論　　説

Sharing Responsibilities on Corruption Allegations in Investor-State Arbitration

The Contribution of *Metal-Tech v. Uzbekistan*

Umirdinov Alisher

Key words: foreign investment, arbitration, corruption, illegality

Abstract

The long-awaited – the first investment treaty arbitration to deny its jurisdiction because of corruption – came in 2013 in the arbitration case involving Uzbekistan and the Israeli investor *Metal-Tech*. Until this time, there was plenty of speculation about the role of investment treaty arbitration on corruption, burden and standard of proof, legality requirement and so on. *Metal-Tech* Tribunal clarified many unexplored legal questions that have tremendous impact to the following investment arbitrations and also investors doing a business with corrupt governments in the world. Although the *Metal-Tech* Tribunal was widely credited for sua sponte use of its investigation powers in corruption-alleged case, however, in the substantive matters it also has a significant role for the development of ICSID jurisprudence. Therefore, it has a potential to stand as a 'precedent' for the future arbitration on corruption allegations.

A. Introduction

Almost 16 years before, when Alejandro Posadas informed us on '[c]orruption issues under investment disciplines are still very much unexplored', he was

completely right.[1] Today, the scenario has totally changed. Corruption in investment arbitration has attracted the attention of many in these recent years.[2] However, a dearth of elaborate investment arbitration jurisprudence has led to many open-ended questions. For instance, to what extend should the host country share the responsibility with the corrupt investor? Does it lead to limitation in calculation of compensation? Which phase of Tribunal procedure is much fairer for dealing with corruption? To whom should the burden of proof be laid? If the Tribunal brought the corruption issue to the later stage of merits, how should we apply fair and equitable treatment to the corruption allegations?[3] These are only some of the unresolved issues. Therefore, a hot debate continues on how to deal with these issues in investment arbitration.[4] Although scholarship on this theme increased markedly in the last several years, it has rather limited effect than real investment Tribunal award.

Having said that, for the first time in 2006, the contract based-investment Tribunal, *World Duty Free v. Kenya*（*World Duty*）[5] , announced its decision and rejected all the investor's claims because of corruption. This very controversial decision triggered both praise and severe criticism towards investment

1） A. Posadas, 'Combating Corruption under International Law', 10 *Duke Journal of Comparative and International Law*（1999）345, 412-413.

2） See further H. Raeschke-Kessler, D. Gottwald, 'Corruption in Foreign Investment-Contracts and Dispute Settlement between Investors, States, and Agents', 9 *The Journal of World Investment & Trade*（2008）5; F. Haugeneder, 'Corruption in Investor-State Arbitration', 10 *The Journal of World Investment & Trade*（2009）323; M.A.Losco, 'Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction', 63 *Duke Law Journal*（2013）1201; M.A. Raouf, 'How Should International Arbitrators Tackle Corruption Issues?', 24 *ICSID Review : Foreign Investment Law Journal*（2009）116; R.Z.Torres-Fowler, 'Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration', 52 *Virginia Journal of International Law*（2011）995; J.W. Yackee, 'Investment Treaties and Investor Corruption: An Emerging Defense for Host States', 52 *Virginia Journal of International Law*（2011）723.

3） Posadas, *supra* note 1, 413.

4） Recent Transnational Dispute Management Journal's special issue also illuminates the importance of the topic. See, Corruption and Arbitration, 3 *Transnational Dispute Management*（2013）.
http://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=48

5） *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006.

arbitration.[6] All stakeholders of this field impatiently begun to await the next stage: the decision of investment-treaty-arbitral-panel on corruption. Not so long after, the International Centre for Settlement of Investment Disputes（ICSID）arbitration Tribunal recently delivered a critical judgment. In *Metal-Tech Ltd. v. The Republic of Uzbekistan*（*Metal-Tech*）, *the first investment treaty arbitration Tribunal* decided not to establish its jurisdiction over an investor claim in mining sector because of corruption.[7] The dispute erupted after the termination of a raw material supply contract and cancellation of an exclusive right to export refined molybdenum oxide. Uzbekistan won a favorable decision at the jurisdictional stage by persuading the Tribunal that the investment did not qualify as a 'legal investment'. This is the second published award after *World Duty*, in which the investment arbitration dealt with the allegation of corruption as the decisive legal matter.[8]

In this article, first, I present previous Tribunal decisions and conflicting

6） For critics of World Duty, see A. Llamzon, 'The Control of Corruption Through International Investment Arbitration: Potential and Limitations', *Proceedings of the Annual Meeting of American Society of International Law*（2008）210-211; K.Lim, 'Upholding Corrupt Investors' Claims Against Complicit or Compliant Host States – Where Angels Should *Not* Fear to Tread' in Karl P. Sauvant（ed）, *Yearbook on International Investment Law & Policy 2011-2012*（2013）601, 613-618. In contrast, see for the researchers and practitioners who praised or at least show sympathy to the way Tribunal took in the World Duty, Yackee, *supra* note 2, 729-734; R. Moloo, C. B. Lamm & H. T. Pham 'Fraud and Corruption in International Arbitration', in M.Á. Fernández-Ballesteros, D. Arias（eds）, *Liber Amicorum Bernardo Cremades*（2010）730.

7） *Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013. It is an interesting coincidence that cases against Uzbekistan in investment arbitration are increasingly playing a greater role for clarification of vague notions of Bilateral Investment Treaties. See, I. Musurmanov, 'The Implications of Romak v Uzbekistan for Defining the Concept of Investment', 20 *Australian International Law Journal*（2013）105.

8） Even though only two years have passed since the award, *Metal-Tech* decision attracted wide attention of scholarly work. See, C.B.Lamm, B. K. Greenwald, & K. M. Young, 'From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption', 29 *ICSID Review: Foreign Investment Law Journal*（2014）328; M.A.Losco, 'Charting a New Course: Metal-Tech v. Uzbekistan and the Treatment of Corruption in Investment Arbitration', 64 *Duke Law Journal Online*（2014）37; C. Rose, 'Circumstantial Evidence, Adverse Influences, and Findings of Corruption: Metal-Tech Ltd. v. The Republic of Uzbekistan', 15 *The Journal of World Investment & Trade*（2014）747; T. Kendra, A. Bonini, 'Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus?', 31 *Journal of International Arbitration*（2014）439.

arguments on corruption in arbitration until *Metal-Tech* decision（B）. Next, I shortly introduce the factual background and main findings of *Metal-Tech* Tribunal（C）respectively. The following fourth section analyses conflicting arguments on various *substantive and procedural issues* which were raised in *Metal-Tech* decision and try to evaluate their potential implications for the future developments in investment arbitrations（D）. Lastly, I conclude by praising arbitrators and also counsels of host country for their sophisticated and appropriate approach to the case; however, I also offer the warning that one should be careful in generalizing the outcome of the case for all corruption tainted cases（E）.

B. Corruption in Investment Arbitration until *Metal-Tech*（2013）

Corruption, which refers to the actions of person who betrays his or her role as a public servant for his or her own interest,[9] is still a reality in the many parts of the world. It is difficult to find any country however which has not outlawed corruption through its criminal legislation.[10] International law also now owns a whole framework of anti-corruption treaties and conventions in the world.[11] As a moral hazard, corruption is also condemned by major religions.[12] With the development of investment arbitration, corruption issues also start to appear in the

9） R. Klitgaard, *Controlling Corruption*（1988）22.

10） Many developed countries also extended the application of their anti-corruption legislation to the illegal acts of their citizens abroad. See, for a review of Canada, US and UK legislation respectively, N. Campbell, E. Preston, & J. O'Hara, Foreign Corrupt Practices-The Growth and Limitations of Canadian Enforcement Activity', 23 *Indiana International & Comparative Law Review*（2013）35; B. W. Bean, E. H. MacGuidwin, 'Unscrewing the Inscrutable: The UK Bribery Act 2010', 23 *Indiana International & Comparative Law Review*（2012）10; B. Earle, A. Cava, 'When Is a Bribe Not a Bribe: A Re-Examination of the FCPA in Light of Business Reality' 23 *Indiana International & Comparative Law Review*（2013）111.

11） See, J. Wouters, C.Ryngaert, & A. S. Cloots, 'The Fight Against Corruption in International Law', 94 *Leuven Centre for Global Governance Studies Working Paper*（2012）.

12） M. A. Arafa,'Corruption and Bribery in Islamic Law: Are Islamic Ideals Being Met in Practice?' 18 *Annual Survey of International & Comparative Law*（2012）171, 203-204（Arguing that one of the biggest world religions, Islam, also condemns corruption. It was narrated by Abdullah Ibn 'Amr Ibn al-'as that "The Apostle of Allah（PBUH）cursed the one who offers bribe as well as the one who accepts the bribe." Not surprisingly, not only the briber and the bribed, but also the mediator between the briber and the bribed was also condemned.）

jurisprudence of Tribunals. Although, municipal legal systems have much more sophisticated system of regulation on corruption, investment arbitrations that find their judicial basis from Bilateral Investment Treaties（BITs）apparently lack such equivalents. This is because the main objective of current BITs that were modeled according to 1980s western BIT models, is to protect and promote foreign investment,[13] it is not shocking if one finds very few BITs that regulate corruption and bribery.[14] Nonetheless, as I explain later, investment arbitration has already had to deal with corrupt practices of investors.

Let us now have a look to the previous jurisprudence on this matter. The majority of investment arbitrations have considered corruption or bribery against so-called transnational（international）public policy.[15] In his classic award, judge Lagergren treated corruption as an international evil and contrary to international public policy.[16] This is because agreement was contemplated in order to bribe Argentinian officials. He noted as follows:

> ［T］here exists a general principle of law recognized by civilized 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 the courts or arbitrators. . . . such corruption is an international evil; it is

13） J.W.Salacuse, *The Law of Investment Treaties*（2010）1.

14） See, one of such rare provision in Article 9 of *Agreement Between Japan and The Republic of Uzbekistan for the Liberalization, Promotion and Protection of Investment*, 15 August 2008:
Each Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations.

