extent corruption may vitiate a party's consent to arbitrate under the relevant treaty. Here, a distinction may be made between situations where the treaty expressly provides for a condition of legality and situations in which no such condition exists, bearing in mind that limits to a tribunal's adjudicative power can be both consensual and inherent.[42]

39. Many investment treaties contain an express legality condition, which takes the form of a provision requiring that investments be made in accordance with host state law, either in the provision defining 'investment' or in a separate clause relating to the treaty's applicability. Many clauses are expressed to apply to the time when an investment is 'made', namely originally established or acquired,[43] which raises the question of how subsequent (il)legality should be treated.[44] Another question is the material scope of the host state's law against which an investor's conduct must be assessed: in *Saba Fakes*, the arbitral tribunal established that the legality requirement concerns compliance with the host state's laws governing the admission of investments in the host state, not any type of law even unrelated to the very nature of the investment regulation.[45]

40. Investment arbitration case law has applied legality clauses to allegations of corruption and fraud,[46] violations of the host state legal order,[47] and infringements of foreign investment laws.[48] Tribunals have at times held that legality clauses do not extend to trivial infringements,[49] which can be justified as a sensible compromise to avoid that minor bureaucratic violations such as defective paperwork defeat meritorious claims.

41. In the absence of an express treaty provision, lawfulness (which is typically engaged in the context of corruption and bribery) has been argued to be an

implicit condition of investment treaties. Thus, the tribunal in *Phoenix v Czech Republic* held that states cannot be deemed to offer access to ICSID arbitration for investments made in violation of their own laws or the international law principle of good faith.[50] In a similar vein, the tribunal in *SAUR v Argentina* stressed the fundamental importance of conformity with national law and good faith in the context of consent to investment arbitration.[51] The tribunal in *Hamester v Ghana* further held that:

> An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law.
>
> [..]
>
> These are general principles that exist independently of specific language to this effect in the Treaty.[52]

42. Finally, the tribunal in *Inceysa v El Salvador*, a case involving a concession solicited by fraud where lawfulness was not part of the treaty definition of investment, emphasized that:

> [T]he Claimant is not right to indicate that in order to determine whether its investment falls within the scope of the Agreement, it is necessary to examine only the definition of the term investment, contained in Article 1(2) of the Agreement, where there is no reference to the clause 'in accordance with law,' and that it is not possible to examine other clauses of the Agreement to determine the type of investments protected by it.
>
> [..]
>
> [T]his Arbitral Tribunal considers that the consent granted by Spain and El Salvador in the BIT is limited to investments made in accordance with the laws of the host State of the investment. Consequently, this Tribunal decides that the disputes that arise from an investment made illegally are outside the consent granted by the parties and, consequently, are not subject to the jurisdiction of the Centre..[53]

43. As with express terms, a case-by-case inquiry will determine whether a dispute involving corruption implicitly lies outside the tribunal's adjudicative power *ratione materiae*, notwithstanding that the parties are otherwise willing to submit to the tribunal's personal jurisdiction. Should the alleged illegality be found to exist and affect the investment itself, this will be a bar to the arbitral tribunal's jurisdiction *ratione materiae* and will stop the inquiry at the preliminary stage.

2. Non-Viability of a Claim Involving Corruption Based on Admissibility

44. In situations where the legality of the investment (and the tribunal's jurisdiction) is not at issue, the question arises as to whether corruption disentitles the claimant from treaty protection and the claim can be dismissed on grounds distinct from the merits. Here, as in international commercial arbitration, arbitral tribunals have referred to the notion of international public policy.

