

# Corruption and Arbitration

October 5, 2017



# Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republics

## Article 2

Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and shall admit such investments ***in accordance with its provisions of law.***

# Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments

## Article 1

1. The term “investment” shall mean any kind of asset accepted ***in accordance with the respective laws and regulations of either Contracting States . . .***

“[w]herever a clause ‘in accordance with the laws of the host state’ may be placed in a treaty, it may be understood to imply that investments made in violation of national laws are not covered by the treaty.” The ‘in accordance with the laws of the host state’ requirement applies whether it is contained explicitly in the treaty or is found implied.”

*Rudolph Dolzer & Christoph Schreuer, Principles of International Investment Law 85 (2008)*

“no legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them.”

*Inceysa Vallisoletana, S.L. v. Republic of El Salvador,  
ICSID Case No. ARB/03/21, Award (August 2, 2006)*

. . . “the law is clear – and rightly so – that in such situation the investor is deprived of protection and, consequently, the host State avoids any potential liability.”

*Metal-Tech Ltd. v. The Republic of Uzbekistan,  
ICSID Case No. Arb/10/3, Award (October 4, 2013)*

“It is uncontroversial that respect for the law is a matter of public policy not only in El Salvador, but in any civilized country. If this Tribunal declares itself competent to hear the disputes between the parties, it would completely ignore the fact that, above any claim of an investor, there is a meta-positive provision that prohibits attributing effects to an act done illegally.”

*Inceysa Vallisoletana, S.L. v. Republic of El Salvador,  
ICSID Case No. ARB/03/21, Award (August 2, 2006)*

“I am convinced that a case such as this, involving such gross violation of good morals and international public policy, can have no countenance in any court either in the Argentine or in France, or, for that matter, in any other civilised country, nor in any arbitral tribunal. Thus, jurisdiction must be declined in this case. It follows from the foregoing, that in concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature rather than from any national rules on arbitrability. Parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.”

*Judge Lagergren in ICC case no 1110 (1963)*

“No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff’s own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, potior est condition defendents”.

*Lord Mansfield in Holman v. Johnson (1775) 1 Cowp. 341, 343.*

. . . The 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*. . . .

180. It remains nonetheless a highly disturbing feature in this case that the corrupt recipient of the Claimant's bribe was more than an officer of state but its most senior officer, the Kenyan President; and that it is Kenya which is here advancing as a complete defence to the Claimant's claims the illegalities of its own former President. Moreover, on the evidence before this Tribunal, the bribe was apparently solicited by the Kenyan President and not wholly initiated by the Claimant. Although the Kenyan President has now left office and is no longer immune from suit under the Kenyan Constitution, it appears that no attempt has been made by Kenya to prosecute him for corruption or to recover the bribe in civil proceedings. . . .

181. The answer, as regards public policy is that the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world.

*World Duty Free Co. v. Kenya,*  
*ICSID Case No. ARB/00/7 (October 4, 2006) (Guillaume, Rogers & Veeder)*

“Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law.”

*Fraport AG Frankfurt Airport Services Worldwide v. Philippines,  
ICSID Case No. Arb/03/25, Award (August 16, 2007)*

**Thank You**