15） It is arguably preferable to use transnational public policy, which is common to all nations. See, M. Hunter, G. C. E. Silva, 'Transnational Public Policy and its Application in Investment Arbitrations' 4 *The Journal of World Investment*（2003）367, 367. Those authors distinguish international public policy from transnational one as following: 'The international public policy of one country may not be the same as the international public policy of another country. By contrast, the concept of "transnational public policy" involves the identification of principles that are commonly recognized by political and legal systems around the world'. See also, D. Tamada, 'Host States as Claimants-Corruption Allegations', in Sh. Lalani, R. P. Lazo（eds）, *The Role of the State in Investor-State Arbitration*（2015）117（claiming the preference for 'transnational public policy' for the reason of 'based on the mixture of private and public law, ' it may 'properly reflect and correspond to the hybrid character of investor-State arbitration'）

16） *ICC Award No. 1110 of 1963 by Gunnar Lagergren*, Arb.Int'l 1994, at 282 et seq.（hereafter referred to as *Lagergren*）

> contrary to the good morals and to an international public policy common to the community of nations.[17)]

In the *World Duty* award, the Tribunal determined that the investor's payment to the president of Kenya was a bribe.[18)] The Tribunal decided that the Claimant is 'not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of *ordre public international and public policy* under the contract's applicable laws.'[19)] In another place, the Tribunal also noted that,

> [I]n 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.[20)]

More support for *Lagergren* and *World Duty* also came from the *Niko v. Bangladesh*（*Niko*）decision.[21)]

> It is widely accepted that the prohibition of bribery is of such importance for the international legal order that it forms part of what has been described as international or transnational public policy.[22)]

It is noteworthy to observe the Tribunals' attention given to the differentiation between international public policy that is susceptible to change according to each country's legal order and transnational public policy that is 'likely to be narrower in scope, but more uniform' than previous one.[23)] Until 2013, the *World Duty* was only investment arbitration case where a Tribunal considered corruption for the rejection of remedy as a decisive factor.[24)] In the majority of cases where

17）*Ibid*., 291.
18）*World Duty, supra* note 5,para.188.
19）*Ibid*.（emphasis added）
20）*Ibid*, para.157.（emphasis added）
21）*Niko Resources Ltd v. Bangladesh, Bapex and Petrobangla*, ICSID Case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, 19 August 2013, paras.431-433.
22）*Ibid*., para. 431.
23）Martin and Silva, *supra* note 15, 368.
24）In this regard, commercial arbitration has much wealthy jurisprudence on corruption. See, the detailed appendix on international arbitral awards concerning corruption, C. Rose,

corruption allegations appeared, either the respondent States or claimant investors did not succeed in proving any reliable evidence to establish bribery,[25] or the Tribunal found the bribery was not decisive in gaining the contract.[26] One should be careful here: although *World Duty* was decided under ICSID arbitration, its jurisdictional power came not from BIT, but a concession agreement. Therefore, *World Duty* has its own limits for wider implications to treaty-based investment arbitration. Apart from this, there are some other investment arbitration cases where Tribunals rejected investors' claim because of illegal activity or illegality of investment. I will raise them in the subsequent sections.

If someone looks carefully for scholarship on this point, it is easy to find harsh criticism directed towards development of jurisprudence in such a direction. For instance, Torres-Fowler argues that,

> ［T］he endorsement of such a strict approach to the corruption defense represents *World Duty Free's* greatest shortcoming because it ultimately sanctions the unjust enrichment of an equally culpable party. Even Judge Lagergren, in his 1963 decision noted "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."（Torres-Fowler quotes）The Tribunal *World Duty Free* regrettably ignored the nuances of this concept, opting instead to send a clear message to investors that investments based

'Questioning the Role of International Arbitration in the Fight against Corruption', *Leiden Law School Research Paper*（2013）1, 53-62.

25） See, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No ARB/07/14, Award, 22 June 2010, paras.423-424（hereafter referred to as *Liman Caspian*）（Claimants could not meet the burden of proof）; *EDF*（*Services*）*Ltd v. Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para.231（hereafter referred to as *EDF Services*）（'the Tribunal concluded that Claimant has failed to satisfy the required level of proof of the alleged bribe solicitation by government officials'）; *TSA Spectrum de Argentina SA v. Argentine Republic*, ICSID Case No ARB/05/5, Award, 19 December 2008, para.173（hereafter referred to as *TSA Spectrum*）（Tribunal rejected finding corruption since, Argentine had not submit clear and convincing proof.）

26） See, *Niko, supra* note 21; Other than those cases, in *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8, Award, 17 January 2007, Siemens could gain a US$ 217 million award, plus US$20 million performance bond. However, in 2008, after the award, evidence of corruption emerged during the course of domestic proceedings in Germany and the US. Siemens waived rights to the 2007 arbitral award, and both parties asked ICSID to discontinue annulment and revision proceedings. See, for the detailed story of the Siemens affair, Yackee, *supra* note 2, 723-726.

upon offers of illegal payments to public officials will not receive the protections other investors are generally afforded at the risk of creating potentially creating severe consequences for investors, ICSID and overall the Global Antibribery Regime.[27)]

Therefore, *World Duty's* approach was criticized as an 'all-or-nothing' approach[28)] or 'zero-tolerance approach'[29)] in deciding the corruption alleged cases. In contrast to these, Yakee favors dealing with investor misbehavior in the jurisdiction phase by claiming that '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 offer or moderate the legal consequences of the investor's misbehavior.'[30)] Such contrasting positions also sparked interesting discussion on online forums of international law scholars such as 'Opinio Juris' between several well-known scholars in the field.[31)] With all this interesting and tense debate in mind came the ICSID Tribunal's decision on the *Metal-Tech* case.

C. Factual Background

The facts of *Metal-Tech* case are as follows. At the end of the 1990s, an Israeli company, Metal-Tech（Claimant）entered several contracts and formed a joint venture subsequently named 'Uzmetal' with two State-owned companies in Uzbekistan: molybdenum mining company Almalik Mining Metallurgy Combinate（AGMK）and molybdenum producer and exporter Uzbek Refractory

27） Torres-Fowler, *supra* note 2, 1017.
28） Haugeneder, *supra* note 2, 330.
29） Liamzon argues that 'If anti-corruption is used to trump all other considerations, *zero tolerance scrutiny* may potentially invalidate large numbers of foreign investments, and thus upset the machinery of investor protection to the point of breakdown, which would ultimately do more harm than good to host states themselves. Also, this would likely result in unfinished or mal-maintained projects and act against the interests of host state`s citizens.' See, Llamzon, *supra* note 6, 210-211; Raouf, *supra* note 2, 131-134.
30） Yackee, *supra* note 2, 744.
31） See, J.W.Yackee, '*VJIL Symposium: Introducing "Investment Treaties and Investor Corruption*"', http://opiniojuris.org/2012/05/31/vjil-symposium-introducing-investment-treaties-and-investor-corruption/

and Resistant Metals Integrated Plant（UzKTJM）.[32] Outdated technology and equipment of both State-owned companies were the main reasons for the forming of the new JV Uzmetal.[33] According to the contract, the Claimant had to contribute with its technology, know-how and access to international markets, as well as part of the financing needed for a new plant.[34] Metal-Tech, UzKTJM and AGMK held 50%, 30% and 20% of the shares, respectively.[35]

A dispute erupted in 2006, allegedly by the initiation of criminal proceedings against the Claimant on the ground that officials of JV Uzmetal had abused their authority and caused harm to Uzbekistan.[36] A resolution by the cabinet ministers abrogated JV Uzmetal's rights to purchase raw materials and the Claimant lost its exclusive right to export refined molybdenum oxide.[37] Two Uzbek shareholders then initiated proceedings against the Claimant in the domestic economic court and the court upheld bankruptcy.[38] Eventually, after the completion of liquidation proceedings, on 30 December 2009, JV Uzmetal was delisted from the State registry of legal entities.[39] After this, based on BIT between Israel-Uzbekistan, on 26 January 2010, Metal-Tech submitted a Request for Arbitration to the ICSID arguing for a breach of several substantive rights of investor according to the Treaty and required the payment of US$ 174 million as compensation.[40]

As a matter of fact, at the very beginning of the investment activity, the investor entered several consultancy（or agency）contracts with Uzbek citizens.[41] During one of the hearings in the Tribunal, it was revealed that three Uzbek individuals primarily engaged in so called 'lobbyist activity' and they had been compensated with payments totaling almost US$ 4 million through connected offshore companies.[42] The total payments made by the Claimant to the consultants

32） Metal-Tech, *supra* note 7, para.7
33） *Ibid*., paras.8-10
34） *Ibid*.
35） *Ibid*., para.15.
36） *Ibid*., para.37.
37） *Ibid*., para.38.
38） *Ibid*., para.45.
39） *Ibid*., paras.52-53.
40） *Ibid*., para.108.
41） *Ibid*., para.86.
42） *Ibid*.,para.202.

exceeded its initial cash contribution to the venture and amounted to nearly 20% of the entire project cost.[43] Payments were done in a non-transparent manner using offshore bank accounts,[44] the services of consultants lacked proof,[45] consultants lacked any professional qualification to perform such services,[46] and consultants had strong connections with high profiles in Uzbekistan who were either in charge of monitoring and overseeing the Claimant's investment or human resources for ministries.[47] Due to the conclusion of such dubious and sham contracts[48] during the establishment period, the respondent argued for the illegality of the Claimant's investment, with these arguments occupying the main attention of the Tribunal which ultimately affected the entire proceedings of the Tribunal and its decision on the award.

D. Implications of *Metal-Tech* for Investment Arbitration

How can we measure the impact of *Metal-Tech* to the future arbitral awards? To what extend did it contribute to the solution of mind-numbing questions, which were listed in the opening of present paper? And does it serve for the strengthening of the ICSID system or the collapse of it?[49] The author will evaluate these questions using detailed legal arguments. First of all, I will address the standard of proof in the *Metal-Tech* case（Ⅰ）. I will then move on to a detailed analysis of 'in accordance' clause of BITs and its application to the *Metal-Tech* dispute（Ⅱ）. Later on, an additional aspects of 'in accordance' clause（legality requirement）will be explored（Ⅲ and Ⅳ）. Finally, in sub-section Ⅴ the

43）*Ibid*., para.199.
44）*Ibid*.,para.202. In fact, most of the consulting contracts between parties prohibit disclosure of their contents.
45）*Ibid*., paras.204, 207.
46）*Ibid*., para.208.
47）*Ibid*., paras.225-226. For instance, the Claimant admitted that, because one of the consultants 'was the brother of the Prime Minister, one of the "main figures" ' in Uzbekistan at that time, he had a ' "very good network" and a "very good connection with different Government bodies" '.
48）*Ibid*., paras.216, 218.
49）The impact to the future of ICSID system has already been discussed and a warning issued. See, Torres-Fowler, *supra* note 2.

significance and the potential impact of *Metal-Tech* award will be examined.