45. A reference to international public policy is unsurprising in contractual matters, where a treaty is not at stake. Thus, the tribunal in *World Duty Free v Kenya*, a contract-based ICSID dispute arising from a revoked contract that had been obtained by bribery, held that:

> In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.
>
> [..]
>
> [T]he Tribunal concludes that the Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of ex turpi causa non oritur actio.[54]

46. In treaty-based cases, certain arbitral tribunals have likewise dismissed the claim based on international public policy. Thus, for example, the tribunal in *Plama v Bulgaria* held that an express provision requiring conformity with a particular law was not required to deny access to treaty protection:

> The Tribunal finds that Claimant's conduct is contrary to the principle of good faith which is part not only of Bulgarian law.. but also of international law.. The principle of good faith encompasses, inter alia, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment.
>
> [..]
>
> In consideration of the above and in light of the ex turpi causa defence, this Tribunal cannot lend its support to Claimant's request and cannot, therefore, grant the substantive protections of the ECT.[55]

47. These decisions show that increasingly, and not uncontroversially, corruption is not just seen as a matter between the disputing parties, but as a safeguard of the rule of law. As emphasized by the tribunal in *Metal-Tech v Uzbekistan*:

> The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.[56]

48. The tribunal in *Inceysa v El Salvador* similarly stressed the importance of ensuring the respect for the rule of law:

> [T]he inclusion of the clause 'in accordance with law' in the agreements for reciprocal protection of investments follows international public policies designed to sanction illegal acts and their resulting effects.
>
> It is uncontroversial that respect for the law is a matter of public policy.. in any civilized country.. [a]bove any claim of an investor, there is a meta-positive provision that prohibits attributing effects to an act done illegally.[57]

49. In this context, the distinction between substantive admissibility and a ruling on the merits tends to be more notable in investment arbitration than in commercial arbitration. This is perhaps unsurprising given its hybrid provenance and the obvious influence of public international law, where the very essence of a preliminary objection (be it in relation to jurisdiction or admissibility) is that the party raising the objection requires a decision on it before any further proceedings on the merits, unless agreed otherwise.

50. More generally, the evolution of arbitral case law, in particular in relation to investment treaty arbitration, shows the increasing importance of the threshold question. Unlike the question of arbitrability, deciding corruption

at a preliminary stage does not mean that the existence of circumstances of corruption will not be determined and established by arbitral tribunals, and that recalcitrant parties may allege corruption merely as dilatory tactics. To the contrary, in cases in which the dispute involves circumstances of corruption — and unless such circumstances relate to the determination of the merits of the claimant's case or the respondent's defence, which would justify their determination on the merits — the threshold question allows tribunals, in investment treaty arbitration, to decide corruption when it affects the instrument on the basis of which they have been seized or to exclude the possibility for the claimant to rely on the substantive protection of the treaty when doing so would breach international public policy. The advantage of the distinction, however, is not merely greater conceptual clarity. As a matter of procedural efficiency, giving arbitral tribunals the tools to dispose of claims involving corruption at the preliminary stage when the circumstances so justify, would ensure that such claims will not prosper and that the party harmed by corruption will not undergo long and costly proceedings before the claim is ultimately dismissed.

NOTES

1 *See* Paris Court of Appeal, *S.A.S. MAN Diesel & Turbo France c Société Al Maimana General Trading Company Ltd société de droit irakien*, N°13/10256, 4 November 2014, 7 (holding that the characteristic elements of corruption were not made out on the facts).

2 On the concepts of 'jurisdiction' and 'admissibility', for example, *see* Y Banifatemi and E Jacomy, *Compétence et recevabilité dans le droit de l'arbitrage en matière d'investissements* (Pedone, 2015).

3 The US Supreme Court appears to have tempted even distinguished commentators to accompany it on this terminological adventure. *See Howsam v Dean Witter Reynolds Inc*, 537 US 79, 83-84 (2002) ('gateway matters').

4 *See* G Bermann, "The 'Gateway' Problem in International Commercial Arbitration" (2012) 37 Yale LJ 1, 7-8.

5 *See e.g.* N Blackaby and C Partasides, *Redfern and Hunter on International Arbitration* (OUP 2009), 132 n 203; A Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International 2004) 64; E Gaillard and J Savage (ed), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) paras 585-586.

6 ICC Case No 1110 (1963), 10 Arb Int'l 3, para 282.

7 *See, e.g., Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award, 4 October 2013, para 389. ("While reaching the conclusion that the claims are barred as a result of corruption, the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act."). *See also Niko Resources (Bangladesh) Ltd v People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited ('Bapex'), Bangladesh Oil Gas and Mineral Corporation ('Petrobangla')*, ICSID Case No ARB/10/11 and ICSID Case No ARB/10/18, Decision on Jurisdiction, 19 August 2013, para 484 ("If and to the extent the Claimant or its parent com-

pany had unclean hands, the Respondents disregarded this situation. They may not now rely on these events to deny jurisdiction under an arbitration agreement that they then accepted. The additional details of which the Respondents may have learned subsequently through the account in Canadian judgment do not aggravate the offence in any substantial manner compared to what was publicly known in Bangladesh when the GPSA was concluded.").

8 In this respect, *see Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No AA 226, Final Award, 18 July 2014, paras 1362-1363 (deciding that the so-called doctrine of 'unclean hands' does not exist as a general principle of international law barring a claim from protection: "However, as Claimants point out, despite what appears to have been an extensive review of jurisprudence, Respondent has been unable to cite a single majority decision where an international court or arbitral tribunal has applied the principle of 'unclean hands' in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim. The Tribunal therefore concludes that 'unclean hands' does not exist as a general principle of international law which would bar a claim by an investor, such as Claimants in this case.").

9 ICC Case No 1110 (1963), 10 Arb Int'l 3, para 20.

10 *See, e.g.*, A Crivellaro, 'The Courses of Action Available to International Arbitrators to Address Issues of Bribery and Corruption' (2013) 10 TDM 3, 14-15 (considering the decision to have turned on the obviousness of corruption in the case, as opposed to the likely more frequent cases where accusations of corruption are brought to avoid liability under the contract).

11 *See* E Gaillard and J Savage (ed), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) para 586.

12 *See* E Gaillard and J Savage (ed), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) para 585.

13 *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, 6 November 2003, ICJ Reports (2003) 161, para 29.

14 *See Abaclat and Others v Argentine Republic*, ICSID Case No ARB/07/05, Decision on Jurisdiction and Admissibility, 4 August 2011, para 504; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Republic of Paraguay*, ICSID Case No ARB/07/9, Decision on Jurisdiction, 29 May 2009, para 132.

15 For classic example, *see, e.g.*, *Mavrommatis Palestine Concessions (Greece v United Kingdom)*, Objection to the Jurisdiction of the Court, Judgment, 30 August 1924, PCIJ Series A No 2, 10; *Certain German Interests in Polish Upper Silesia (Germany v Poland)*, Preliminary Objections, Judgment, 25 August 1925, PCIJ Series A No 6, 19.

16 *See* D Williams, 'Jurisdiction and Admissibility' in P Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 919; V Heiskanen, 'Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration' (2014) 29 ICSID Review 231, 7-12. For an example, *see Pan American Energy LLC and BP Argentina Exploration Company v The Argentine Republic*, ICSID Case No ARB/03/13, Decision on Preliminary Objections, 27 July 2006, para 54 ("In the present Decision, the terms 'jurisdiction' and 'competence' shall be used interchangeably, having regard to the preliminary objections raised by Respondent and debated between the parties. *For the same reason, there is no need to go into the possible — and somewhat controversial — distinction between jurisdiction and admissibility.* Whatever the labelling, the parties have presented their case on the basis of the six objections raised by the Respondent." (emphasis added)). Cf *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, para 41.

17 *See* Y Banifatemi and E Jacomy, *Compétence et recevabilité dans le droit de l'arbitrage en matière d'investissements* (Pedone, 2015).

18 *See, e.g.*, *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v Turkmenistan,* ICSID Case No ARB/10/1, Award, 2 July 2013, para 6.3.4; *Abaclat and Others v Argentine Republic*, ICSID Case No ARB/07/05, Dissenting Opinion of Professor G Abi-Saab, 28 October 2011, para 126; *Northern Cameroons (Cameroon v United Kingdom)*, Preliminary Objections, Separate Opinion of Sir G Fitzmaurice, 2 December 1963, ICJ Reports 1963, 102-103.