I. Agency Agreements and Standard of Proof

One of the central questions of *Metal-Tech* was whether the often-used agency agreements by investors in order to lobby the government of host State are illegal in that case? In other words, could the Tribunal rely on circumstantial evidence to proof the corruption? Once the existence of agency agreement became clear at the hearing process, surprisingly taking a more active approach, the Tribunal asked Claimants to clarify this type of transaction. The legitimacy of agency contract was such important that the main body of award almost dedicated for its analysis.

During the arbitral hearing process, several elements in one of the consultancy contracts（the December 2000 Contract）attracted the Tribunal's attention:

> （i）First, neither Mr. Sultanov nor Mr. Mikhailov who allegedly required the Claimant to enter into the contract with MPC（consulting company）was qualified to fulfill most of the "obligations" listed in the contract. … （ii）Second, under the December 2000 Contract, Metal-Tech was to make periodic payments to MPC. These payments were not contingent on the fulfillment of the obligations listed in the contract. … （iii）Third, the Claimant was unable to show that any services were actually rendered in return for the payments.'[50)]

In the end, because of a breach of Uzbekistan's anti-bribery laws, the Tribunal found *Metal-Tech's* actions illegal, as follows:

> For all these reasons, the Tribunal comes to the conclusion that the December 2000 Contract cannot be regarded as a genuine agreement and must be deemed a sham designed to conceal the true nature of the relationship among the parties to it.[51)]

Moreover, regarding the pressing question of standard of evidence, the Tribunal decided to determine

> On the basis of the evidence before it whether corruption has been

50） Metal-Tech, *supra* note 7, para.216.
51） *Ibid*., para.218.

established with reasonable certainty. In this context, it notes that corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence.[52]

This approach on standard of proof can be considered a U-turn, since previous Tribunals commonly adopted a 'high standard of proof of corruption'[53] or a 'clear and convincing evidence'[54] standard.[55] Furthermore, investors are known for often using such kind of agency or intermediary agreements for promoting their business in overseas.[56] How should we perceive the agency agreements between investor and his local agent in the light of *Metal-Tech* award? By putting this question, I felt a necessity to pay attention to the content of corruption.

Corruption has many types and one can observe a strong conceptual diversity regarding it.[57] The most relevant type of corruption for our topic is so called 'influence peddling'.[58] It 'is the offering, giving, or promising of an undue advantage to a person like experts or consultants, who sell their influence to the government'.[59] Universal consensus, with minor exceptions, seems established

52）*Ibid*., para.243.

53）EDF Services, *supra* note 25,para.221; The same approach can be observed in *Niko, supra* note 21, para.424 and *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010（hereafter referred to as *Hamester*）para.134.

54）*Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009（hereafter referred to as *George Siag*）, paras.325-6.

55）However, there are some other cases, which decided not to require higher standard of proof. See, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007（hereafter referred to as *Tokios Tokelés*）, para.124; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011（hereafter referred to as *Libananco Holdings*）, para.125; *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013（hereafter referred to as *Rompetrol Group*）, para.182; Haugeneder and Liebscher also notes that there is no uniform formula on the application of standard of proof. See, F. Haugeneder, C.Liebscher, 'Corruption and Investment Arbitration: Substantive Standards of Proof' *Austrian Arbitration Yearbook*（2009）539, 549.

56）M.Scherer, 'Circumstantial Evidence in Corruption Cases Before International Artibral Tribunals' 2 *International Arbitration Law Review*（2002）29, 29.

57）B. Denolf, 'The Impact of Corruption On Foreign Direct Investment' 9 *The Journal of World Investment & Trade*（2008）249, 253.

58）D. Bishop, 'Toward a More Flexible Approach to the International Legal Consequences of Corruption', 25 *ICSID Review: Foreign Investment Law Journal*（2010）63, 64.

59）Raeschke-Kessler, Gottwald, *supra* note 2, 7.

that influence peddling is a criminal offence.[60] In foreign investment projects that relates to the exploitation of natural resource,[61] 'it is a very frequent phenomenon'[62] and sham consultancy contracts are one of the representative forms of this.[63] Why are investors so keen to use intermediary agents? One can find the passage from Raeschke-Kessler and Gottwald's paper as the best illustration of this situation:

> Investors hardly ever commit illicit activities themselves. In the majority of the cases, they contract intermediaries, often agents or consultants, to act on their behalf. The advantages for investor are obvious: he does not have to lose face to anyone, and leaves "dirty work" to others. In addition, the agent or consultant often has his seat in the host country or is even its national, so he is culturally and geographically closer to the officials of the host countries and knows more about their culture, including the habits governing corrupt practices.[64]

It should be stressed that agency agreements are very new topic for investment treaty arbitration. To my knowledge, there was no previous ICSID case which dealt with this type of contract as a central question.[65] Interestingly, International Chamber of Commerce（ICC）jurisprudence supports the invalidity of the agency agreement whose aim is to bribe bureaucrats of host countries.[66] One of the first reported international arbitral award that addressed corruption claims, an agency

60） Even though the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions does not cover influence peddling as a corrupt act, Art.18 of the UN Convention against Corruption and Art.12 of the Criminal Law Convention on Bribery of the Council of Europe have addressed it. In contrast, Bishop and Scherer respectively note that influence peddling is not always classified as corruption and it is not universally condemned. See, Bishop, *supra* note 58, 64; Scherer, *supra* note 56, 30.

61） Raeschke-Kessler, Gottwald, *supra* note 2,12; Denolf, *supra* note 57, 259.

62） Raeschke-Kessler, Gottwald, 7.

63） *Ibid*., 12; Raouf, *supra* note 2,119.

64） Raeschke-Kessler, Gottwald, *supra* note 2, 12.

65） Even though influence peddling was not the central problem, in its obiter dictum *Niko* Tribunal explicitly condemned it by saying that: 'Courts in a number of countries and arbitral tribunals have found that *contracts having influence peddling* or bribery as their objectives or motives were void or unenforceable. Legal writers have supported these conclusions.' *Niko*, *supra* note 21, para.436（citations are omitted）.

66） Raeschke-Kessler, Gottwald, *supra* note 2, 28.

agreement was concluded between a politically connected Argentine engineer（claimant）and a company from the UK（respondent）to sell electrical equipment to the Argentinian government.[67] When the respondent refused to pay a significant commission after £28 million worth of sold product, dispute erupted. The sole arbitrator, Judge Lagergren, declined jurisdiction while stating that 'the agreement between the parties contemplated the bribing of Argentine officials for the purpose of obtaining the hoped-for business.'[68] Lagergren's judgment then played a significant role of precedent for its followers to find contracts procured though corruption unenforceable.[69]

In the next *ICC No. 8891*, the circumstantial evidences, such as a short performance of the consultancy agreement, the inability of the consultant to produce evidence of their activity, and massive commission charged by the consultant（18.5% of the value of the contract）led the arbitral Tribunal to conclude that agreement for consultancy which was had between the claimant and the defendant was intended to bribe officials.[70] Similarly, in the next *ICC Case No.7047*, parties entered a consultancy contract concerning the sale of tanks for an amount of nearly 500 million USD.[71] 15% of the whole value of the contract was assigned as a commission, something the Tribunal rightly qualified as 'disproportionally high and unusual'.[72] As such, commercial arbitration jurisprudence also supports the reasoning of *Metal-Tech* Tribunal regarding sham contracts. For example, *ICC Case No. 8891* has many identical similarities with *Metal-Tech*, such as the extraordinary high payment for the consultant, the impossibility for the agent to producing evidence of his activity, and the existence of purpose to bribing officials.

To sum up, against the main trend in *investment* arbitral jurisprudence, but in line with commercial arbitration, *Metal-Tech* Tribunal decided to find corrupt conduct of the foreign investor under *reasonable certainty* while relying on a

67）*Lagergren, supra* note 16.
68）*Ibid*., Opinion, para.17.
69）Torres-Fowler, *supra* note 2, 1011-1012.
70）ICC Case No.8891 JDI 1076（2000）（hereafter referred to as *ICC Case No.8891*）
71）*Westacre*（*UK*）*v. Jugoimport*（*Yugoslavia*）, ICC Case No.7047, Asa Bull.301（1995）
72）However, Tribunal didn't approve the bribery defense as respondent raised it only late during the oral hearing. *Ibid*., 343.

circumstantial evidence.[73] As Rose rightly points out, this also demonstrates 'a shift in the willingness of ICSID tribunals to play a more active role in seeking evidence that may ultimately result in the tribunal's lack of jurisdiction over the dispute.'[74] In front of various red flags, the 'arbitrator's common sense and curiosity' definitely played an important role.[75] While the *Metal-Tech* Tribunal should be credited for its finding based on series of red flag's using its discretion power, still, whether future Tribunals adopt its methodology on standard of proof is not yet clear.[76]

II. 'Implemented in Accordance with the Laws and Regulations' Clause

Many BITs have 'implemented in accordance with the laws and regulations'（legality）clause inside definitions of investment.[77] These clauses require investment conduct compliance with national legal order. Put another way, they still hold '*renvoi* to national law' and a failure to comply with it may 'have an international legal effect'.[78] After conducting a survey of jurisprudence in 2009, Llamzon concluded that 'it does appear that arbitrators continue to sidestep the corruption issue whenever possible, and are more comfortable deciding cases on

73） See, Kendra, Bonini, *supra* note 8, 447（noting that 'Metal-Tech arbitration signifies a noteworthy development on the issue of Tribunals making their own investigations, as neither party had actually raised corruption claims and the Tribunal decided to inquire about it on its own initiative'）; Losco, *supra* note 8, 38（depicting Metal-Tech award as 'a departure from prior ICSID jurisprudence '）.

74） See, Rose, *supra* note 8, 753. The same opinion can also be found from Losco, *supra* note 8, 45.

75） Scherer, *supra* note 56, 36.

76） Regarding this point, Lamm, Greenwald and Young argues that Metal-Tech 'established a precedent for other Tribunals to rely on red flags and other circumstantial evidence to find corruption.' Lamm, Greenwald & Young, *supra* note 8, 14. It is important to note that, in the Metal-Tech case, the host country was represented by the authors of this article, Lamm, Greenwald and Young, who are the attorneys in the International Arbitration Group at White & Case LLP; See for the criticism, Losco, *supra* note 8, 48-52. Also, for the criticism towards improper reading of the Uzbek criminal code by the Tribunal, see Rose, *supra* note 8, 753-756.

77） The author uses 'in accordance' clause and legality clause interchangeably in this article.

78） *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August, 2007（hereafter referred to as *Fraport*）, para.394.（emphasis added）

grounds independent of corruption.'[79] Admittedly, the cases discussed below, including *Metal-Tech*, demonstrate and re-confirm that arbitrators can fold bribes within the legality requirement of most BITs. To date, compared to corruption issues, the 'legality' clause mostly addressed to the illegality and fraud cases.

1. Legality Clause and Jurisdiction

As can be easily seen throughout the award, the Claimant tried hard to convince arbitrators to find their jurisdiction on this current case in order to move to the liability phase.[80] On the other hand, the Respondent argued that 'since the Claimant has made and operated its investment in violation of Uzbek laws', it might not invoke the Israel-Uzbekistan BIT's 'protections in respect of its investment'.[81] Therefore, the *Metal-Tech* Tribunal faced a fundamental legal problem over whether illegality is a matter affecting the jurisdiction of treaty-based arbitral Tribunals, requiring them to decline jurisdiction in case illegality is found, or whether illegality is a matter only affecting the merits of a dispute.[82]

First of all, the majority of investment Tribunals interpreted these clauses 'as depriving an investment made in breach of the domestic law of the host State from investment treaty protection'.[83] Decision on Jurisdiction in *Salini v. Morocco*（*Salini*）, the first decision that mentioned this feature, stated as follows:

> ［i］n focusing on "*the categories of invested assets（. . .）in accordance with the laws and regulations of the aforementioned party*," ［the relevant clause］

79）Llamzon, *supra* note 6, 211-212.
80）*Metal-Tech, supra* note 7, para.181.
81）*Ibid*., para.110.
82）The problem of illegality, not only corruption, but with wider scope, such as fraud attracted attentions of many on this issue. See, S.W.Schill, 'Illegal Investments in Investment Treaty Arbitration', 11 *The Law and Practice of International Courts and Tribunals*（2012）281; R.Moloo, A.Khachaturian, 'The Compliance with the Law Requirement in International Investment Law', 34 *Fordham International Law Journal*（2012）1474; T.Obersteiner, ' "In Accordance with Domestic Law" Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors' 31 *Journal of International Arbitration*（2014）, 265; Z.Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' 29 *ICSID Review : Foreign Investment Law Journal*（2014）155.
83）Schill, 284.

refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.[84)]

Tribunals such as *Tokios Tokelés,*[85)] *Bayindir v. Pakistan（Bayindir）*,[86)] *Saipem v. Bangladesh（Saipem）*,[87)] *Inceysa v. El Salvador（Inceysa）*[88)] adopted the same obiter from the *Salini* decision. However, as mentioned by the *David Minotte v. Poland（David Minotte）*, Tribunals were divided in treating legality clauses in different stages of Tribunal: 'while some tribunals have treated arguments based on fraud, etc, as going to jurisdiction or admissibility, while others have treated them as arguments going to the merits'.[89)] In the first group of cases, for example, *Phoenix v. Czech（Phoenix）*, considered the issue in the jurisdiction and admissibility stage.[90)] Also, *Saba Fakes v. Turkey（Saba Fakes）* and the *Inceysa* Tribunals took a similar approach and held that the occurrence of illegality was the matter of host State's consent under a BIT（a question of jurisdiction *ratione voluntatis*）.[91)]

The second group of rather few Tribunals considered it as a matter of merits. For example, the *Berschader v. Russia（Berschader）* tribunal believed it was inappropriate to consider legality issue in jurisdiction proceedings. The Tribunal held the view that 'the lawfulness of the investments relied upon by the Claimants

84）*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, para.46.（emphasis added）

85）*Tokios Tokelés, supra* note 55, Decision on Jurisdiction, 29 April 2004, para.84

86）*Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, paras.108-109.

87）*Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation of Provisional Measures, 21 March 2007, para.79, note 11.

88）*Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para.145.

89）*David Minnotte & Robert Lewis v. Republic of Poland*, ICSID Case No. ARB（AF）/10/1, Award, 16 May 2014, para.131. See also, *Abaclat and others*（*Case formerly known as Giovanna a Beccara and others*）*v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para.648.

90）*Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para.64.

91）*Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para.121; *Inceysa, supra* note 86, paras.160-161.

is a not an issue affecting the jurisdiction of the Tribunal, but rather a substantive issue pertaining to the merits of the case. It would, therefore, be inappropriate for the Tribunal to consider this issue at this stage in the proceedings.'[92] In *Vanessa v. Venezuela（Vanessa）*, the Tribunal decided to join the issue to the merits, since 'justice is better served' rather than to bifurcate, thus also taking a similar approach.[93] Similarly, in *David Minotte*, the Tribunal decided to reject the Respondent's argument. This is because the Respondent's case was in this respect based essentially upon the alleged negligence of the Claimants.[94]

So, what was the *Metal-Tech* tribunal's approach to this question? The Tribunal reasoned as follows:

> The Tribunal decided to join the Respondent's objections to jurisdiction and admissibility to the merits on the ground that they were closely related to the merits. At the same time, it bifurcated the proceedings between jurisdiction and liability, on the one hand, and quantum on the other, because damage quantification（if applicable）could be easily heard in isolation from the rest of the case.[95]

Having said so, during the process of arbitration, corruption allegations revealed unexpectedly and subsequently it was also proved by circumstantial evidences.

Uzbekistan's consent to ICSID arbitration, as expressed in Article 8（1）of the

92）*Vladimir Berschader and Moïse Berschander v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006, para.111.

93）*Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB（AF）04/6, Decision on Jurisdiction, 22 August 2008, para.3.3.4.

94）See, *David Minnotte, supra* note 89, paras.135-136. The following facts also played a major role in denying the jurisdiction claims of the Respondent: no evidence was put forward by Poland regarding deliberate fraud by the Claimants in the first stages of the investment; also, the Respondent had many dealings with investor before the initiation of this arbitration and showed no concern that the investment had been improperly made. Moreover, it was not investment arbitrations, but other Tribunals too, which adopted this approach where necessary. See, *Prince von Pless Administration*, PCIJ Series A/B, No.52（1933）14（'Whereas the Court may order the joinder of preliminary objections to the merits whenever the interest of the good administration of Justice require it.'）; Also see, *Barcelona Traction, Light and Power Company, Limited*（New Application: 1962）（Belgium v. Spain）, ICJ, Judgment of February 5, 1970.（"the…proceedings on the merits …will place the Court in a better position to adjudicate with a full knowledge of the facts " and because". The question raised by…these objections and those arising on the merits are too intimately related and too closely interconnected for the Court to be able to adjudicate upon the former without prejudging the latter".）

95）*Metal-Tech, supra* note 7, para.117.

> BIT, is restricted to disputes "concerning an investment." Article 1（1）of the BIT defines investments to mean only investments implemented in compliance with local law. Accordingly, the present dispute does not come within the reach of Article 8（1）and is not covered by Uzbekistan's consent. This means that this dispute does not meet the consent requirement set in Article 25（1）of the ICSID Convention. Accordingly, failing consent by the host state under the BIT and the ICSID Convention, this Tribunal lacks jurisdiction over this dispute.[96)]

As a result, the Tribunal found it lacked jurisdiction and could not proceed to the liability issue.[97)] However, a closer reading of decision reveals to us that this is no more than a discussion of jurisdiction issues under the camouflaged umbrella of merits phase, therefore, it should be distinguished from handling corruption issue with illicit treatment of host State in merits phase. From this perspective, the *Metal-Tech* award was criticized as a 'blunt remedy'.[98)] One of reason why it is a 'blunt remedy' is that dismissing every kind of corruption in the jurisdiction phase may decrease foreign investment attractiveness of the host country（the so called 'reputational cost'）and eventually harm its economic development.[99)] This argument is quite persuasive in the time of greater transparency, since the majority of investment awards are now accessible and they give detailed information about the host State's investment environment.[100)] The Tribunals' already enough experience to deal with investor conduct in the merits of the case also further supports the criticism against *Metal-Tech*.[101)] Further, by reversing the case due to legality issue at the jurisdiction phase only, Tribunals may unnecessarily avoid from investigating intimately interconnected matters in merits that helps to

96） *Ibid*., para.373.
97） *Ibid*.,paras.372-373.
98） Losco, *supra* note 8, 48.
99） Tamada, *supra* note 15, 118.
100）Internet homepages, such as http://www.italaw.com/, http://www.iareporter.com/, http://oxia.ouplaw.com/, routinely report on the latest awards, decisions and developments on investment arbitration to the wider attention and further contributing to the transparency of the system.
101）See, P. Muchlinski, '"Caveat Investor"? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard', 55 *International and Comparative Law Quarterly*（2006）527.

discover partial culpability of the host State.[102)]

From this perspective, we have to acknowledge the limits of the *Metal-Tech* decision. This is because, with the *Metal-Tech* approach, the problem remains unresolved, since it lets the host country to forfeiture of the assets acquired in the deal leading to that violation without any responsibility.[103)] Therefore, the problem is not only whether corruption, fraud and illegality is bad, it is rather how to deal with post-illegal investment transaction more fairly and not to let one party unjustly enrich due to the cost of another party's illegal act. The dissenting opinion of arbitrator Bernardo Cremades in *Fraport* echoes this frustration in the investor community. While condemning the illicit behavior of foreign investors, he also argued the equal responsibility of the host country:

> If the legality of the Claimant's conduct is a jurisdictional issue, and the legality of the Respondent's conduct a merits issue, then the Respondent Host State is placed in a powerful position. In the Biblical phrase, 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. Such an approach does not respect fundamental principles of procedure.[104)]

His solution was as follows:

> As a matter of principle, therefore, the legality of the investor's conduct is a merits issue. The inquiry at the jurisdictional phase required by the phrase «in accordance with the laws and regulations of the Host State» is limited to determining whether the type of asset is legal in domestic law.[105)]

102）As Kulkarni has summarized: 'Thus when there is a tendency of uncertainty of the facts and the incidents that occurred are too intimately interconnected with the dispute and when it is impossible to adjudge without further inspection of those facts the arbitral tribunal can join the jurisdictional objections to the merits of the dispute. This procedure of joining the jurisdictional objections to the merits cannot be a sure shot solution to deal with the issue of corruption but can surely be of adequate assistance to the arbitral tribunal to make an in depth analysis of the facts and the incidents that occurred during the whole process of making the investment.' See, S.A. Kulkarni, 'Enforcing Anti-Corruption Measures Through International Investment Arbitration', 10 *Transnational Dispute Management*（2013）1, 29.