19 *See, e.g., HOCHTIEF Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/07/31, Decision on Jurisdiction, 24 October 2011, para 90 ('Jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal.'); *Ioan Micula, Viorel Micula and others v Romania,* ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, para 63.

20 *See Urbaser SA and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No ARB/07/26, Decision on Jurisdiction, 19 December 2012, para 118 (noting that there is no principle preventing jurisdictional defects from being cured).

21 *See, e.g., Achmea BV v Slovak Republic*, PCA Case No 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, para 120.

22 *See, e.g., Methanex Corporation v United States of America*, NAFTA/UNCITRAL, Partial Award, 7 August 2002, paras 122-126. *But* cf *Itera International Energy LLC and Itera Group NV v Georgia*, ICSID Case No ARB/08/7, Decision on Admissibility of Ancillary Claims, 4 December 2009, paras 34-36.

23 *See, e.g., ICS Inspection and Control Services Limited v Argentine Republic*, UNCITRAL, PCA Case No 2010-9, Award on Jurisdiction, 10 February 2012, ¶ 280.

24 For an analysis of arbitral practice, *see* A Crivellaro, 'The Courses of Action Available to International Arbitrators to Address Issues of Bribery and Corruption' (2013) 10 TDM 3.

25 *See* M Hwang and K Lim, 'Corruption in Arbitration — Law and Reality' (2012) 8 Asian International Arbitration Journal 1, 64.

26 *See, e.g.*, ICC Rules 2012, Article 6(9); UNCITRAL Arbitration Rules 2010, Article 23(1); UNCITRAL Model Law, adopted in 1985 and amended in 2006, Article 16(1). It could be worth recalling the notion that '[t]he motivating force behind the establishment of the autonomy of the arbitration clause in international contracts is the plain desire to uphold the validity of the agreement to arbitrate': W L Craig, W W Park and J Paulsson, *International Chamber of Commerce Arbitration* (Oceana Publication 2000), para 5.04.

27 *Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] UKHL 40, para 35 (in the context of Section 7 of the English Arbitration Act of 1996).

28 *See, e.g., Westinghouse and Burns & Roe (USA) v National Power Company and the Republic of the Philippines*, ICC Case No 6401 (1991), 7 Mealey's Int Arb Rep 1 (1992), Section B, 13-14.

29 *See, e.g., Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] UKHL 40, para 34.

30 *See, e.g., Harbour Assurance Co Ltd v Kansa General International Insurance Co Ltd* [1991] QBD, [1992] 1 Lloyd's L Rep 81, 92.

31 *See* P Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in P Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law International 1987) 258. *See also* B Hanotiau and O Caprasse, 'Public Policy in International Commercial Arbitration' in E

Gaillard and D Di Pietro (ed), *Enforcement of Arbitration Agreements and International Arbitral Awards — The New York Convention in Practice* (Cameron May 2008) 789 ('fundamental notions of a particular legal system'). *See also* E Gaillard and J Savage (ed), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) para 1534-1535 (arguing that arbitrators should not limit themselves to international public policy as understood in those countries where enforcement is likely and should also take 'fundamental principles of justice' into account).

32 *See* W M Reisman, 'Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration' in A van den Berg (ed), *International Arbitration 2006: Back to Basics?* (Kluwer Law International 2007) 856.

33 Paris Court of Appeal, *European Gas Turbines SA v Westman International Ltd.*, 30 September 1993, XX Yearbook of Commercial Arbitration (1995) 198, 201.

34 *See* E Gaillard and J Savage (ed), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) para 1468. Further, arbitral tribunals have been routinely unimpressed by the fact that corrupt practices may have been tolerated behaviour at the time in the respective countries.