103）For thorough discussion of State responsibility regarding corruption, see A.P.Llamzon, 'State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration' 10 *Transnational Dispute Management*（2013）1.

104）*Fraport, supra* note 78, Dissenting opinion, para.37.

105）*Ibid*., para.38.

> The foreign investor that commits a crime should go to jail or suffer the other penalties prescribed by law. However, it is equally mistaken to adopt an interpretation of a standard phrase in investment instruments in a manner capable of leaving an investor without a remedy, and a Host State secure and immune in a gross violation of a Bilateral Investment Treaty.[106)]

Hardly surprising, critics of the *Metal-Tech* approach remain dissatisfied and they argue for the employing of a more flexible solution.[107)] For instance, Newcombe also considers dismissal of corruption allegations on jurisdictional grounds as a 'blunt tool for dealing with the complexity and variety of issues that arise in investor misconduct cases, particularly where State misconduct is also a live issue', because of 'its binary function'.[108)] Rather, he proposes to use principle of substantive admissibility,[109)] which 'goes to the nature of claim and whether there are impediments to a properly constituted tribunal hearing the claim.'[110)] But, as with many other arbitrations, the *Metal-Tech* Tribunal also decided to join 'jurisdiction and admissibility to the merits on the ground that they were closely related to the merits' and did not pay much attention to their difference.[111)] Nonetheless, the *Metal-Tech* Tribunal did not go further than the legality issue and never allowed the investor to present its case on liability. For this reason, *Metal-*

106）*Ibid*., para.39.

107）See, D. Tamada, 'Fight against Corruption and International Investment Law', *Kyoto Seminar on International Investment Law*, 10 February 2014, available at http://www.hamamoto.law.kyoto-u.ac.jp/sonota/2014Kyoto/PPT_Tamada_corruption.pdf#search='dai+tamada+corruption（last visited 9 May 2015）. Haugeneder argues that '…all-or-nothing" approach in case of a "compliance-with-local-law" clause in the BIT may be perceived as unbalanced: The more corrupt a State is, the better its chances to defend an investment claim against the investor. A State that documents corruption at the stage of initiation of an investment is likely to successfully defend BIT claims provided it is not concerned about its reputation.' Haugeneder, *supra* note 2, 330.

108）A. Newcombe, 'Investor Misconduct: Jurisdiction, Admissibility or Merits?' in Ch.Brown, K. Miles（eds）, *Evolution in Investment Treaty Law and Arbitration*（2011）187,199.

109）Zeiler notes that it refers to 'substantive nature of notion of admissibility' whereas 'the term "procedural admissibility" seems not be in use'. G. Zeiler, 'Jurisdiction, Competence, and Admissibility of Claims in ICSID Arbitration Proceedings', in Ch. Binder et al.（eds）, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*（2009）76, 85.

110）Newcombe, *supra* note 108,193. See also for the reasons why admissibility is the preferable option for Tribunals when dealing with investor misconduct, 198-200.

111）*Metal-Tech, supra* note 7, para.117.

Tech should be considered not materially different from way of dismissing the claim on jurisdiction grounds.

Surprisingly, Newcombe's proposal was confirmed by a UNCITRAL Tribunal's recent final decision on *Hesham Talaat v. Indonesia*（*Hesham Talaat*）, where the Respondent submitted that the claimant has been involved in corruption and money laundering in the Indonesian banking sector.[112] The decision is based on Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organization of the Islamic Cooperation（OIC Agreement）, which is a typical type of investment treaty found in the 1990s.[113] The OIC agreement has unique anti-corruption clause in article 9. It reads as follows:

> The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.

In the 2012 award on jurisdiction and admissibility,[114] the Tribunal found its jurisdiction as follows:

> The Tribunal considers that, for purposes of determining the effect of Article 9 of the OIC Agreement on the rights of the Parties in further proceedings in this arbitration, the Tribunal *must look closely* at the Parties' claims concerning the allegations of criminal conduct, which include the corruption and money laundering allegations against the Claimant on the one hand, and the solicitation of bribes allegations against the Respondent on the other hand. This is not a question of jurisdiction but of the merits, to be dealt with at the merits phase of this arbitration.[115]

112）*Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014.

113）The Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organization of the Islamic Cooperation（formerly Organization of the Islamic Conference）was approved and opened for signature by resolution 7/12-E of the Twelfth Islamic Conference of Foreign Ministers held in Baghdad, Iraq, on 1-5 June 1981. It entered into force on 23 September 1986.

114）*Hesham Talaat, supra* note 112, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, 21 June 2012.

115）*Ibid*., para.99.（emphasis added）

Although the OIC agreement sets out provisions are commonly found in BITs（including legality clause in Article 2）,[116] the Tribunal did not pay much attention to the legality clause in the preliminary jurisdictional phase.[117] In the merits phase, the claimant also successfully demonstrated the Respondent's breach of fair and equitable treatment（FET）in relation to the trial and conviction of the investor.[118] However, the claimant failed to recover his damages. Relying on the doctrine of clean hands, the Tribunal found the claimant's claim inadmissible[119] and concluded that:

> The Claimant failed to uphold the Indonesian laws and regulations. The Tribunal further considers that the Claimant's action, whether criminal or not, caused a liquidity issue to Bank Century, and his actions have been prejudicial to the public interest, in this case the Indonesian financial sector. The Claimant having breached the local laws and put the public interest at risk, he has deprived himself of the protection afforded by the OIC Agreement. In this regard, the Tribunal is of the view that the doctrine of "clean hands" renders the Claimant's claim inadmissible.[120]

More interestingly, due to the inadmissibility decision, the claimant was prevented from pursuing his claim for FET and breach of FET of host the State was offset by virtue of Article 9 of the OIC Agreement.[121] This is a seemingly contrasting position vis-à-vis the *Metal-Tech* Tribunal due to the fact that, in order to 'look closely', the Tribunal in *Hesham Talaat* allowed parties to argue their all claims in front of investment Tribunal. Significantly, even though Indonesia failed on the jurisdictional issues, it substantially succeeded on the merits. It is also

116）Article 2 of the OIC agreement states that 'The contracting parties shall permit the transfer of capitals among them and its utilization therein in the fields permitted for investment in accordance with their laws.'

117）The Tribunal decided as follows:
The Parties have not disputed the fact of the Claimant's original investment. As the investment was made, there is no question that this Tribunal has jurisdiction over disputes relating to the Investment, and the question becomes whether access to the Claimant's substantive rights is limited or prevented by Article 9.
Hesham Talaat, supra note 114, para.98.

118）*Ibid*., supra note 112, para.621.

119）*Ibid*., paras.645-647.

120）*Ibid*., paras.645-646.

121）*Ibid*., para.648.

telling that in *Hesham Talaat* case, as I have shown above, arbitrator Cremades, who wrote a strong dissenting opinion in Fraport case in favor of joining jurisdiction to the merits in corruption alleged cases, was president of Tribunal. This obviously had an impact on the decision.

In my opinion, all things considered, investment tribunals appear to be developing very welcome and quite predictable jurisprudence on the legality clause. This is a warning to the investor community against conducting illicit conduct in host countries, helps host countries to penalize investors' crimes, and make a commitment to the strengthening of the Rule of Law. On this last point, the *Metal-Tech* award is indeed a welcome development. But, it has an imperial lack. Because, according to *Metal-Tech* approach, a foreign investor could not challenge the responsibility of the host State in the merits phase. In contrast, in the *Hesham Talaat*, although illegality in question did not relate to the acquisition of claimant's investment,[122] the Tribunal boldly decided to bring the dispute in the merits phase. By doing so, the latter contributed to further deepening of the gap between investment arbitrations on the question of how to deal with corruption allegations. It remains to be seen which approach will prevail and be taken up by future arbitrations.

2. Degree of Severity of Illegality

The next most important question regarding the legality matter which needs to be asked here is to what extend illegality is required, according to the legality clause, in order to reject jurisdiction of investment Tribunal? In the current case, the Tribunal enumerated several 'red flags' recognized by the international community as a list of indicators for establishing a corruption.[123] Surprisingly, a subsequent list of 'red flags' that existed in the behavior of Uzmetal matches almost entirely with these, and it was exactly these factors which led the Tribunal

122) Therefore, in their short dissenting note, the minority did not agree 'that the doctrine of "clean hands" applies to render the Claimant's claims inadmissible by virtue of his illegality unless that illegality relates to the acquisition of his investment, which is not the present case.' *Ibid*., para.683.

123) The Tribunal cited the red flags from the *Woolf Committee Report on Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in Bae Systems Plc* (2008) 25-26.

to dismiss the claims of the Israeli investor.

> 1）“An Adviser has a lack of experience in the sector;”
> 2）*（Omitted, because of non-existence in Metal-Tech case.）*
> 3）“No significant business presence of the Adviser within the country;
> 4）“An Adviser requests ‘urgent’ payments or unusually high commissions;”
> 5）“An Adviser requests payments be paid in cash, use of a corporate vehicle such as equity, or be paid in a third country, to a numbered bank account, or to some other person or entity;”
> 6）“An Adviser has a close personal/professional relationship to the government or customers that could improperly influence the customer’s decision”.[124)]

After finding these red flags in the investors transaction,

> The Tribunal comes to the conclusion 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.[125)]

What about in other Tribunals? Arbitral decisions show us various scenarios. A first group of cases relates to illegality per se. In *Tokios Tokeles*, the Respondent argued that the full name, under which the claimant registered its subsidiary, is ‘improper because ‘subsidiary enterprise’ but not ‘subsidiary private enterprise’ is a recognized legal form under Ukrainian law’.[126)] The Respondent also contended that it had ‘identified errors in the documents provided by the claimant related to asset procurement and transfer, including, in some cases, the absence of a

124）*Metal-Tech, supra* note 7, para.293.（emphasis added）
125）*Ibid*., para.372.（emphasis added）
126）*Tokios Tokeles, supra* note 56, para.83.

necessary signature or notarization'.[127] The Tribunal denied this as follows:

> In the present case, the Respondent does not allege that the Claimant's investment and business activity—advertising, printing, and publishing—are illegal per se. … Even if we were able to confirm the Respondent's allegations, which would require a searching examination of minute details of administrative procedures in Ukrainian law, to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty.[128]

Therefore, this case stands that 'in accordance' clause does not cover the failure to observe minor bureaucratic formalities.[129] It requires restrictively interpretation of 'in accordance' clause and in regard of mere formalities embodying de minimis rule.[130] We can also find several other cases against Ukraine where the Respondent's allegation was denied by the Tribunal according to the same reason: minor breaches of domestic law does not exclude the investor from the substantive protection of BIT.[131]

Different from above-mentioned cases, the *Fraport* Tribunal dealt with prohibition of ownership. The majority of the Tribunal held that the investor had breached the domestic law of the Philippines, which prohibits owning more than 40% of shares of local companies in the public utility industry.[132] The Tribunal's carefully worded statement is worth citing at length here:

---

127) *Ibid*., para.83.
128) *Ibid*., para.86.
129) Regarding this point, one of the ICSID Tribunal highlighted the breach of legality clause by arguing that legality clauses 'are intended to ensure the legality of the investment by excluding investments made in breach of fundamental principles of the host State's law, e.g. by fraudulent misrepresentations or the dissimulation of true ownership.' See, *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, para.104.
130) Schill, *supra* note 82, 293.
131) In *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 297, the Tribunal stated that such investment should not be 'excluded from the Tribunal's jurisdiction by virtue of alleged defects in Claimant's registration paperwork.' In another case, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para.145, Tribunal noted that non-compliance with domestic law requirement could only cause to loss some of privileges, but not BIT protection.
132) *Fraport, supra* note 76, para.398.

> When the question is whether the investment is in accordance with the law of the host State, considerable arguments may be made in favour of construing jurisdiction *ratione materiae* in a more liberal way which is generous to the investor. In some circumstances, the law in question of the host State may not be entirely clear and mistakes may be made in good faith. An indicator of a good faith error would be the failure of a competent local counsel's legal due diligence report to flag that issue. *Another indicator that should work in favour of an investor that had run afoul of a prohibition in local law would be that the offending arrangement 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 protected profitability. This would indicate the good faith of the investor*. In this case, the comportment of the foreign investor, as is clear from its own records, was egregious and cannot benefit from presumptions which might ordinarily operate in favour of the investor.[133)]

In another case more related to corruption, *Inceysa*, it was revealed that the claimant investor obtained a contract through fraudulent misrepresentation. The investor made false representations during the bidding process, which might make it ineligible to attend or attain the bid if the host State had known about it.[134)] Therefore, the Tribunal found the act of the investor in violation with the principle of good faith[135)], *the principle nemo auditur propiam turpitudinem allegans*（no one shall be heard who invokes his own guilt）[136)] in international public policy,[137)] as well as the principle that prohibits unlawful enrichment.[138)] In these last two cases, if *Fraport* stands for the position that shocking illegality under domestic law of investment activity deprives investment protection of BIT from investor, *Inceysa* represents the a case where the illegal conduct of the investor qualifies a legal investment illegal.[139)]

133）*Ibid*.,paras.396-397.（emphasis added）
134）*Inceysa, supra* note 86, para.237.
135）*Ibid*., para.234.
136）*Ibid*., para.240.
137）*Ibid*., para.252.
138）*Ibid*., para.253.
139）Schill, *supra* note 82, 300（'The decision of the Tribunal in Inceysa therefore stands for

Not only general cases on legality clause, but more corruption related cases also have some vital implications on this very point. In *Hamester*, the Tribunal asked a question which can be categorized as a causation test: whether fraud was decisive in securing the contract?[140] The Tribunal found 'no conclusive evidence proving that Cocobod（Ghanaian side）would not have entered into the joint venture had it known that some of the figures were overstated'.[141] That is to say, in securing the joint venture agreement, alleged fraud was not the decisive factor.[142] Moreover, the respondent failed to provide other evidence in regards to the fraud in the initial investment's respective agreement.[143]

Following from the *Hamester* award, the *Niko Resources* Tribunal also relied on the causation test and affirmed its jurisdiction even though there was bribery, because the main contract was not procured by bribery. According to the Tribunal,

> The case of bribery which has been established in the present case did not procure the contracts on which the claims in this arbitration are based. The JVA had been concluded long before the acts of corruption. The Minister who received the benefit of the vehicle and of the invitation to the United States was forced to resign quickly thereafter in June 2005. The GPSA［Gas Purchase and Sale Agreement］was concluded only some 18 months later, in December 2006. Thus, there is no link of causation between the established acts of corruption and the conclusion of the agreements, and it is not alleged that there is such a link.[144]

In short, scholarship is busy with analyzing the cases rather criticizing them on above-mentioned point.[145] The relatively consistent jurisprudence of investment arbitration on this point may serve as the context of such scholarship: arbitral Tribunals agree that an explicit legality clause would deprive the foreign investor

---

the proposition that not only the illegality under domestic law of the business activity, or the assets used, could qualify as relevant illegality under an "in accordance with host State law"-clause, but also illegal conduct in acquiring a per se legal investment. '）

140）*Hamester, supra* note 53, para.135.
141）*Ibid*., para.137.（explanation added）
142）*Ibid*., para.135.
143）*Ibid.*
144）*Niko, supra* note 21, paras.454-455.
145）For example, see, Schill, *supra* note 82.

from protection and that trivial violations of the host State's law should not bar the investor from enjoying treaty protection. Gross illegality *ab initio* would trigger deprivation of investment protection and Tribunals' jurisdiction.

Metal-Tech is a unique case due to peculiar circumstances. To my knowledge, it is the first Tribunal ever to deal with such specific facts. I have two short remarks on the framework which was used by the Tribunal. The first one is the validity of adopting a framework of 'key red flags', which was produced by the former Chief Justice of England and Wales. The Claimant rightly made an appropriate objection, since the former Chief Justice's report came after initiation of the *Metal-Tech* dispute. The response of the *Metal-Tech* Tribunal was, while simultaneously referring to some of ICC cases that were noted above section A（Ⅰ）, that '*the red flag lists merely assemble a number of factors which any adjudicator with good common sense would consider when assessing facts in relation with a corruption issue whether now or in 1998*.'[146] That is to say, the *Metal-Tech* Tribunal also did not consider the above the listed items as a normative framework of red flags, rather it considered it as any reasonably man would recognize and for this reason, the Tribunal's reasoning is persuasive.[147] Second remark is an appropriateness of application of 'key red flags' framework to the *Metal-Tech* dispute. It is an interesting coincidence that above-mentioned flags enumerated from（1）,（3）,（6）fits to the investor's conduct in *Metal-Tech* very well. Almost of all of the red flags, such as a huge amount of payment, no proof of services, connections with public officials, lack of qualification and non-

146）*Metal-Tech, supra* note 7, para.293, note 340.（emphasis added）

147）The content of 'red flags' may differ according to the author's（or organization's）perception on corruption. For instance, the U.S. Department of Justice in a brochure regarding the Foreign Corrupt Practice Act（FCPA）listed the following items as 'red flags' which the U.S. firm should be aware of: 'unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to be in violation of the FCPA, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer.' See, Scherer, *supra* note 56, 32, note 33.

transparent manner were present. Without facing any difficulty, the Tribunal found all these elements from transactions between investor and several Uzbek individuals. To conclude with, the Israeli investor's corrupted misbehavior was manifested by red flags that were closely connected to the making of the investment and they rightly formed the basis of the Tribunal's dismissal of claims. Also, the investor entered a sensitive natural resource field illegally（and consciously）with substantial amounts of capital. Therefore, once an investors' breach was substantially established by *the circumstantial facts*, jurisdiction should be denied accordingly. The *Metal-Tech* Tribunal reached a fair conclusion: the initial stage of the Israeli investor was tainted by huge corruption and it is not so difficult to imagine the role of bribery for the procurement of that special contract to the investor.[148] Nevertheless, this framework of red flags should be adapted and applied with much care and, in this sense, the *Metal-Tech* Tribunal's approach should not be generalized.

III. ICSID Art.25（1）: Legality as an Additional Jurisdictional Requirement?

During the jurisdiction phase, the Respondent raised the possible legality element of Article 25（1）. It reads as follows:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an *investment*, between a Contracting State（or any constituent subdivision or agency of a Contracting State designated to the Centre by that State）and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.[149]

In other words, the question was whether the definition of the term 'investment' contained in Art.25（1）in ICSID convention incorporates the requirement of

148）See also, *David Minnotte, supra* note 89, para.132, where the Tribunal implicitly reinforced this position in its obiter dictum: 'There may be circumstances where fraud is so manifest, and so closely connected to facts（such as the making of an investment）which form the basis of a tribunal's jurisdiction as to warrant a dismissal of claims in limine for want of jurisdiction.'