35 *Yugoslav Companies v Dutch and Swiss Group Companies*, ICC Case No 2730 (1982), 111 Clunet (1984), 914; *UK Company v French Company/African Country*, ICC Case No 3913 (1981), 111 Clunet (1984), 920; *Iran v Greek Company/Iran*, ICC Case No 3916 (1982), Coll of ICC Arbitral Awards 1974-1985 (1990), 507; *Hilmarton, Broker v Omnium, Contractor*, ICC Case No 5622 (1992), 2 Rev Arb (1993), 327; *Westacre (UK) v Jugoimport (Yugoslavia)*, ICC Case No 7047 (1994), 301 ASA Bull (1995); *Frontier AG and Brunner Sociedade v Thomson CSF*, ICC Case No 7664 (1996); ICC Case No 8891 (1998), 127 Clunet (2000), 1076.

36 *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listruik Negara*, UNCITRAL, Award, 4 May 1999, XXV Yearbook of Commercial Arbitration (2000), para 118.

37 *See, e.g.*, *Hilmarton, Broker v Omnium, Contractor*, ICC Case No 5622 (1992), 2 Rev Arb (1993); ICC Case No 8891 (1998), 127 Clunet (2000), 1076; *Middle-East Agent v European Contractor*, ICC Case No 15668 (2011), Award, 23 March 2011 (unpublished, cited in A. Crivellaro, "The Courses of Action Available to International Arbitrators to Address Issues of Bribery and Corruption" (2013), 10 TDM 3, 3; *State-owned Corporation X v Corporation Y*, ICC Case No 11307 (2003), XXIII Yearbook of Commercial Arbitration (2008), 24.

38 *See, e.g.*, *Hilmarton v Omnium*, Swiss Federal Tribunal, Decision, 17 April 1990, 253 ASA Bull. (1993) (setting aside the *Hilmarton* arbitral award and distinguishing between trafficking in influence and bribery).

39 For an analysis, *see, e.g.*, A Sayed, *Corruption in International Trade and Commercial Arbitration*, (Kluwer Law International 2004) 199-200.

40 The mechanism is now well established: the eligible investor accepts a State's advance offer to arbitrate as contained in a treaty by initiating a claim, thus "perfecting" the agreement to submit the dispute to arbitration.

41 *See, e.g.*, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, 4 June 2008, ICJ Reports (2008) 177, para 62; *ICS Inspection and Control Services Limited v The Argentine Republic*, PCA Case No 2010-9, Award on Jurisdiction, 10 February 2012, para 280.

42 *See also* C Lamm, B Greenwald and K Young, 'From World Duty Free to Metal-Tech. A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption' (2014), 29 ICSID Review 328, 342.

43 *See, e.g.*, *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award, 4 October 2013, paras 130, 372 (establishing that Article 1(1) of the Israel-Uzbekistan BIT addressed lawfulness as a criterion for the existence of an investment, and determining that 'corruption is established to an extent sufficient to violate Uzbekistan law in connection with the *establishment of the Claimant's investment* in Uzbekistan. As a consequence, the investment has not been "implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made" as required by Article 1(1) of the BIT.' (emphasis added)).

44 On this aspect, see *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines*, ICSID Case No ARB/03/25, 16 August 2007, para 345 ('Although this contention is not relevant to the analysis of the problem which the Tribunal has before it, namely the *entry* of the investment and not the way it was subsequently conducted, the Tribunal would note that this part of the Respondent's interpretation appears to be a forced construction of the pertinent provisions in the context of the entire Treaty. The language of both Articles 1 and 2 of the BIT emphasizes the *initiation* of the investment. Moreover the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed *substantive* violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction.')

45 *Saba Fakes v Republic of Turkey,* ICSID Case No ARB/07/20, Award, 14 July 2010, para 119 ('The Tribunal is not convinced by the Respondent's position that *any violation of any of the host State's laws* would result in the illegality of the investment within the meaning of the BIT and preclude such investment from benefiting from the substantive protection offered by the BIT. As to the nature of the rules contemplated in Article 2(2) of the Netherlands-Turkey BIT, it is the Tribunal's view that the legality requirement contained therein concerns the question of the *compliance with the host State's domestic laws governing the admission of investments in the host State*. This is made clear by the plain language of the BIT, which applies to *"investments . . . established in accordance with the laws and regulations . . . ."* The Tribunal also considers that it would run counter to the object and purpose of investment protection treaties to deny substantive protection to those investments that would violate domestic laws that are unrelated to the very nature of investment regulation. In the event that an investor breaches a requirement of domestic law, a host State can take appropriate action against such investor within the framework of its domestic legislation. However, unless specifically stated in the investment treaty under consideration, a host State should not be in a position to rely on its domestic legislation beyond the sphere of investment regime to escape its international undertakings vis-à-vis investments made in its territory.' (emphasis added)).

46 *See, e.g.*, *Gustav F.W. Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 123; *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award, 2 August 2006, paras 236-238.

47 *See, e.g.*, *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award, 4 October 2013, para 165; *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004, para 86.

48 *See, e.g.*, *Saba Fakes v Republic of Turkey,* ICSID Case No ARB/07/20, Award, 14 July 2010, para 119.

49 *See, e.g., Desert Line Projects LLC v Republic of Yemen*, ICSID Case No ARB/05/17, Award, 6 February 2008, para 104; *LESI SpA and ASTALDI SpA v R*épublique Algérienne Démocratique et Populaire, ICSID Case No ARB/05/3, Decision, 12 July 2006, para 83(iii).

50 *See, e.g., Phoenix Action Ltd v The Czech Republic*, ICSID Case No ARB/06/05, Award, 15 April 2009, paras 101, 106.

51 *SAUR International SA v Republic of Argentina*, ICSID Case No ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, para 308 ('Cependant, le Tribunal coïncide également en partie avec l'argumentation avancée par la République argentine. Il entend que la *finalité du système d'arbitrage d'investissement consiste à protéger uniquement les investissements licites et* bona fide. Le fait que l'APRI entre la France et l'Argentine mentionne ou non l'exigence que l'investisseur agisse conformément à la législation interne ne constitue pas un facteur pertinent. *La condition de ne pas commettre de violation grave de l'ordre juridique est une condition tacite*, propre à tout APRI, car en tout état de cause, il est incompréhensible qu'un État offre le bénéfice de la protection par un arbitrage d'investissement si l'investisseur, pour obtenir cette protection, a agi à l'encontre du droit' (emphasis added)).

52 *See, e.g., Gustav FW Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, paras 123-124.

53 *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award, 2 August 2006, paras 197, 207.

54 *World Duty Free v The Republic of Kenya*, ICSID Case No ARB/00/07, Award, 4 October 2006, paras 157, 179 (emphasis added). *See also Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award, 4 October 2013, para 292. For another contract-based ICSID case, *see also Niko Resources (Bangladesh) Ltd v People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited ('Bapex'), Bangladesh Oil Gas and Mineral Corporation ('Petrobangla')*, ICSID Case No ARB/10/11 and ICSID Case No ARB/10/18, Decision on Jurisdiction, 19 August 2013, paras 470-471 (although in *Niko* the tribunal referred to a distinction between jurisdiction and merits, as opposed to a distinction between jurisdiction and admissibiility: '... in the present case jurisdiction is not based on [an investment treaty] but on two agreements. The arbitration clause in these agreements is not merely an offer subject to conditions which may or may not be accepted. Rather it contains a firm agreement binding both parties to submit their disputes to ICSID arbitration. The question whether the investment was made in good faith or not and, if not, what consequences would have to be drawn from it, are matters which must be resolved in the agreed manner. In a contractual dispute as the present one, alleged or established lack of good faith in the investment does not justify the denial of jurisdiction but must be considered as part of the merits of the dispute.')

55 *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award, 27 August 2008, paras 144, 146.

56 *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award, 4 October 2013, para 389.

57 *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award, 2 August 2006, paras 247-248.