149）*Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 18 March 1965（emphasis added）[ICSID Convention].

legality? In practice, very few investment Tribunals attributed such an additional criteria to Article 25（1）. This very autonomous approach can be found from the *Phoenix* award. In this case, the Tribunal enumerated legality requirement as one of the definitional element of ICSID Convention Article 25（1）.[150] In the Tribunal's view, express reference to the legality clause in the BIT 'does not modify in any way the ICSID notion', because it is 'implicit in the rules of interpretation'.[151] Actually, by adding additional attributes to the notion of investment of Art.25（1）, the *Phoenix* Tribunal places an additional burden on investors. However, such an autonomous approach has not found enough support from investment Tribunals, yet. In line with latter Tribunals, the *Metal-Tech* Tribunal also denied giving an additional meaning to the ICSID Art.25（1）. The Tribunal's reasoning was as follows.

> The Tribunal does not share the view expressed for instance in Phoenix pursuant to which compliance with the laws of the host State and respect of good faith are elements of the objective definition of investment under Article 25（1） of the ICSID Convention. In the Tribunal's view, the Contracting Parties to an investment treaty may limit the protections of the treaty to investments made in accordance with the laws and regulations of the host State. Depending on the wording of the investment treaty, this limitation may be a bar to jurisdiction, i.e. to the procedural protections under the BIT, or a defense on the merits, i.e. to the application of the substantive treaty guarantees. Similarly, a breach of the general prohibition of abuse of right, which is a manifestation of the principle of good faith, may give rise to an objection to jurisdiction or to a defense on the merits. This does not mean that these elements are part of the objective definition of the term "investment" contained in Article 25（1） of the ICSID Convention.[152]

One can also find a strong rejection of the *Phoenix* approach in the *Saba Fakes* Tribunal on incorporating such additional element into art.25（1）:

150）*Phoenix, supra* note 90, para.114. The Tribunal of Toto also considered it as an application of additional criteria. See, *Toto Costruzzioni Generali SpA v. Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, para.85.

151）*Phoenix*, para.116.

152）*Metal-Tech, supra* note 7, para.127.（emphasis added）

> Likewise, the principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be 'legal' or 'illegal,' made in 'good faith' or not, it nonetheless remains an investment. The expressions 'legal investment' or 'investment made in good faith' are not pleonasms, and the expressions 'illegal investment' or 'investment made in bad faith' are not oxymorons.
> …
> As far as the legality of investments is concerned, this question does not relate to the definition of "investment" provided in Article 25(1) the ICSID Convention and in Article 1(b) of the BIT. In the tribunal's opinion, while the ICSID Convention remains neutral on this issue, bilateral investment treaties are at liberty to condition their application and the whole protection they afford, including consent to arbitration, to a legality requirement of one form or another.[153)]

Moreover, the *Gustav Hamester* Tribunal seems also to support this position, by stating 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 (as elaborated, e.g. by the Tribunal in Phoenix). *These are general principles that exist independently of specific language to this effect in the Treaty*.[154)]

In summary, *Metal-Tech* took a party-defined approach that leaves articulation of notion of investment to the parties, rather than self-contained approach. Though it is not clear whether the ICSID Convention drafters intended to put such a meaning in it or not,[155)] to the limited knowledge of the author, among scholars,

153) *Saba Fakes, supra* note 91, paras.112,114.
154) *Hamester,* supra note 53, paras.123-124. (emphasis added)
155) According to the Dolzer and Schreuer, the negotiating history of the ICSID Convention

nobody has lent their support to Phoenix.[156] While the legality issue was raised by Uzbekistan, one can argue that creating unnecessary legal burden for parties' conflicts with the purpose of ICSID. If we remember that the drafters of the ICSID system are sovereign States, then it may be better not to make the system totally independent from the legitimate control of its owners. Such a 'heretical'[157] way of expanding the notion of each clause or its words may only serves to the interest of a limited number of actors.

By way of contrast, let us imagine that the *Metal-Tech* case is brought to the ICSID Tribunal by a Greek investor who relies on Greece-Uzbekistan BIT, that does not have an explicit 'in accordance' requirement. Then, if we apply the reasoning of above majority Tribunals, what would happen? Would the investment treaty Tribunal find its jurisdiction on corruption alleged case and moved to the merits stage? A closer reading of *Metal-Tech* decision reveals the Tribunal's support for such reasoning, even in the absence of legality clause. But the legal base of defense against corrupt investor's claim will in such a case not be ICSID Convention Art.25（1）, but rather, 'general prohibition of abuse of right' that is 'manifestation of the principle of good faith'.[158] For this reason, like *World Duty* case, the Tribunal showed the possibility of relying on general principles of law, such as principle of good faith, or international public policy.[159] By this way of understanding the Tribunal's reasoning, one can conclude that the *Metal-Tech* Tribunal only tried to stop the illegitimate expansion of the scope of the ICSID Convention.

---

speaks in favor of a party-defined approach. R.Dolzer, Ch.Schreuer, *Principles of International Investment Law*, 2nd ed,（2008）74.

156）Dolzer and Schreuer considered Phoenix's widened interpretation as 'autonomous approach'. *Ibid*., 72.

157）This strong word was used by the following authors regarding the expansion of MFN clause to the dispute settlement clause by Maffezini v. Spain Tribunal. See, C.McLachlan, L.Shore & M.Weiniger, International *Investment Arbitration: Substantive Principles*（2007）254.

158）*Metal-Tech, supra* note 7, para.127.

159）The Metal-tech Tribunal stated as follows: 'Having reached the conclusion that it lacks jurisdiction over the treaty claims, the Tribunal can dispense with the analysis of the Respondent's other objections to jurisdiction and admissibility in respect of these claims, including the objections based on the violation of international public policy and transnational principles as well as on fraud.' *Ibid*., para.374.

IV. Scope of MFN Treatment and Legality Requirement

The next argument which the Claimant proposed the Tribunal is whether the most favored nation（MFN）treatment necessitates to incorporate the more favorable definition of 'investment' from Article 1（1）of the Greece-Uzbekistan BIT（which has no 'in accordance to law' requirement）into the Israel-Uzbekistan BIT? The reasoning for this is very clear: to escape from an 'in accordance' clause requirement of Israel-Uzbekistan BIT.

In the *Metal-Tech* case, the Tribunal did not accept such kind of reasoning by stating that,

> As a general matter, the Tribunal notes that, ordinarily, an MFN clause cannot be used to import a more favorable definition of investment contained in another BIT. The reason is that the defined terms "investments" and "investors" are used in the MFN clause itself, so that the treatment assured to investments and investors by Article 3 necessarily refers to investments and investors as defined in Article 1 of the BIT. In other words, one must fall within the scope of the treaty, which is in particular circumscribed by the definition of investment and investors, to be entitled to invoke the treaty protections, of which MFN treatment forms part. Or, in fewer words, one must be under the treaty to claim through the treaty.[160)]

Other arbitral decisions almost uniformly support the *Metal-Tech* position. In *Société Générale v. Dominican Republic (Société Générale)*, the Claimant made an 'argument that the definition of investment included in the Central American

160）*Ibid*., para.145. It seems that the Claimant also raised the Israel-Uzbekistan BIT's preamble in order to strengthen its claim on MFN treatment. Notably, Metal-Tech failed to ignore this point and reached very well deserved and self-telling outcome by saying that,
The object and purpose of the Treaty is neutral for present purposes. The Preamble emphasizes, on the one hand, "economic cooperation to the mutual benefit of both countries" as well as an "increase [of] prosperity in both states", and, on the other, an intention to create "favorable conditions for greater investments by investors" as well as "the promotion and reciprocal protection of investments" and "the stimulation of individual business initiative". In other words, the Preamble refers to both the private interests of the investor as well as the public interests of the state. It is thus of little assistance in the present context. See, *ibid*., para.158.（emphasis added）

Free Trade Agreement-Dominican Republic with the United States, which includes among other features the 'expectation of gain or profit', extends to Societe Generale as the beneficiary of the clause under the Treaty here concerned'.[161] However, the Tribunal found this unpersuasive. According to the Tribunal,

> Each treaty defines what it considers a protected investment and who is entitled to that protection, and definitions can change from treaty to treaty. In this situation, resort to the specific text of the MFN Clause is unnecessary because it applies only to the treatment accorded to such defined investment, but not to the definition of 'investment' itself.[162]

In *Berschader*, the Tribunal also stayed away from widening the scope of MFN treatment to the definition of the Treaty. It stated that the definitions deal with matters that have no relation to the treatment of investors.[163] Therefore, it was very difficult for Tribunal to see how an MFN treatment could possibly apply to these provisions and denied literal interpretation of MFN clause.[164] In an identical case, the *Vannessa v. Venezuela（Vannessa）* Tribunal also rejected the benefit of the MFN treatment provision to the definition and expansion of the category of investments as MFN treatment can only be asserted in respect of investments that are within the scope of the applicable treaty.[165]

MFN treatment is one of the most ancient parts of international economic treaties.[166] In contrast with absolute fair and equitable treatment, it is a relative standard, which depends on the conduct of the particular host State. Negotiating countries insert MFN treatment because it serves to widen the rights of the investor.[167] Although, it seems a simple task to apply this substantive treatment,

161）*Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A.v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, para.40.
162）*Ibid*., para.41.
163）*Berschader, supra* note 92, para.188.
164）*Ibid*.,paras.188, 192.
165）*Vannessa, supra* note 93, Award, 16 January 2013, para.133.
166）Tawil points out the origin of MFN clause that had been traced back to the 15th century. See, G.S.Tawil, 'Most Favoured Nation Clauses and Jurisdictional Clauses in Investment Treaty Arbitration' in Binder et al（eds）, *supra* note 109, 10.
167）*Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, para.196 cited in Dolzer & Schreuer, *supra* note 155, 206.

nonetheless, difficult situations emerge when it is applied in a mechanical manner that leads to 'fundamentally subverting the carefully negotiated balance of the BIT in question'.[168] For identical reasons, Cole also argues for keeping MFN treatment in its boundaries and warns against unnecessary widening of its scope through teleological interpretations.[169] There may be two trends of interpretation with respect to MFN treatment: literal interpretation and interpretation according to the *ejusdem generis rule*. While the first one aims to extend the application of the MFN treatment to the all other subjects of BIT, the second trend of interpretation operates according to the comparison. To put it another way, while an expansion of MFN treatment to the definition of treaty is a typical outcome of literal interpretation, the second approach, which is more preferable, condemns a 'regime change' that nullifies carefully negotiated balance of treaty partners.[170] Choosing the latter approach, the *Metal-Tech* Tribunal wisely decided the issue and thus contributed to the development of predictable jurisprudence in investment arbitration.

V. A Bitter Fruit of BIT Justice

Finally, in the *Metal-Tech* case, the Respondent also raised its counterclaims since 'by promising to pay several individuals to obtain or influence the Government's approval of its investment project, the Claimant violated Uzbek laws on bribery, as well as transnational principles and international public policy prohibiting corruption.'[171] Since the Tribunal concluded that it lacks jurisdiction over the Claimant's treaty claims due to legality clause, it found unnecessary to deal with the Respondent's 'objections based on the violation of international

168）See, McLachlan, Shore & Weiniger, *supra* note 157, 254. Most of the previous cases and scholarship has focused mainly on the application of MFN to the dispute settlement clause. Therefore, it is not surprising to read the following observation from the leading academics of the field, Dolzer and Schreuer, who argue that arbitral Tribunals 'so far do not address in detail the question whether and to what extent any limits exist for the application of the rule to such substantive guarantees.' See, Dolzer & Schreuer, *supra* note 155, 211.

169）See, T.Cole, 'The Boundaries of Most Favored Nation Treatment in International Investment Law' 33 *Michigan Journal of International Law*（2012）537, 541.

170）See, Dolzer & Schreuer, *supra* note 155, 211.

171）Metal-Tech, *supra* note 7, para.195.

public policy and transnational principles'.[172] The Tribunal went on to say that:

> The Tribunal found that the rights of the investor against the host State, including the right of access to arbitration, could not be protected because the investment was tainted by illegal activities, specifically corruption. The law is clear – and rightly so – that in such a situation the investor is deprived of protection and, consequently, the host State avoids any potential liability. That does not mean, however, that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs.[173]

Having found that the host State also contributed to creating corrupt transactions, the Tribunal also penalized the host State by allocating each side's burden to their own. In other words, while the investor had to bear only almost US$1.7 million, Uzbekistan's share became almost US$8 million.[174] In conclusion, the corruption defense cost Uzbekistan the loss of its counterclaims and it was thus left with an expensive burden of legal fees.

How can we evaluate the position of the *Metal-Tech* case on responsibility sharing on corruption issues? Does it seem fair enough? Could we think of another legal and more effective ways to deal with corruption issues in investment arbitration?

Generally speaking, the decision in the *Metal-Tech* case is quite fair and has the potential to get enough support both from academia and arbitration society. Still, it is true to an extent, that under most BITs States give their consent only to legal investments and it is logical to assume that foreign investors also knowingly invest into those countries and implicitly accept its legal order. According to Yakee, '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.'[175]

172）*Ibid*., para.374.
173）*Ibid.*, para.423.（emphasis added）
174）*Ibid*., para.414.
175）Yakee, *supra* note 2, 744.

Metal-Tech also tried to internalize the criticisms properly. For instance, Torres-Fowler launched the so-called 'contributory fault approach' which requests the host State to share some part of responsibility with investor regarding the consequence of corruption allegations.[176] To him, '[r]ather than holding the investor solely accountable for the bribe, a contributory fault standard would award damages *according to the relative levels of culpability* as between the investor and the host State in the overall dispute.'[177] If we apply Torres-Fowler's approach to the *Metal-Tech* award, it is easy to see implicit confirmation of the contributory fault factor by Tribunal through allocating an expensive cost to the host State.[178] In *Plama v. Bulgaria（Plama）*, although the scenario was vice versa, after finding the claimant guilty of fraudulent misrepresentation when obtaining investment, using its discretion to award costs, the Tribunal decided to shift 'all of the fees and expenses of the Tribunal and ICSID's administrative charges plus the reasonable legal fees and other costs incurred by the Respondent'.[179] The same approach can be found in the *Cementownia v. Turkey（Cementownia）*arbitration. Because the claimant filed a fraudulent claim, the Tribunal ordered it to pay all the expenses and legal fees of the arbitration and the host State.[180] Tamada describes this approach as 'reasonable and fair since it enables the respondent to avoid paying the unnecessary costs of arbitration'.[181]

What is more, in the *Metal-Tech* case, the Claimant had a significant chance of presenting its case before the Tribunal and got substantial remedy. Nevertheless, the Claimant failed to persuade the Tribunal on the legality of his investment, therefore losing the case. In turn, the Tribunal carefully recognized an unavoidably undesirable the outcome for the Claimant,

…the Tribunal lacks jurisdiction over Metal-Tech's treaty claims as well as

176）Torres-Fowler, *supra* note 2, 1030-1034.
177）*Ibid*.,1029.（emphasis added）
178）We should note that Torres-Fowler's contributory fault approach mainly targeted the merits phase. In contrast to this, the Metal-Tech case showed how Tribunals apply this approach in the jurisdiction phase. See, *ibid*., 1032.
179）*Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para.322.
180）*Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB（AF）/06/2, Award, 17 September 2009, paras.177-178.
181）Tamada, *supra* note 15,118.

over Metal-Tech's claims based on Uzbek law. 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.'[182)]

By saying so and following previous Tribunals in dealing with identical problems,[183)] the Tribunal apparently applied the clean hands doctrine.[184)] The clean hands doctrine stands for 'any willful conduct that is iniquitous, unfair, dishonest, fraudulent, unconscionable, or performed in bad faith'[185)] and deprives the investor from enforcing its claims through substantive protection of BITs.[186)] The Tribunal made it clear that it cannot help a culpable party if the latter tries to sue another party for illicit conduct. However, the *Metal-Tech* Tribunal also showed its sensitivity towards discussions on corruption allegations in investment arbitration and hence failed to forget punishing the host State for its cooperation and neglect in dealing with corrupt investors. It used all means available to it to undertake such a task: namely, expensive cost allocation and denying its counterclaims. For this reason, consistent with the spirit of current global battles

182）*Metal-Tech, supra* note 7, para.389.（emphasis added）

183）For instance, see *Plama, supra* note 179, para.143; *Inceysa, supra* note 88, paras.240-244.

184）The oft-cited note from Fitzmaurice is quite telling in this regard:
He who comes to equity for relief must come with clean hands'. Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it.
See, G.Fitzmaurice, *Recueil des Cours* 92（1957-II）119.

185）O.J.Herstein, 'A Normative Theory of the Clean Hands Defense', 17 *Legal Theory*（2011）171, 173. On clean hands doctrine, see also R.Moloo, 'A Comment on the Clean Hands Doctrine in International Law', 8 *Transnational Dispute Management*（2011）1.

186）Lim, *supra* note 6, 608（noting that transnational public policy and duty of good faith are also not materially different from the clean hands doctrine）

against corruption, the Metal-Tech award is a very good start for dealing with corruption in investment treaty arbitration by firmly sticking to the legality clause.

E. Conclusion

The *Metal-Tech* award has two dimensions: to some extent, it confirmed the stances of previous Tribunals, such as MFN treatment and definition of investment; good faith and ICSID art.25（1）; illegality and initial stage of investment. From this perspective, it has a law developer role by meeting 'its duty to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law'.[187] Additionally, the *Metal-Tech* case also has some important implications towards treaty making. Since most of BITs does not contain any explicit clause that binds foreign investor to observe certain norms of conduct, it is extremely desirable to make such kind of input into forthcoming BITs.[188]

On the other hand, it also brought forth a new approach on several legal questions, such as standard of proof, agency agreements, cost allocation and counterclaims.[189] On standard of proof it lowered the previous high requirement

187）*Metal-Tech, supra* note 7, para.116.

188）In addition to article 9 of IOC agreement in *Hesham Talaat* case, Yakee also proposed the more elaborate following version of model anti-corruption clause. He called it Article X. '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 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.' See, Yakee, *supra* note 2, 742-743.

189）Metal-Tech also clarified a long-disputed matter regarding the meaning of Article 10 of Uzbek's foreign investment law, which the Claimant relied on to show proof of consent of Uzbekistan to the ICSID arbitration. After the 2006 Zarafshon-Newmont case against Uzbekistan, this country was very keen on the particular meaning of Article 10. Zarafshon-Newmont case（gold mining sector, 2006）, Denver-based Newmont Mining

and changed the status quo of investment arbitration jurisprudence. However, whether future investment arbitrations follow *Metal-Tech's* approach to standard of proof is not yet clear. As one argued in a different confext, we 'need more decisions to see whether this is an actual trend'.[190)]

But this does not mean that all vague questions have now been solved. Many questions are still awaiting a response and we hope that in the near future investment Tribunals clarify the following questions: What if the investor established its investment in a totally legal way, however, it subsequently engaged in hard corruption or continuously breached the law of the host country after establishing its investment? How about the length of retroactivity of legality clause; to what extend it can go back to the illegal action of investor? The author hopes that future *Metal-Tech*-like decisions further contribute to the clarification of the above-mentioned questions.

Corp tried to sue Uzbekistan in the ICSID based precisely on this provision. See, T Minaeva, 'Uzbekistan: Planned reforms to foreign investment law', *Global Arbitration Review News*, July（2013）. Metal-Tech Tribunal finally clarified it as follows:
To the Tribunal, Article 10 does not embody Uzbekistan's consent to submit disputes to ICSID arbitration independently of the BIT. Paragraph（1）of Article 10 merely states that a dispute which the Parties are unable to resolve amicably may be resolved by the Economic Court of Uzbekistan or through arbitration. It contains no expression of consent to a particular arbitral mechanism. More specifically, it embodies no offer by the State to submit to dispute settlement in the ICSID framework; ICSID is not even mentioned. The Tribunal notes that statutory provisions more specific than Article 10 – even provisions expressly naming ICSID – have been held not to contain state consent to ICSID arbitration. See, *Metal-Tech, supra* note 7, para.383.

190）A. Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection' in A. Reinisch（ed）, *Standards of Investment Protection*（2008）9, 28.